

THE
LAW OF TRANSFER
IN BRITISH INDIA

BEING

*A COMMENTARY, ANALYTICAL, CRITICAL, AND
EXPOSITORY ON THE TRANSFER OF PROPERTY ACT
(Act IV of 1882, as amended to date)*

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PREFACE TO THE FIRST EDITION.

Of all Acts of the Indian Legislature, none has required such a careful nursing at the hands of the most leading jurists of the day as the TRANSFER OF PROPERTY ACT, 1882. Not long after the policy of codification had been sanctioned by the Secretary of State in Council, and none too soon as would appear from the chaotic state of the law, at least on the subject of mortgages, commented upon by the Privy Council in *Thumbusawmy's case*, (1) the Government of India appear to have taken steps to legislate, and consequently in 1870 a Commission was appointed in England to draft a Bill embodying the fundamental principles of the law relating to immoveable property. This Commission, composed of Lord Romilly, M. R., Sir Edward Ryan, formerly Chief Justice of Bengal, Lord Sberbrooke, Sir Robert Lush, Sir John MacLeod (the distinguished Madras Civilian who helped Macaulay in framing the Penal Code), and Sir W. M. James, drafted a Bill which was sent down to this country for legislation. On its arrival it was then subjected to repeated alterations, after which it was ushered into the Legislative Council in 1879. For three more years the Bill served its apprenticeship and received many finishing touches from the hands of eminent Judges like the Right Hon'ble Sir Richard Garth and Sir Raymond West, until it was finally enacted into law on the 17th February 1882.

The subject which had required the collaboration of so many eminent jurists is by no means easy. Indeed it was universally regarded as a subject which presented to the draftsmen the utmost difficulties, and it is certainly not the fault of its framers if the enactment is found to be still in places inaccurately worded, or is not more comprehensive and complete.

As it is, the Act has been found to be eminently workable and suited to the every-day requirements of legal life. But an Act which professedly condenses within the space of 137 short sections the whole law of Real Property, which in England occupies several portly tomes, can but scarcely fail to be anything but somewhat abstruse and aphoristic. Such an Act, therefore, would seem to require a careful and exhaustive commentary, and it is apprehended, a commentary, which besides elucidating all the difficult problems foreshadowed in the Act, also deals with the law in its practical application to the varying circumstances of an ever-growing complicated society. Indeed the sections of the Act may be regarded as so many enunciations of propositions

(1) I. L. R., 1 Mad., 1 (23), P.C.

all of which are founded upon reason or some well-known principle of equity or public policy. To a student of law the bare remembrance of these sections would not import much without the intelligent appreciation of the principles upon which the different sections are pivoted. To a practising lawyer such a knowledge is not only essential but indispensable, for in the words of Lord Coke it is generally true "that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the law is the safety of all,"(1) or as Lord Bacon said, these principles are these *legum leges* essential to the true understanding and proper application of the law, whereof some claim from us instinctively, as it were, recognition as if they had been "written with the finger of Almighty God upon the heart of man."(2)

It cannot be denied that while there are many advantages in favour of codification, one serious, albeit inevitable, drawback of a codified law is its tendency to encourage snippety and incoherent study. Such a study is no doubt useful for what the Germans significantly call *brodstudien*, but it is not conducive to great or lasting results. Indeed it may be generally stated of all aphoristic teaching that it has the general tendency to cramp research and endow *dicta* with a glamour of innate truths which disguises from the learner the bed-rocks of those very truths to which they are no more than allied by a remote kinship.

The plan of the work may be said to be the outcome of this conviction. While the work has been allowed to assume the form of a commentary mainly on the Act, and the discussions have been accordingly arranged according to the subjects of the several sections, the entire work has been so planned as to facilitate at once the work of a careful study as well as a hasty reference. With these two-fold objects in view the commentary on each section has been preceded by three articles under the headings of "Analogous law," "Principle," and "Meaning of words." The object of the first is to collect in one place under each section all the cognate sections of the Indian Acts and their English prototypes, to trace its genealogy and to show the relationship it bears to the corresponding sections of the other Indian enactments. It is apprehended that this arrangement will not only materially assist the reader in pursuing a more logical and systematic study of the subject, but will also enable him the more easily to hang upon his memory the various sections when they are so presented in the company of cognate rules with which he may be already familiar. Under this head, it has also been the object of the work to point out whether and if so how far the several sections are founded upon English law, and in what important particulars the two agree with or differ from each other. Where the two laws were coincident, cases have been freely drawn upon from the English precedents, and thus the commentary has been considerably enriched by apt illustrations thus afforded, but where the Indian law has differed at all, a danger signal will be found there prominently hoisted up to prevent the unwary from stumbling into its pitfalls. After "Analogous law,"

(1) 1 Just. Epil.

(2) *See Calvin's case, 7 Rep., 126.

the "Principle," or reason of the rule is next stated, as far as possible, in clear and non-legal language. This will, it is hoped, not only enable the reader to obtain a more permanent grasp of the law, but will also enable him to appreciate its reasonableness and thus extend its usefulness to a variety of cases. The third article on the "Meaning of words" may be said, to be the commentary in brief, and in this the principal words and phrases of each section are concisely explained and elucidated. After this follows an analytical exposition of the law founded upon all the reported and unreported but printed cases of the several chartered and unchartered High Courts, the English cases and such other references as appeared to be necessary. It is believed that the commentary will be found in this respect to be exceptionally exhaustive. In this exposition the cases have been throughout cited from the actual reading of the reports and not from the mere *placita* prefixed to them, and in fact, wherever possible, the Judges, *ipssissima verba* have been incorporated into the text, thus obviating, it is hoped, in many cases a reference to the actual authorities. With the requirements of the legal practitioner in view, who usually cares more for the result than for the process by which it has been arrived at, long discussions have been as far as possible eschewed, all controversial points being stated in as concise a way as was consistent with clearness.

An introduction containing a great deal of cognate matter, and giving a short history of Property, its origin, and the law regulating its transfer is also added.

And with a view to complete the law of the Transfer of Property and as its necessary adjunct, select forms of transfer have been collected towards the end of the book, which, it may be hoped, will not only assist materially in drawing up deeds, but may also be not a little useful in construing them. The work closes with a full report on the Act made by the Law Commissioners and by the Select Committee, as well as of the discussions in the Legislative Council at the time of the passing of the Act and its subsequent amendments.

Finally, every attempt has been made to make the volume complete and exhaustive, but it was not possible in a work of such magnitude that the author may not have occasionally tripped both as to doctrine and diction; but all that he can plead in self-defence is that he had to labour throughout unaided and at a considerable pressure. But whatever may be found to be the shortcomings of the book, the author trusts that it may still appeal to congenial minds who may find it occasionally useful as a *vade-mecum*, if not as a work of reference, in spite of its blemishes.

H. S. G.

15th March, 1901.

PREFACE TO THE SECOND EDITION.

THE first edition of this work was published in March 1901, and though it was exhausted in a few months, and a new edition called for, advantage has been taken of the opportunity thus afforded to overhaul the text in the light of further research, the result being presented in the two volumes now being published.

Although the first edition consisted of about 700 pages, the first volume alone of this edition has outgrown that limit. Even as it is, it has not been allotted more space than was found necessary to adequately deal with the subject with its numerous intricate but essential ramifications. When the whole work is completed, it will, I trust, be found to be a complete repertoire of all the living case-law, English and Indian, on the subject; and I hope it may even prove to be a contribution in some degree helpful in the solution of problems yet untouched by judicial decisions, or upon which they are conflicting.

As the work is not merely a commentary, but an attempt at exposition of the law relating to transfer, the new title bestowed on it seemed the more appropriate. I have, however, preserved the scheme of the first edition.

The references to cases have been brought down to September, 1904.

H. S. G.

15th September 1904.

PREFACE TO THE THIRD EDITION.

THE rapid exhaustion of the last impression of this volume has left the author only two alternatives—a re-print or a new edition. The re-print of a new work on a subject on which the case-law has been accumulating with giant strides would have necessitated an unwieldy addenda now absorbed in the 73 pages of additional matter worked into the text. A new edition had, therefore, become indispensable, and the thorough revision made in the text will, the author trusts, otherwise justify its issue within a year of the completion of the work.

Purchasers of the last edition, however, owe a word of explanation from the author. When that edition was under preparation the author had estimated the matter in hand to go into two volumes and an announcement was accordingly made to that effect. But as the work of revision progressed it was soon discovered that the issue of the work in two volumes would not only make an inconvenient division of the subject but would also add to their bulk and greatly delay their completion. He had, therefore, to sanction the issue of the work in three volumes, but he made representations to the publishers for reduction of the price, though they did not find it possible.

The plan adopted in the present edition has undergone little change from that described in the preface to the first edition, and the considerable addition to the bulk and volume since made is due to the closer examination and more minute treatment of the subject-matter therein dealt with. In this respect the present edition differs as much from the last, as the latter differed from its predecessor.

The text and addenda contain all decisions reported up to the present month.

5th October 1907.

H. S. G.

PREFACE TO THE FOURTH EDITION.

THE text of this edition has been again revised, and in parts enlarged, and the cases brought down to the latest date of its publication.

The bare texts of the Regulation of 1806, the Transfer of Property Act, and its processual sections now relegated to the Code of Civil Procedure, for convenience of reference, preface the commentary, while in order to make each volume, as far as possible, self-contained, a separate Table of Cases and Topical Index have been added to this Volume which, with the added Commentary of a hundred pages, has now increased to a dimension which causes some apprehension as to the size of the ensuing volumes—specially the second which deals with an important branch of the Law of Transfer. But the increase was inevitable and though every effort has been made to keep out extraneous matter, it would have been incompatible with the scheme of the work to ignore subjects which form an integral part of the Law of Transfer, though they are usually omitted by mere annotators of the Act.

1st September, 1914.

H. S. G.

NOTE TO THE REPRINT.

This is merely a reprint of the Fourth Edition to which, however, an Addenda is added bringing the citation to cases down to the close of last year.

25th January, 1915.

H. S. G.

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LIST OF ABBREVIATIONS.

A. & E.		{ Adolphus and Ellis' Reports (1834—1841).
		{ " " (N. S. 1841—1852).
Act. ...	* ...	... Acton's P. C. (1809—1811).
All. ...	...	... Allahabad.
A.L.J.R.	...	... Allahabad Law Journal Reports (1904—).
Amb. ...	...	... Ambler's Reports (1737—1784).
A.W.N.	...	... Allahabad Weekly Notes (1891—).
A.C. ...	...	... Appellate Civil Jurisdiction.
Agra ...	...	... Agra High Court Reports (1866—1868).
App. Cas.	...	... Law Reports, Appeal Case.
Atk. ...	...	... Atkins' Reports (1736—1754).
B. & Ad.	...	... Barnewall and Adolphus' Reports (1830—1834).
B. & Ald.	...	... Barnewall and Alderson's Reports (1817—1822).
B. & O.	...	... Barnewall and Cresswell's Reports (1822—1830).
B. & S.	...	... Best and Smith's Reports (1861—1866).
Bac. & Ab.	...	... Bacon's Abridgment.
Beav.	...	... Beavan's Reports (1838—1866).
B. L. R.	...	... Bengal Law Reports (1868—1876).
Bing.	...	... Bingham's Reports (1822—1834).
Bing. N. C.	..	... Bingham's New Cases (1834—1840).
B. H. C. R.	...	... Bombay High Court Reports (1862—1875).
Bom. L. R.	...	... Bombay Law Reporter (1899—).
B. P. J.	...	... Bombay Printed Judgments (1869—1898).
Br. C. C.	...	... Brown's Chancery Cases (1778—1794).
Brow. & Lush.	...	... Browning and Lushington's Reports.
Bur. L. R.	...	... Burmah Law Reports (1894—).
Bur. L. R.	...	... Burmah Law Reports (1894—).
Camp. ...	...	... Campbell's Reports (1807—1816).
C. B. ...	...	... Common Bench Reports (1845—1856).
C. B. (N. S.)	...	... Common Bench (New Series) (1856—1865).
C. & J.	...	... Crompton and Jervis' Reports (1830—1832).
C. L. R.	...	... Calcutta Law Reports (1877—1883).
C. & M.	...	... Crompton and Meeson's Reports (1832—1834).
C. M. & R.	...	... Crompton, Meeson & Roscoe's Reports (1834—1835).
C. & P.	...	... Crompton & Payne's Reports.
Ch. C. C.	...	... Cases in Chancery (1660—1668).
Ch. R.	...	... Reports in Chancery (1615—1712).
Cowp.	...	... Cowper's Reports (1774—1778).
Co. Litt.	...	... Coke upon Littleton.
Coll.	...	... Colles (House of Lords) (1697—1714).
C. & P.	...	... Carrington and Payne's Reports (1823—1841).
C. L. J.	..	... Calcutta Law Journal (1904—1905).
C.P.L.R.	..	... Central Provinces Law Reports (1866—1904).
C. P. D.	...	... Law Reports, Common Pleas Division.
Cowp.	...	... Cowper's Reports (1774—1778).
Cr. J.	...	... Crompton and Jervis's Reports (1830—1832).
Cr. M.	...	... Crompton and Meeson (1832—1834).
Cr. M. & R.	...	... Crompton, Meeson & Roscoe's Reports (1834—1836).
C. W. N.	...	... Calcutta Weekly Notes (1896—).

D. & C.	...	Deacon and Chitty's Reports (1832—1835).
D. M. & G.	...	DeGex, Macnaghten and Gordon's Reports (1851—1857).
De. G. & J.	...	DeGex and Jones' Reports (1862—1865).
DeG. & S.	...	DeGex and Smale's Reports (1846—1852).
DeG. F. & J.	...	DeGex, Fisher and Jones' Reports (1859—1862).
DeG. J. & S.	...	DeGex, Jones, and Smith's Reports (1862—1866).
DeG. M. & G.	...	DeGex, Macnaghten and Gordon's Reports (1851—1857).
Dick.	...	Dicken's Reports (1559—1798).
Doug.	...	Douglas's Reports (1778—1784).
Dowl.	...	Dowling's Reports (1830—1840).
Dowl. (N. S.)	...	Dowling's Reports (New Series) (1841—1842).
Dowl. & L.	...	Dowling and Lowndes's Reports (1843—1849).
Dr.	...	Drewry's Reports (1852—1859).
Dr. & War.	...	Drury and Warren's Reports (1841—1843).
Drew.	...	Drewry's Reports (1852—1859).
Drew. & S.	...	Drewry and Smale's Reports (1859—1865).
Durn. & E.	...	Durnford and East Reports (1785—1800).
East	...	East's Reports (1800—1812).
E. & B.	...	Ellis and Blackburn's Reports (1852—1858).
E. B. & E.	...	Ellis, Blackburn and Ellis' Reports (1858).
Ed.	...	Edition.
E. & E.	...	Ellis and Ellis' Reports (1858—1861).
Eq. Ca. Ab.	...	Equity Cases Abridged (1853—1855).
Esp.	...	Espinasse's Reports (1793—1807).
Exch.	...	Exchequer Reports (1848—1856).
Ex. D.	...	Law Reports, Exchequer Division.
F. B.	...	Full Bench.
Fisher.	...	Fisher on Mortgages (5th Ed.).
Fins.	...	Finch's Reports (1673—1681).
Free.	...	Freeman's Reports (ch.) (1660—1706).
Giff.	...	Giffard's Reports (1857—1865).
Hare	...	Hare's Reports (1841—1853).
H. & C.	...	Hurlstone and Coltman's Reports (1862—1866).
H. & M.	...	Hemming and Miller's Reports (1862—1865).
H. & N.	...	Hurlstone and Norman's Reports (1856—1862).
H. & C.	...	Law Reports, House of Lords Cases.
H. Bl.	...	Henry Blackstone Reports (1788—1796).
H. L. C.	...	Clark's House of Lords Cases (1847—1866).
Holt N. S.	...	Holt's Nisi Prius Reports (1815—1817).
Holt Eq.	...	Holt's Nisi Equity Reports (1688—1711).
I. L. R. All.	...	Indian Law Reports, Allahabad Series (
" Bom.	...	" " " Bombay Series
" Cal.	...	" " " Calcutta Series (1876).
" Mad.	...	" " " Madras Series
Ir.	...	Irish.
Ir. Eq. R.	...	Irish Equity Reports (1867—).
I. J.	...	Indian Jurist.
I. J. (N. S.)	...	Indian Jurist, New Series.
J. & H.	...	Johnson & Hemming's Reports (1859—1862).
Jur.	...	Jurist (1837—1854).
Jur. N. S.	...	Jurist, New Series (1855—1856).
Kay & J.	...	Kay & Johnson's Reports (1854—1858).
Keen	...	Keen's Reports (1836—1838).
Keb.	...	Kemble's Reports (1661—1679).
Kn.	...	Knapp's Reports (P.C.) (1829—1836).
Leon.	...	Leonard's Reports (1558—1615).

L.J.	...	...	Law Journal Reports (1823—1831).
L.J. (N. S.)	...	...	Law Journal Reports (New Series) (1831—
L.J. Ch.	...	...	Law Journal, Chancery.
L.R.	...	...	Law Reports (1866—).
L.R. Ch.	...	...	Law Reports, Chancery.
L.R. C.P.	...	...	Law Reports, Common Pleas.
L.R., Eq.	...	...	Law Reports, Equity Cases.
L.R., Ex.	...	...	Law Reports, Exchequer.
L.R., H.L.	...	...	Law Reports, English and Irish Appeals.
L.R.H.L.C.	...	...	Law Reports, House of Lords Cases.
L.R., I.A.	...	...	Law Reports, Indian Appeals.
L.R., Q.B.	...	...	Law Reports, Queen's Bench Cases.
L.T.	...	...	Law Times' Reports (1859—).
Mar.	...	...	Marshall's Reports (1814—1816).
M. & A.	...	...	Montagu & Ayrton's Reports.
M. & C.	...	...	Mylne & Craig's Reports (1835—1841).
M. & G.	...	...	Macnaghten & Gordon's Reports (1849—1852).
Man. & G.	...	...	Manning and Granger (1840—1844).
M.H.O.R.	...	...	Madras High Court Reports (1832—1835).
M. & K.	...	...	Mylne & Keen's Reports (1832—1835).
M. & P.	...	...	Moore & Payne's Reports (1828—1831).
M.L.J.R.	...	...	Madras Law Journal Reports (1890—).
M. & S.	...	...	Maulé & Selwyn's Reports (1813—1817).
M. & W.	...	...	Meeson & Welsby's Reports (1836—1847).
Mad.	...	...	Maddock's Reports (1815—1822).
Mcq.	...	...	Mcqueen's House of Lords Cases (1851—1852).
Mac. & G.	...	...	Macnaghten & Gordon's Reports (1849—1852).
Marsh.	...	...	Marshall's Reports (1813—1816).
Mer.	...	...	Merivale's Reports (1815—1817).
Mont.	...	...	Montagu's Reports (1829—1832).
Mont. & Ayr.	...	...	Montagu & Ayrton's Reports (1833—1838).
Mood.	...	...	Moody's Chancery Cases (1824—1844).
M. I. A.	...	...	Moore's Indian Appeals (1836—1872).
Moo. P. C.	...	...	„ Privy Council Reports (1836—1862).
Moo. P. C. (N.S.)	...	...	„ „ New Series (1862—1865).
My. & Cr.	...	...	Mylne and Craig's Reports (1835—1841).
My. & K.	...	...	„ and Keen's Reports (1832—1835).
Nag. L. R.	...	...	Nagpur Law Reports (1905—).
N. & M.	...	...	Neville and Manning's Reports (1832—1836).
N. & P.	...	...	Neville and Perry's Reports (1836—1838).
N. S.	...	...	New Series.
N. W. P. H. C. R.	...	...	North-Western Provinces High Court Reports (1866—1875).
O. C.	...	...	Original Civil Jurisdiction.
P. C.	...	...	Privy Council.
P. D.	...	...	Law Reports, Probate Division.
P. L. R.	...	...	The Punjab Law Reporter (1900—).
P. R.	...	...	Punjab Record.
P. Wms.	...	...	Peere Williams' Reports (1695—1736).
Phill.	...	...	Phillips' Reports (1841—1849).
Q. B.	...	...	Adolphus and Ellis' Queen's Bench Reports (1834—1841).
Q. B. D.	...	...	Law Reports, Queen's Bench Division.
R. & M.	...	...	Russel and Mylne's Reports (1829—1831).
R. R.	...	...	Revised Reports (1875—).
Russ.	...	...	Russell's Reports (1826—1829).
S. D. A.	...	...	Sudder Dewany Adaulat Reports.
S. C.	...	...	Select Cases.

Sch. & Lef. Schoales & Lefroy's Reports (1802—1906).
Sel. Ca. Select Cases Anon.
S. J. Solicitor's Journal.
S. L. C. Smith's Leading Cases.
Sh. Shower's Reports (1678—1795).
Sim. Simon's Reports (1826—1850).
Sm. L. C. Smith's Leading Cases.
Sm. & Giff. Smale & Giffard's Reports (1852-1857).
Stark. Starkie's Reports (1815-1822).
Supra. Above.
Sup. Vol. Supplementary Volume.
Sw. Swanston's Reports (1818-1819).
Taunt. Taunton's Reports (1807-1819).
T. L. R. Times Law Reports.
T. R. Term Reports (1785-1800).
Vaugh. Vaughan's Reports (1865-1874).
Vern. Vernon's Reports (1681-1720).
Ves. Vesey's (Junior) Reports (1789-1817).
Ves. Sen. Vesey's (Senior) Reports (1746-1755).
Ves. & B. Vesey and Beame's Reports (1812—1814).
W. N. Law Reports, Weekly Notes (English).
W. R. Weekly Reporter (Sutherland's) (1864—1877).
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S. 4	Do.	Act III of 1885.
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S. 59	Do.	Act VI of 1904.
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Ss. 85-90	Repealed, amended in parts and re-enacted in	The Code of Civil Procedure (Act V of 1908), O. 34, rr. 1-6.
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S. 105	Do.	Act VI of 1904.
S. 117	Do.	<i>Ib.</i>
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INTRODUCTION.

1. THE term "property" is nowhere defined in the Act. It appears that the Law Commissioners had intended to define the term in the words of the New York Code, in which it is thus defined:—

Meaning of property. "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others; the thing of which there may be ownership is called property." (1) This definition in its turn is founded upon the Roman notion of *dominium* or *proprietas*, which in the Civil law was nothing more than the aggregate of rights which constituted ownership; *dominium id est proprietas*, says Naratius. (2) This subjective conception of property is however, in no way in conformity with the notions of English jurisprudence, in which the term receives a dual significance of a legal concept and a thing. As a legal concept it is "a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration." (3) In this respect Austin's conception of property closely corresponds with that of the Hindu Sage Jimutavahana who defined ownership to be "the absolute use of a thing according to the pleasure of the owner." (4) Similarly in the French Code, property is defined to be "the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes." (5) By Abrens property is defined to be a material thing subject to the immediate power of a person. (6) In all these definitions, it will be noticed, the description of the term is confined to either its subjective or objective conception. Property consists in either certain rights over a thing, or a thing over which certain rights exist. But it is conceivable that the rights may not in all cases be indefinite in point of user unrestricted in point of disposition or unrestricted with regard to the rights of others whose enjoyment is postponed. For example, the interest of a lessee or of a mortgagee in property is commonly spoken of as property, though in strict parlance such an interest would not be regarded in law as property according to the view of modern jurisprudence. There are at least six other connotations of the term, which, however, need not be here adverted to. (7) In Indian enactments there

(1) § 175.

(2) De acquirendo rerum Domino D. 41. 1-13.

(3) 2 Austin's Jurisprudence, p. 217.

(4) Mandlik's Vyavahar Mayuka, 31, note 1

(5) Art. 544, Code Napoléon; "Le droit de jouir et disposer des choses de la manière la plus absolue pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements."

(6) "Un bien matériel sujet au pouvoir immédiat d'une personne." Abrens, cours, 11-117.

(7) Austin has collected the various mean-

ings of the term: (1) In its strict sense as denoting a right—indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration over a determinate thing. (2) A right indefinite in point of user, but limited in duration (e.g., a life interest in immovable property). (3) As used opposed to a right of possession: in this sense the term "right of property" even includes *servitus*. (4) In the language of the classical Roman Jurists, the term *proprietas* or *proptestas* or *dominium* has two principal meanings. It is either a right indefinite in

can be no doubt that the term is intended to be used in its wider sense as including not only the property strictly so called, but also any interest or right therein,—*jus in rem* to use the language of the classical Roman jurists. (1)

2. In the Act also the term appears to have been used in the latter acceptance (§ 175). And the term has been so described in the General Clauses Act (2) and other Acts of the Indian Legislature. (3) But the definitions as given in the several Acts are all by no means consistent with one another and will not bear close scrutiny. Indeed, no two definitions of the words "moveable" and "immoveable property" as defined in the several Acts, precisely agree. (4) (§§ 61—70).

3. The primitive conceptions of property were as crude as they were imperfect. Indeed, it is necessarily so with all embryonic conceptions which only in course of time assume definite form and shape. It is conceivable that the primitive man had no conception whatever of anything which we may designate as *dominium* or *proprietas*. Such a man wandering at large and free to occupy or possess whatever ministered to his wants or suited his fancy, had little reason to be reminded of his rights and their correlative duties. It is only when society outgrew its primeval simplicity that a conception of property would begin to assume importance. In the golden age of the poets there would be no necessity for individual ownership, and communion of goods and property would appear to be the rule: *erant omnia communia et indivisa omnibus, velutq; unum cunctis patrimonium esset*. (5) This primitive state of existence is still to be found in the backward regions, still uncontrolled by man, where the savage wanders at large and treats himself to what he finds subservient to his wants in his immediate vicinity. It is by no means certain whether the outcome of such a state of existence is invariably the same. It may be that in some countries the gregarious instincts of man would assert themselves in forming strong family ties or tribal units. It is thus that in archaic society family and property were regarded as inseparable terms. The two forces which have always exercised their most potent influence upon man are the love of procreation and of food. The love of procreation is born with man and brings him in affectionate contact with the other sex, and thence with the other members of his own species. His craving for food brings him in contact with the rest of the animate and inanimate world. The one would in course of

point of user, over a determinate thing—or, generally, *jus in rem*. In the first sense it is opposed to *servitus*; and these form two divisions of rights availing generally against the world. In the second or larger and vaguer sense, it includes all to which in the first sense it is opposed; all rights not coming within the description of *obligatio*. (5) In English law, the term "property" is not, unless used vaguely and popularly, applied to immovables. In the case of moveables the term is used for what the Roman lawyers called *dominium*. (6) It is applied to rights *in rem* over or in persons, but not to others. Originally right of the master in the slave was called *dominium*, from which the term was subsequently enlarged in its meaning. (7) Another meaning is the aggregate of a man's faculties, rights or means. It is tantamount to the term "estate and effects" or

perhaps to the term "*assets*." (8) In the largest possible meaning it means legal rights or faculties of any kind, as when we talk of the institution of property; or of security to property as arising from such a form of Government, or the like. The term "property" here means the legal rights in the largest sense.—Austin's "Jurisprudence," II, pp. 817—821.

(1) For fuller information see §§ 174—177, *post*.

(2) Ss. (5), (6), Act 1 of 1868; s. 3 (25), Act X of 1897.

(3) *E.g.*, S. 3. Registration Act (III of 1877); S. 22, Indian Penal Code (Act XLV of 1860); S. 3, Indian Succession Act (X of 1865).

(4) *Nathu v Nand Ram*, 8 B. L. R., 528.

(5) Justin, *oh. i*, I, 48,

time create family and feudal ties, and the other would equally create notions of property. Indeed, it would perhaps be more correct to say that in

(1) *Occupatio*. the archaic state of existence whatever the rude man could seize and capture was his property, whether it be a woman or a slave or an article of food. In a state of primitive existence, man would make no distinction between the one and the other. "The household" writes Dr. Hunter, "was the foundation of Roman social organisation. The father of the household (*pater familias*) alone possessed legal rights. His house was his castle, and within his family he was absolute monarch. The family included all the father's legitimate descendants, all females that had married any of the male members of the family, and all persons adopted into the family. Over all the members, he exercised judicial powers. He was also high priest of the family. The position of the wife was one of complete subjection. As wife she was in the hand (*manus*) or power of her husband : as member of the household she was legally her husband's daughter (*in loco filiae*). The power of the father (*patria potestas*) over his dependants was absolute. He might punish any of them—even a grown son that had filled the highest offices in the state—in life and limb. He might even sell his son in slavery—slavery if to a stranger, quasi-slavery if to another Roman citizen." (1) And this description applies to a state of society which was the result of many centuries of social evolution. This primitive conception of family life would appear to be true not only as regards Rome, but other nations as well. 'Speaking of the Cyclops, by which the poet perhaps intended to mean distant and less civilized people, Homer wrote in *Odyssey* : " they have neither assemblies for consultation nor *themistes*, but every one exercises jurisdiction over his wives and his children, and they pay no regard to one another." It is from these isolated groups that clans are in course of time evolved. As the *patria potestas* slackens, or the *pater familias* dies, the once united family is disintegrated, and new families evolve. Affiliation as by marriage and social intercourse would further conduce to the same end. It is thus that out of the original impulses of man families are formed and tribes are constituted. "First of all," writes Guizot, the historian, "let us take feudalism in its most simple primitive, and fundamental element, let us consider a single possessor of his fief in his domain, and let us see what will become of all those who form the little society around him. There he constructs what he will call his castle. With whom does he establish himself ? with his wife and children ; perhaps with some freemen, who have not become proprietors ; these attach themselves to his person, and continue to live with him at his table. These are the inhabitants of the interior of the castle. Around and at its foot, a little population of colonists and serfs gather together, who cultivate the domain for the possessor of the fief. (2)" And we find a similar description given of the ancient *gentiles*. "The union of several households constituted a clan (*gens*). The successive elevation of sons to the rights of independent house-holders would soon result in the existence of a number of households more or less closely related by blood, claiming (even if in some cases no longer able definitely to trace) descent from a common ancestor, called by a common family name, celebrating common religious rites, and cherishing many other interests with a markedly common feeling. Such a group of household was a *gens*, and the members were *gentiles*. Although at first exclusively related by blood, and jealous of the admission of strangers, the members of a clan did not always, or perhaps very

(1) Hunter's Roman Law, p. 5.

(2) Hunter's Roman Law, p. 102.

long, continue so ; the intense desire of family early prompted the system of adoption, which, however, was guarded by a ceremony of a public and religious character ; but the fiction of blood relationship was to a late period consistently maintained." (1) The clans were the most primitive element in Roman Society, and " the clan's lands must, in the primitive period of joint possession, have been the smallest in the division of land." At the same time " the clanships were from the beginning regarded, not as independent societies, but as integral parts of a political community." (2) This description, though intended to describe the primitive condition of ancient Rome, is equally applicable to the archaic Society of ancient India. " There are in the history of law " observes Sir Henry Maine, " certain epochs which appear to us, with such knowledge as we possess, to mark the beginning of distinct trains of legal ideas and distinct courses of practice. One of these is the formation of the Patriarchal Family, a group of men and women, children and slaves, of animate and inanimate property, all connected together by common subjection to the paternal power of the chief of the household. I need not here repeat to you the proof which I have attempted to give elsewhere, that a great part of the legal ideas of civilised races may be traced to this conception, and that the history of their development is the history of its slow unwinding." (3) This was written specially with reference to the early social conditions of India.

4. The continuance of the Patriarchal system would hardly have been possible for long, were it not engrafted upon religion. Law and Religion. Indeed, religion and law are found so closely welded in the early writings that the two were for a long time regarded as wholly indissoluble. Thus, for instance, Cicero claimed knowledge of law as essential for the due performance of the duties of a pontiff, (4) and Ulpian, the last of the classical jurists, (5) even went so far as to regard lawyers as in a sense priests. (6) The secular and sacerdotal offices were in early times invariably combined in the same person. The head of the family was invariably its priest. Nothing dominated the actions of the primitive men, whether Roman, Aryan or Greek, so much as religion. Inspired by the awful phenomena presented by Nature, and fixed by the zeal which its inscrutable mysteries presented, the curiosity and casuality of man could, failing their solution, only find harbour in mysticism and devotional rituals. The mysteries of nature were so great, its terrors so real, that the simple savage naturally believed in the all-pervading presence of good or evil spirits which he adored, with a view to please or pacify them with equal impartiality. It is to this that is primarily due the respect which the primitive man felt for the *pater familias*. The latter had lived and seen much more of the awful majesty of Nature and so deserved respect of the younger people. He was accordingly naturally constituted their priest. He was supposed to be inspired, if not actually wielding more influence with the gods, and his behests durst not be disobeyed. "The regal period" writes Hunter, "was marked by very strong religious feeling, expressed in simple and inexpensive ceremonies and ritual. Nothing could be done in private or in public life without consultation of the gods. "The whole of nature was to the Romans pervaded by divine power. A simple spear—even a rough stone—sufficed as a symbol ; a consecrated space, a sacrificial hearth as temple or altar. For 170 years it is said, Rome knew no religious

(1) Hunter's Roman Law p. 6.

(2) Mommsen Roman History, Bk. 1, Ch. III, p. 38.

(3) Maine's Village Communities, p. 15.

(4) De Leg. II, 19.

(5) 2 Austin's Jurisprudence, 580.

(6) "Jus est ars boni, et æqui, cuius merito quis not sacerdos appellet," Dig., 1-1.

images.' (1) Every temple had a priest to perform the sacred rites, as well as a sacristan; but every Magistrate, in the course of his official duties, and every private citizen, within his own house, performed religious rites. A few public priests were held in high reverence. There were three colleges or guilds of priests or rather of professors of theology—the pontiffs, the augurs, and the fetials. The pontiffs were the most intimately connected with the law. In the earliest times they were in exclusive possession of the civil as well as of the religious law. They alone regulated the calendar, and determined the *dies fasti* on which alone legal business could be transacted; they alone were in possession of the technical forms according to which law-suits must be conducted, they convoked the assembly of the wards when wills were to be received or adoption (*arrogatio*) was to take place. In some cases of deep moral offence they might pronounce sentence of death; but a right of appeal lay to the people. In spite of the intensity of Roman religious feeling, the religion of the state was always absolutely subject to the political authority." (2)

5. It was from the necessity of religion that females were excluded from the line of succession. Being inferior to man in strength and presumably in intellect, their claim to officiate at the family worship was, of course, easily ignored, and their exclusion from participation in the family estate would then follow suit. (3) Again, it is owing to this conception of religion and its duties that the rule of primogeniture had to be adopted by the Indo-Germanic nations. Every tribe and household had its own especial god who could only be propitiated by the due performance of especial ceremonies. And so closely were these ceremonies associated with each family that if, after the death of the father, the brothers wished to divide the heritage they were permitted to do so, but only on condition that a new religious ceremony would be accomplished. (4)

In India, the same dominating influence of religion is throughout perceptible. To a Hindu religion has always been the first condition of existence. The orthodox are enjoined to live this life so that it may lead to everlasting beatitude. The life of a householder is not condemned, but is, on the other hand, recognized as a distinct step in the advancement of the purpose of life which is happiness in this world and the next. To attain to this state, a man must beget a son, so that his happiness in the two worlds may be assured: "By a son, a man obtains victory over all people; by a son's son, he enjoys immortality; and, afterwards by the son of that grandson, he reaches the solar abode." (5) It was conceived that as a man requires nourishment to eke out his existence in this world, so does he in the world unseen. Some one must therefore be left behind in this world to minister to these wants: "Oh, my father, if I live, thou shalt receive rich banquets, but if I die thou shalt go without thy share of savoury repasts with which the dead are nourished." (6) These words put into the mouth of Orestes aptly describe the longing and desire of the ancient, as also the modern Hindu. The value of a son consists in that he nourishes the disembodied soul of his father, and thereby perpetuates his spiritual existence. A soul without such pabulum would wander about famished

(1) Thene's Roman History, Bk. 1, pp. 157, 158.
Ch. xiii. p. 119.

(2) Hunter's Roman Law, p. 10.

(3) The exclusion of women from royal succession seems to have been in later days justified on the ground of public policy. Sir H. Maine's Early Law and Custom,

(4) M. de Coulanges, *cits* Antique.

(5) Manu, C. 9. v. 137, and so in v. 138 Manu says: "Since the son delivers (*trayate*) his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself."

(6) Æschylus *Chæph.* 462, 468.

and forlorn through a world against which he had made no provision.⁽¹⁾ It is the same sentiment which urged the shade of the fallen Patroclus to appear before Achilles in vision and chide him for not having attended to his funeral.⁽²⁾

6. A daughter cannot take the place of a son, for as soon as she is married her connection is cut off from the family which had given her birth, and she then belongs to another family. In plain language while the son carries the name of the father, the daughter upon marriage can no longer be trusted to do the same.⁽³⁾ It was therefore desirable at all events to have a son, and if the man be so unfortunate as not to get one of his own, he was allowed to make one by adoption. Even a second marriage, otherwise reprobated, was permissible in the hope of begetting a son to continue the lineage.⁽⁴⁾ The deceased ancestor if properly taken care of became a *Pitri* or a deity. Of all ceremonies necessary for his elevation to this rank none was so important as the funeral obsequies. "Ancestor-worship," says the learned author of the "Early Law and Custom," is still the practical religion of much the largest of the human race. We who belong to Western civilization are but dimly conscious of this, mainly on account of the Hebrew element in the faith of Western societies."⁽⁵⁾ Such sacrifices were not unknown to the Hebrews,⁽⁶⁾ and indeed with but slight variation such offerings are in vogue up to date among all nations. "With happy auspices and purifications thou bringest the offerings and dost present them, in spring, summer, autumn, and winter, to the Dukes and former Kings. And they say, 'we give to thee, we give to thee myriads of years, duration unlimited.'"⁽⁷⁾ And is this not but a prosaic version of that love which animates the deed and endows it with feelings and appetites of the material world?

7. Thus then religion and the gregarious propensities of man contributed to the maintenance of the patriarchal system. In those far-off days the needs of man were not many. And the early history of property was therefore necessarily of slow development.⁽⁸⁾ Examples could, if necessary, be multiplied to show what must now appear to be almost a self-evident proposition that the primitive man, as such, had no need to ear-mark anything as his own. Of him it could truly be said that he was the master of all he surveyed, his rights there was none to dispute. But as in response to the desires and promptings of human nature individuals grew into families and families into tribes, the necessity of some mode of Government became necessary. For a time the will of the head of the family or clan would no doubt be regarded as supreme.⁽⁹⁾ In course of

(1) Cf. *Aen.* VI, 326; *Juv.* III, 267.

(2) The *Iliad*.

(3) *Manu*, C. 5, v. 156.

(4) *Ib.*, p. 106.

(5) Sir H. Maine's *Early Law and Custom*, p. 58.

(6) Psalm, cvi. 28; Deuteronomy, xxvi, 14.

(7) Dr. Legge's *Shih King*, Sacred Books of the East, Vol. III, pp. 348, 349.

(8) In an iconoclastic essay on "The origin of property in Land" by De Oontanges the eminent French constitutional historian combats the theory of communism as the primary stage in the history of property. The only conclusion to which we are

brought by this prolonged examination of authorities is that community in land has not yet been historically proved." *Ib.*, p. 148. It may be stated against the conclusion that it ignores entirely the evidence afforded by ethnological and other cognate sciences.

(9) See Maine's *Ancient Law*, p. 125.

["The patriarchal authority of a Chieftain is as necessary an ingredient in the notion of the family group as the fact (or assumed fact) of its having sprung from his loins; and hence we must understand that if there be any persons who, however truly included in the brotherhood by virtue of their blood relationship, have nevertheless *de facto* withdrawn themselves from the empire of its

time-usages would arise out of the practices of each community which would grow in weight and uniformity with time, and would then be finally moulded into law. And as the wants of man grew and could not be satisfied without labour, the idea of property or ownership would be generated, for no man would allow another to participate in the fruit of his toil unless he was bound to him by a family or feudal tie. And whether the natural condition of mankind was of "war of every man, against every man" ⁽¹⁾ or of a more sociable nature, it is certain that the strong man would occasionally prey upon the weak till the latter reinforced by his clansmen and neighbours would effectively retaliate, teaching the strong man not to covet things which are in the possession of another, albeit weaker party. Thus *occupatio* or acquisition of property by taking possession of a thing which belonged to no one would be naturally regarded the primitive as also the most natural mode of acquisition. Originally, the person in possession was therefore its master, but such possession though tantamount to ownership could not be otherwise than transient. The recognition of a permanent right created by possession is clearly the result of the growth of legal conception. At the outset the *right* of possession was co-extensive with the *act* of possession; the former was recognized as long as the latter lasted. In the words of Blackstone "the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determinate spot of it, for rest, for shade or the like, acquired for the time a sort of ownership from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might give the sole property of the fruits which he had gathered for his own repast,—a doctrine well illustrated by Cicero who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own." ⁽²⁾ It may be doubted whether this theory does not assume an amount of discretion and candour which was certainly not one of the characteristics of antiquity. The man who first claimed ownership on the strength of his prior possession may have had to prove his theory by the force of his right arm. Initially the man in possession would be the owner if he could keep it. It was not unjust but according—

"To the good old plan,
That they should take who have the power,
and they should keep who can." ⁽³⁾

8. We have the authority of history to show that the early struggles for the right born of possession were bitter and bloody. It was only after the inutility of such a contest was made manifest that the struggles ceased and the doctrine assumed the sanctity of a law of nature. ⁽⁴⁾ The idea of absolute ownership acquired

ruler, they are always, in the beginnings of law, considered as lost to the family. It is this patriarchal aggregate—the modern family thus cut down on one side and extended on the other—which meets us on the threshold of primitive jurisprudence." *Ib.*, pp. 188, 184.

(1) Hobbes, *Leviathan* (Morley's Ed.), p. 65.

(2) *Quemad modum theatrum curu commune sit, recte tenem, dici potest ejus esse*

eum locum quisque occuparet. DeFin, Bk. III, Ban., 20; 2 Black. Comm., 3, 4.

(3) Wordsworth on Rob Roy's Grave. Similar words were used by Brennus the Gaul as his justification for invading Cnesium. Cf. Holland's *Jurisprudence* (7th Ed.), 179.

(4) Cf. Genesis, Ch. XIII: "Let there be no strife, I pray thee, between thee and me. If thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand then I will go to the left."

by possession was therefore the work of time, and several causes must have contributed to shew the reasonableness of the rule, the fact that otherwise there would be innumerable tumults being certainly the most important factor. Moreover, as population grew and man became more and more refined, considerable expenditure began to be incurred in making habitations commodious and agreeable, and farms more fertile and productive. In the case of habitations in particular, it was natural to observe that even the brute creation to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beast of the field had caverns, the invasion of which they deemed to be very flagrant injustice and to preserve which they would even sacrifice their lives. Hence before any extensive property in the soil or ground was established, property was established in every man's house and homestead, which seem to have been originally merely temporary huts or moveable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners. For the same reason, there can be no doubt that moveables of every kind became sooner appropriated than the permanent substantial soil, partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use till improved and meliorated by the labour of the possessor which was recognized as affording the strongest reason for allowing exclusive ownership. (1) So long as the occupants were few and the land plentiful, the propriety of permanent ownership would neither be questioned nor even thought about. Indeed, life at such period would be preferably nomadic. But as by degrees the population grew, and it became difficult to migrate to fresh spots without encroaching upon former occupants, and the spontaneous product of nature was exhausted or became insufficient, then it would become necessary to encourage and practise agriculture by a regular connexion and consequence, and which would introduce and establish the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruit in sufficient quantities without the aid of tillage, and thus the necessity and reason for exclusive ownership became apparent. The progress of agricultural knowledge, skill and invention are only compatible with the existence of rights in land. For who would care to bestow labour and capital upon a soil from which he may be at any time ousted by stronger force. Truly then, has Bentham observed that property, is the creature of law, (2) for without its recognition by law there could be no such thing as permanent ownership, which is the mainspring of human progression. Even those who assert communism to be the ideal state of existence have to postulate a due limitation of the numbers of the community and universal education. (3)

9. But while property by *occupatio* was thus established certain limitations dictated by common sense or public policy had to be placed upon its enjoyment. These limitations will, however, be discussed by and by (§§ 29—31 *post*). Similarly to the acquisition of rights by *occupatio*, certain exceptions were necessarily dictated. A man was entitled, as has been before observed, to annex to his own use a thing which belonged to nobody, a rule implied in the maxim—*Qui prior est tempore potior est jure*. (4)

(1) 2 Black, Comm., pp. 4, 5.

(2) Principles of the Civil Code, Ch. VIII, Bowring's Edition, Vol. 1, p. 308.

(3) Mill's Political Economy (People's Edition), p. 129.

(4) "He has the better title, who has first in

10. But this maxim though historically true, has now been considerably restricted in its application by the advance of civilisation, by international laws, and by the civil and exclusive ordinances of the sovereign States. Thus, for instance, it is now held that no one can acquire any property over the high seas; and sea within three miles from the shore, *i.e.*, a marine league, is declared to belong to the Crown; (1) and islands formed within that area similarly belong to it and cannot be occupied by the first finder. But islands formed beyond that limit are no longer subject to the municipal law and would still become the property of the first occupant. (2) Similarly, straits and enclosed waters are appropriated by the States within whose territorial jurisdiction they may be situate. (3) Then again animals *feræ naturæ* do not belong to the man upon whose land they may happen to be, until they are caught or killed. And to this every one has a right so much so that if A starts a wild animal on the land of B and captures or kills it on the land of C, he has the right to take it even though he has trespassed on the lands of both B and C. (4) And if, therefore, after capture he lets go the animal, he loses his property, and it may be appropriated by any one who captures it. But during his pursuit his property remains. (5) The right of property in treasure-trove, (6) in wrecks, derelicts, waifs and estrays is in some countries vested in the State. So public policy dictates that the elements of light, air and water cannot be the subject of exclusive ownership. No doubt a man may enjoy them by means of his windows, his gardens or mills and other conveniences, but he cannot acquire any property therein. The finder of a moveable thing belonging to another does not acquire any property therein, unless the latter had abandoned it, and so the thing had become a *res nullius*. (7) In any other case his position in relation to the owner is that of a bailee and to whom he is liable. (8) Prizes and booty of war belong to the Crown, by virtue of its prerogative right, but it has been customary since the last two centuries to grant them for distribution amongst the captors, and those who have assisted the actual captors, as by conveying encouragement to them, or intimidation to the enemy. (9)

11. It is not only individuals but also States that acquire property by occupancy. (10) No doubt in the early days of the European exploration, new territories were acquired in the names of their States by their emissaries, by bare discovery apart from actual occupation, but international law now recognises no title except by *occupatio*, which means actual or symbolical possession. No doubt, discovery by a State acts as a temporary bar to occupation by another State, but the title so acquired is inchoate and must be converted into a definitive title within a reasonable time or else the right would be lost. (11)

12. Though the true origin and foundation of property was primarily in *occupatio*, everything capable of appropriation was in course of time appropriated. It was thought that everything capable of ownership should have an

point of time." Co. Litt., 14a. See §§ 758—766 post where the maxim will be found fully discussed.

(1) *Whitstable v. Ganu*, 11 C. B., (N. S.). 387; C. B., (N. S.) 859.

(2) Hall's International Law (2nd Ed.), pp. 151. 152.

(3) *Ib.*, p. 151.

(4) Justinian's Institutes, Bk. II, Tit. 1, s. 13; *Churchward v. Studdy*, 4 East, 248. *Sulton v. Moody*, 2 Salk., 156; *Rigg v. Earl of Lonsdale*, 11 Exch., 654.

(5) *Chytun Churn v. The Collector of Sylhet*, 12 W. R., 75.

(6) Treasure Trove Act (VI of 1878).

(7) S. 71, Indian Contract Act (IX of 1872).

(8) S. 71 Indian Contract Act, (IX of 1872). s. 409, Exp. (2), Indian Penal Code (Act XLV of 1860).

(9) *In re Banda and Kirwee Booty*, L. R., 1 Adm., 189 in which the whole law is exhaustively set out.

(10) Hall's International Law (3rd Ed.) 104.

(11) *Ib.*, p. 106.

owner, and that he who could first declare his intention of appropriating any thing to his own use and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property therein. In this way the State became the proprietor of all the unappropriated lands, for whatever had no owner became by law vested in the State. And it is on this principle that immediate ownership is assigned to newly formed lands, as by the rising of an island in a river, or by the alluvion or dereliction of the sea.

13. In this country the right to all waste and unoccupied lands is now vested in the Crown, which is naturally the lord of the waste, and no title can therefore be acquired here by a bare *occupatio*.

14. Indeed, the foregoing observations relating to acquisition of rights by *occupatio* will no longer be applicable to States brought under the control of Government. But even in such States occupation for a definite period of a thing, whether belonging to the State or a private owner, is a well recognised mode of acquiring ownership. This mode of acquisition is called that by Prescription, ⁽¹⁾ a word which is derived from the Roman usage of setting up the plea of *possessio longi temporis* by the claimant at the beginning of the *formula* of the suit. This mode of acquisition according to the *jus civile* required the two conditions of *bona fides* and *justus titulus*. Justinian laid down that ownership over moveables may be acquired by use for three years, and over immoveables by long possession, that is, ten years for persons present, and twenty for persons absent. "And in both these ways, not only in Italy, but in every land swayed by our rule, the ownership of property may be acquired, if only the antecedent ground of possession was lawful." ⁽²⁾ Prescription then is the acquisition of title under the authority of law by length of time and enjoyment. ⁽³⁾ Title by prescription may now be acquired in almost all civilized countries. In France the Code Napoleon recognises prescription as a means of acquisition or exoneration by a certain lapse of time, and under conditions determined by the law. ⁽⁴⁾ In modern jurisprudence, however, the term is now often used in a dual sense as meaning an instrument of the acquisition of property or the instrument of an exemption only from the servitude of judicial process, ⁽⁵⁾ or in other words, either as creating a right in the claimant or only as barring the remedy to recover the property against him. But the two rights are correlative, and if right by prescription is created in one, it must be necessarily extinguished in the other. There may, however, be cases in which the term may, for the purpose of convenience be regarded from the unilateral point of view, as it is in the Indian Limitation Act, ⁽⁶⁾ the object of which is to prescribe periods beyond which an application for judicial remedy would be restricted or barred. ⁽⁷⁾ It is thus enacted in the Indian Limitation Act that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished," ⁽⁸⁾ the

(1) The word is derived from *L. prescribere, prescriptum. prae* before and *scribere* to write.

(2) Justinian, Bk., 11, 6 pr. Hunter's Roman Law, p. 290.

(3) "Prescriptio est titulus, ex usu et tempore substantiam capicus, ab auctoritate legis." Co. 1, Inst., 113b. Possession apart from legal ownership is still regarded in law as a substantive right or interest which exists and has legal incidents and advantages apart

from the true owner's title. Pollock and Wright on Possession, p. 19; cited in *Mustapha Saheb v. Santha Pillai*, I. L. R., 28 Mad., 179 (183).

(4) Code Napoleon, art. 219.

(5) Angell on the Limitations of Actions, (3rd Ed.), § 2.

(6) S. 28, Act XV of 1877.

(7) *Secretary of State v. Vira Rayan*, I.L. R., 9 Mad., 175.

(8) S. 28, Act XV of 1877.

effect of which is that while the remedy of the owner is extinguished, the right is indirectly transferred to the adverse claimant.⁽¹⁾ Now the period limited by the Act for instituting a suit for the recovery of immoveable property is 12 years, in the case of a private individual,⁽²⁾ and 60 years in the case of the Government suing through the Secretary of State for India in Council.⁽³⁾ In England, the period formerly fixed was 20 years, but it was subsequently reduced to 12 years by the Real Property Limitation Act, 1874,⁽⁴⁾ upon which section 28 of the Indian Limitation Act has been moulded. As regards limitation affecting the Crown, the rule was primarily founded upon the maxim *nullum tempus occurrit regi*,⁽⁵⁾ and it was so enacted in 1768 by the *Nullum Tempus Act*,⁽⁶⁾ but this ordinance was amended in 1861,⁽⁷⁾ and its section 5 has been since repealed.⁽⁸⁾

15. But even in the case of property which has already been made the subject of appropriation, possession is good against all the world except the person who can show a better title.⁽⁹⁾ The law gives credit to possession unless explained. No one can evict a trespasser, because he is a trespasser. And law favours possession so far as to allow even tacking with a view to enable the party in possession to perfect his title. Hence there may be any number of persons successively in possession, provided that their possession was under the same title, as if it was transmitted by transfer, inheritance or succession, and still on determination of the statutory period the result would be the same as if the possession had been all along continuous.⁽¹⁰⁾ For the purpose of creating title by prescription it is not necessary that the possession should not have commenced in wrong. On the other hand, such a possession usually originates in trespass and is persisted in wrongfully against the disseizor.⁽¹¹⁾ Any other possession being only permissive would not ripen into a right.⁽¹²⁾

16. In regard to moveable property the time similarly limited is three years calculated from the date when the property is wrongfully taken or retained,⁽¹³⁾ and if the property be lost or acquired by theft, or dishonest misappropriation or conversion, then the same period is allowed to be calculated from when the disseizor first learns in whose possession it is.⁽¹⁴⁾ It then follows that upon the expiration of these periods the person in possession would acquire an indefeasible title against the whole world. But if he have come by the property dishonestly, he does not acquire it so as to be out of the reach of the criminal law, and upon conviction the Court may "make such order as it thinks fit for the disposal" of the property.⁽¹⁵⁾

17. In the case of easements, the right to the advantage can be acquired by its uninterrupted enjoyment for twenty years, unless the servient tenement

(1) *Gunga Gobind v. The Collector*, 7 W.R., 21 (23), P.C.; *Neill v. Duke of Devonshire*, 8 App. Cas., 185 (1892).

(2) Art. 144, Sch. II, Indian Limitation Act (IX of 1908).

(3) *Ib.*, Art. 149.

(4) S. 1, 37 & 38 Vict., C. 57.

(5) "No time affects the Crown."

(6) 9 Geo. III, Ch. 16.

(7) 24 & 25 Vict., C. 62.

(8) Statute Law Revision Act, 1875; 38 & 39 Vict., C. 66, Schedule.

(9) *Per* Cockburn, C.J., in *Asker v. Whitlock*, L.R., 1 Q.B., 1 (6); *per* Lord Tenterden in *Doe v. Dyeball*, Moo. & M., 346; *Meer*

Usodoollah v. Beeby Imaman, 5 W.R., 26, P.C.; *Mylopore v. Yoe*, I.L.R., 14 Cal., 801.

(10) *Padajirav v. Ramrav*, I.L.R., 13 Bom., 160.

(11) *Ramchunder v. Madho Kumari*, I.L.R., 12 Cal., 484 (494), P.C.; *Durga v. Shambhu*, I.L.R., 8 All., 86 (91).

(12) *Meer Usodoollah v. Beeby Imaman*, 1 M.I.A., 19; *Ramalakshamma v. Ramanna*, I.L.R., 9 Mad., 482, P.C.

(13) Art. 48, Sch. II, Indian Limitation Act (IX of 1908).

(14) *Ib.*, Art. 48.

(15) S. 517, Code of Criminal Procedure (Act V of 1898).

belongs to the Government, in which case the right is subject to the rule of sixty years. (1)

18. Thirdly, property may be acquired by accession, that is, where to a thing already owned by somebody something else not before owned by him is added and united, either by the forces of nature, or by the act of man. The doctrine of property so acquired is grounded on the right of occupancy, and is derived from the Roman law by which accessions were held to belong to the principal. (2) Thus the brood of tame and domestic animals belongs to the owner of the dame or mother according to the maxim—*partus sequitur ventrem*, (3) and "if your horse gets my mare with foal, the foal is not your property but mine." (4) Similarly it has been laid down by Coke that that which is the accessory or incident does not lead but follows its principal, (5) that is, while the incident passes by the grant of the principal, the principal does not pass by the grant of the incident. In the case of immoveable property, the rule is the same. Thus if an island is formed in the middle of a river by the deposit of silt, it belongs to the owners of the opposite shores, but if it be nearer to one bank than the other, then it would belong to him who is the proprietor of the nearest shore. But in the case of a new island rising in the sea, it would according to the Civil Law belong to the first occupant; but according to the English law, as stated by Blackstone, to the Crown. But on this point the authorities are by no means unanimous, and the better opinion seems to be that as the four seas belong to no one, the first occupant and not the Crown should have the newly formed land. (6) And as to lands gained from the sea, either by alluvial deposits, by the washing up of land and earth so as in time to make *terra firma*, or by dereliction, as when the sea shrinks back below the usual watermark, the law is held to be, that if the accretion be made by small and imperceptible degrees, it shall go to the owner of the land adjoining; for *de minimis non curat lex*; (7) and besides these owners being often losers by the breaking in of the sea, or at charges to keep it out, the accretion must be regarded as a recompense for such possible charge or loss. On a similar principle if a river running between two estates encroaches imperceptibly, upon the one, the owner thereof has no remedy; but if the encroachment was the result of a sudden change, as brought about by a violent flood, and thereby the loss has been occasioned, he is then allowed to take what the river may have left in any other place by way of recompense.

19 As regards accessions made by man, the rule laid down in the Civil law was contained in the maxim *Quicquid plantatur solo solo cedit*, (8) that is, fixtures and other artificial accessions were regarded as incidents of the property from which they were not allowed to be dissevered. This was no doubt an equitable rule so long as the accession bore no important relation to the principal. But as society progressed, and tenants, for the more convenient or luxurious occupation of the property demised to them, affixed valuable and expensive articles to it, the injustice of denying the tenant the right to remove them at his

(1) S. 15, Indian Easements Act (V of 1882).

(2) "Accessiō cedit principali." ("Accession follows the principal." "Accessorius sequitur naturam sui principalis." ("An accession follows the nature of its principal.") Justinian Bk. 3, 139.

(3) "The offspring follows the mother."

(4) In Latin, "Si equam meam equus tuus precequantem fecerit non est tuum sed meum

quod natum est." Bracton, Bk. II, Ch. 2 s. 3; see Digest, Bk. 2, Ch. 19, s. 13.

(5) Co. Litt., 152. "Accessorium on ducit, sed sequitur secum principale."

(6) *Baban v. Nagu*, I. L. R., 2 Bom., 19 (29).

(7) "The law does not concern itself about trifles." Cro. Eliz., 353.

(8) "Whatever is affixed to the soil belongs to the Crown."

pleasure, and deeming such things practically forfeited to the owner of the land by the mere act of annexation became apparent : the rule had then to be abandoned, and the Courts felt equitably bound to allow the person who had gone to the cost of annexing the fixtures to disannex and remove them. But to allow this in all cases would naturally be inequitable. For if a trespasser who has no right to enter upon the land of another, encroaches upon it and puts up erections thereon, the wrong-doer could not be allowed to remove them. He was therefore required to surrender up the land together with the annexations. But if he had put them up in a good faith believing that he was entitled to the land, the rule was relaxed and a *bona fide* holder was allowed to remove what he had placed innocently upon the land, or at least to receive adequate compensation for it. And this is now the law as enacted by the Transfer of Property Act.⁽¹⁾

20. The fourth mode of acquisition is by alienations *inter vivos*. Property would have had little value to man if his rights therein were only personal to himself. Indeed, the system by which the actual occupant was allowed to be its proprietor so long as he held it, was one, only suited to the rudimentary stage of civilization. As therefore society grew it was found that whatever became inconvenient or useless to one man, was highly convenient and useful to another, and thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property. Then, again, an owner would naturally desire that the property which he had acquired, and for which, it may have been, his wife and children have had to work, should devolve upon them on his death. Such a course would be equally dictated by reason and policy, for if it were otherwise, the death of each proprietor would have been productive of endless disturbances. The assurance which a man feels that his property is transferable and transmittable prompts him to action. He knows that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affection. A man's wife and children are usually witnesses of his death, upon which they generally take possession of all his belongings. Being near him they possess an advantage over strangers, and thus it was that in primitive days, on failure of issue, a man's servants born under his roof were allowed to be his heirs being immediately on the spot when he died.⁽²⁾ But while all these causes contributed to constitute a man's relations his natural heirs, some liberty had necessarily to be left to him to change the course of devolution at his pleasure. For to enact an inflexible line of succession would have been in some cases as much productive of evil as if the man had only a transient dominion over his property. Such a rule was indeed tried, but it was found to have had the effect of making the heirs disobedient, and it was otherwise productive of domestic unhappiness. Several modification of the original rule became then necessary, but these are too varied and complicated to be here even referred to, for they form a distinct branch of the personal law of each country and are only remotely connected with the transfer of property.

21. Another mode of acquisition, but open only to the sovereign power, is by forfeiture and escheat. Forfeiture may be incurred in several ways. An offender who has been convicted for a heinous offence may lose all his property which may be forfeited to Government.⁽³⁾ Persons guilty of treason, or of waging, or attempt to wage war against the

(1) Ss. 51, 108 (h).

(2) 2 Black. Comm., 12.

(3) Ss. 61, 62, 121, 122, 126, Indian Penal Code (Act XLV of 1860).

King are liable to forfeit all their property. (1) Similarly a person committing depredation, or making a preparation to commit depredation, on the territories of a power in alliance or peace with the King is liable to the same penalty. (2) Persons against whom a warrant has been issued for appearance are also liable to have their property forfeited to Government if they do not present themselves after a proclamation issued according to the terms of section 87 of the Code of Criminal Procedure. (3) An attachment so made is, however, subject to the provision of section 89, and may be set aside if the party aggrieved appears within a period of two years and shows cause against the attachment. In times of war or of rebellion, persons convicted of open hostility to the Government are subjected to the penalty of death to which is added forfeiture of property and effects, real and personal of the offender. (4) An attachment or forfeiture once made cannot be questioned in or by any Court, subject to certain reservations which need not be here detailed. (5) Persons dealt with under the Arms Act, Treasure Trove Act and several other Penal Acts are liable to the penalty of forfeiture of the things in respect of which they have committed offences. Forfeiture for treason or felony was also the law in England, but it has been now abolished. (6)

22. The law of escheat is properly a branch of the law of succession by which the property of the intestate and without heir vests in (vi) Escheat. the Crown—*Quod nullius est, est domini regis*. (7) The term "escheat" which literally means "falling back" originated with the Feudal law, by which every grant being made by the feudal lord reverted to him upon failure of heir. In England all lands were and are still supposed to be held from the sovereign as the lord paramount, who is thus entitled to the reversion as the *ultimus hæres* upon the failure, natural or legal, of the intestate tenant's family.

23. "The last consequence" wrote Blackstone, "of tenure in chivalry was escheat; which is the determination of the tenure or dissolution of the natural bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee; (8) that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to whose heirs alone the grant of the feud extended; in the other, the tenant, by perpetrating an atrocious crime, shewed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited, his feud, which he held under the implied condition that he should not turn a traitor or a felon, the consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it." (9) In England escheat as the result of an attainder has been now abolished; (10) but upon failure of heirs, the property there still escheats to the lord of the fee, subject to the King's superior rights of forfeiture. In this country the doctrine of escheat was well recognized from very ancient times.

(1) Indian Penal Code (Act XLV of 1860), s. 121.

(2) *Ib.*, s. 126

(3) Ss. 87, 88, Code of Criminal Procedure (Act XV of 1898).

(4) Ben. Reg. X of 1804; Mad. Reg. VII of 1808.

(5) See Act IX of 1859.

(6) 33 & 34 Vict. C. 13.

(7) "That which belongs to no one belongs to the Crown."

(8) Co. Litt., 13.

(9) 2 Black. Comm., 73, 73.

(10) 33 & 34 Vict., C. 23.

Thus it is laid down in the Mitakshara,⁽¹⁾ that except the property of the Brahmin, which can never escheat to the King,⁽²⁾ the property of the three remaining classes escheats to the King on failure of all heirs. The estate of a Brahmin must upon failure of heirs be made over to a Brahmin, "otherwise the King is tainted with sin."⁽³⁾ This passage has been, however, interpreted by the Privy Council to mean that the King is not precluded from taking the property, but that he is to take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins.⁽⁴⁾ The result of this decision is that the estate of a Hindu, of whatever caste, is subject to the law of escheat in favour of the sovereign power in India. But the Privy Council expressly refrained from deciding whether in the case of a Brahmin the Crown would take absolutely or only upon trust. "It is unnecessary to decide," their Lordships observed, "whether the duty imposed upon the King is one of imperfect obligation, or a positive trust affecting the property in his hands, or whether, if a trust it is or is not one incapable of enforcement by reason of the uncertainty of its objects."⁽⁵⁾ There can be no doubt, however, that where the Crown succeeds by escheat, its position is that of an heir, and that therefore it takes the property subject to all the equities subsisting at the time. An estate so taken is subject to the trusts and charges if any, previously affecting the estate."

24. And similarly if the Crown succeeds to the estate of a Hindu widow, only empowered to alienate for legal necessity, it follows that it must possess the same power which an heir would have had of protecting its interests by impeaching any authorized alienation by the widow.⁽⁶⁾ And so if the Crown took the estate charged with any burthen, as for example of a mortgage, it must discharge the burthen like any other heir.⁽⁷⁾ The Crown claiming by escheat against a party in possession, is bound to show that the last proprietor died without heirs, and that escheat had been thereby occasioned. In order to succeed the Government cannot set up any *jus tertii*, since it claims as the last heir and must make good its own title, as against the person in possession who is entitled to defend it, not only by proof of his own title, but by setting up any *jus tertii* that may exist.⁽⁸⁾ It may forfeit its right otherwise good, by waiver, or recognition of another person as an heir.⁽⁹⁾ The rule as to escheat in respect of persons governed by the Indian Succession Act is embodied in section 28,⁽¹⁰⁾ and the procedure applicable to such cases is prescribed in the Administrator-General's Act.⁽¹¹⁾

25. There is some similarity between forfeiture and escheat, but the two modes of acquisitions are radically different, since while forfeiture is a penalty for a crime personal to the offender, of which the crown is entitled to take advantage by virtue of its prerogative, escheat results from tenure only

(1) Mitakshara, Ch. 11, s. VII, §§. 1—6, wherein all the earlier law givers are cited.

(2) "The property of a Brahmin shall never be taken by the king; this is a fixed law. Manu 9, 189 cited in Mitakshara, ch. II, s. 7, s. 5, Narada, cited in Mitakshara, ch. II, s. VII, s. 5.

(3) This is cited in the Mitakshara as from Narada (Ch. II, s. VII, s. 5), but the passage, occurs nowhere in the Institutes.

(4) *The Collector of Masulipatam v. Cavalay* 8 M.I.A., 500 (523).

(5) *Ib.*, p. 524.

(6) *The Collector of Masulipatam v. Cava-*

lay, 8 M.I.A., 500 (553).

(7) *Cavalay v. The Collector of Masulipatam*, 1 M.I.A., 619; *Mussad v. The Collector of Malabar*, I.L.R., 10 Mad., 189.

(8) *Girdhary Lall v. Bengal*, 12 M.I.A., 448 (469); s. o. in High Court, *Government v. Girdhari Lall*, 4 W.R., 13.

(9) *Collector of Madura v. Veeracamoo*, 9 M.I.A., 446; *Churaghan v. Hurbans*, 7 N. W.P.C.R., 218; *Malan v. Purushutama*, I. L.R., 12 Mad., 287.

(10) Act X of 1865.

(11) Act II of 1874; see ss. 16, 62.

and arises from an obstruction in the course of descent. So while forfeiture affects the rents and profits only, escheat operates on the inheritance.

26. Another mode of acquisition, also ~~the~~ sole prerogative of the sovereign power, is by the levying of taxes and tolls upon its subjects.

(vii) **Taxes, etc.** All these sources of revenue constitute the domain or patrimony of the State.

27. Lastly must be added the acquisition of property by the right of conquest which has played no unimportant a part in the history of the English constitution. Indeed, it is to the conquests of William the Conqueror that England owes the introduction of the military organization of feudalism. No doubt feudalism before the conquest was not unknown in England for the "thegns" and "companions," attached to the Saxon King's war-band were bound to him by military service, as their tenants were in their turn bound to them by a similar process of subinfeudation. But the stubborn resistance Willam had met forced him to order wholesale confiscation of the soil and redistribute it amongst his own followers on the sole condition of military service at the royal call. These latter in turn created undertenures on the the same terms, and a whole army was by this means raised ready at any moment to rally in response to the royal command. In this country, too, a large area of land was similarly distributed from time to time by the English conquerors, but it is at least exceedingly doubtful if the conditions upon the grants initially made can now be enforced. Anyhow, both in this country as well as in England, the grants so made were perpetual being descendible to the grantee and his heirs for ever.

28. Simultaneously with the growth of the notion of property and the diversified modes of its acquisition which have been noticed in the foregoing pages, there have grown up also the different modes or grades of property or interests which have now come to be included in the term in its wider acceptance.

29. *A priori* a man who is the absolute owner of a thing is free to use it as he pleases. For instance, a proprietary of land may put up any erections thereon, although they may be obnoxious to his neighbours. He may mine in it and thereby injure the neighbouring lands. But here again, the rights of the individual are subordinated to the rights of the Society: "This sword is mine in full property, but plenary as this property is as to thousand uses, I may not use it in wounding my neighbour, nor cutting his clothes: I may not wave it as a signal of insurrection against the Government. If I am a minor or a maniac, it may be taken from me, for fear that I should injure myself. An absolute and unlimited right over any object of property would be the right to commit nearly every crime. If I had such a right over the stick I am about to cut, I might employ it as a mace to knock down the passengers, or I might convert it into a sceptre as an emblem of royalty or into an idol to offend the national religion." (1) The fact that a man is an absolute owner of a thing must not therefore be understood to entitle him to use it to the detriment of another man, himself, or of the public. These salutary limitations were expressed in the maxims, *sic utere tuo ut alienum non lēdas* (2) *sic utere tuo ut rem publicam nondēdas*, (3) and *sic uteris tuo semet ut ipsum non lēdas*. (4)

(1) Bentham's Principles of the Civil Code (Bowring's Ed.). Vol. I, pp. 313, 314 *note*.

(2) "Enjoy your own property in such a manner as not to injure the rights of another." See *Jeffries v. Williams*, L. R. 5 Exch., 797.

(3) "Enjoy your own property in such a manner as not to injure the rights of the public."

(4) "Enjoy your own property in such manner as not to injure yourself."

30. Similarly, when it is said that the Crown is the lord of the wastes or even of the high seas, the right of dominion is subject to the necessary qualification that it is subject to the rights of the subject. So when, as is generally the case, the soil of the shore is in the Crown, the rights of the public in the sea or tidal waters, *e.g.*, to fishery or navigation, are natural rights accruing to them as *cestuis que trustent in possession*; but when a private individual holds the shore, such of these rights as remain to the public have become, strictly speaking, "easements." (1)

31. An absolute property means a right indefinite in user, unlimited in duration (that is, capable of going over to a series of successors *ab intestato* which may possibly last for ever), and alienable by the actual owner from every successor who in default of alienation by him might take the right. (2) Of all these attributes the power of alienation from every possible successor is the essence of absolute property. But such a right as has been seen above does not exist, for however unqualified an owner a man may be of his property, he could not by any alienation of his own affect the interests or at least the lord of the fee or the king. Even apart from the law of escheat, the State or Sovereign Government must be presumed to have a right to all things within its territory, or is absolutely and without restriction the proprietor or dominus thereof. For the State is not restrained by positive law, and since property is the creature of law, it follows that the State is under no obligation to abstain from dealing with all things within its territory at its own pleasure and discretion. In this sense all things are absolute property of the sovereign power, and in this sense absolute property pre-eminently so-called, or *dominium*, or *jus in re propria* is understood in the Civil and English law. (3) But of the things which belong to the State, there are some which it reserves to itself, and some the enjoyment or use of which it leaves or concedes to determinate private persons: To those which it reserves to itself, the term *res publicæ* is commonly confined: those, the enjoyment or use of which leaves or concedes to determinate private persons, are commonly called *res privatz*. But there are some over which while the State does not confer any rights to determinate private persons, still which it allows them the use of; such for example, as public ways, public rivers, the sea, etc., which though falling into the category of *res publicæ* are more appropriately designated *res communes*.

32. With regard to *res privatz*, that is to say, things the use or enjoyment of which is left or conceded to determinate private persons, but of which the State is the ultimate owner, it is clear that they may be left or granted to various persons with various restrictions both in respect of user and in respect of time. These are properly rights or *jura in re alienz*, or servitudes, carved out of another estate having a reversion expectant upon it.

33. These rights constitute property in its wider sense, and it is partly in this sense that it has been used in some of the Indian Acts, as for example, the Indian Registration Act. Such property may consist in the possession of rights so great as to approach an absolute property (and which for convenience sake has been designated "absolute property" in its wider sense), or it may, on the other hand, consist of the enjoyment of rights so little as almost to amount to a license.

(1) *Baban v. Nagu*, I. L. R., 2 Cal., 19 (50).

(2) 2 Austin's Jurisprudence, pp. 865, 866.

(3) Thibaut, *Verseche* II, p. 85 *et seq*; 2 Austins Jurisprudence, 871.

34. Then, again, such rights may be present or vested, or only future or contingent. The limitations or restrictions to the power of user may vary to infinity. They are not capable of exact circumscription or exhaustive definition. But the limitations or restrictions vary in degree according as the property is moveable or immoveable. And this then is the natural division of property adopted throughout the Indian Acts. (1) In view of this division the old classification of property into hereditaments corporeal and incorporeal need not be here considered. (2) Of the two sub-divisions of property—moveable and immoveable—the former is, from its inconsiderable nature, subject to less limitations or restrictions than the latter. For this reason as for the fact that the Act is chiefly confined to the exposition of law relating to immoveable property, the subject of moveable property will have to be left out altogether.

35. Of immoveable property then it may be generally said that its proprietor has an indefinite power of user. This power cannot be exactly circumscribed or defined, but it is by no means unlimited, and is, indeed, limited by such of his duties as conflict with or *pro tanto* supersede his right of user. These duties may either be the creation of a contract as where the holder is in possession of an estate carved out of another and superior estate, in which case, his power of user is limited by the superior rights of the reversioner or superior proprietor, or they may be imposed by law, in which case, they are creations of a sovereign power. For instance, if A is the proprietor of a house, it is clear that he may use it in a variety of ways. But if he has taken it on a lease, his right of user is circumscribed by the superior rights of the lessor. In any case, law will not allow him to set it on fire so as to jeopardise the safety of neighbouring buildings, nor reconstruct it in such a way as to destroy the support which it yielded to its neighbour. Then, again, for the same reason its owner cannot prevent a public officer duly empowered in that behalf from entering thereon for the purpose of making a search or apprehending an offender. Lastly, if the house be ancestral and the owner a Hindu, his rights both in respect to user and duration are further circumscribed by the rights of the heirs or co-parceners who may restrain him from using it to the detriment of their interests. Thus then when it is said that property denotes a right indefinite in point of user and unrestricted in point of disposition, such a right must be understood to be subject to all these and similar restrictions. Similarly no property is unlimited in point of duration, since no right can exist beyond the lifetime of the person invested with it. What is then implied by calling property unlimited is, that on the death of the original owner it devolves on his heirs and *their heirs ad infinitum*, unless such devolution has been put an end to by alienation, extinction of heirs, or by some other means known to law. The incident of unlimited duration is by itself perfectly consistent with limited as contradistinguished from absolute

(1) This division was also adopted in the Code Napoleon, Art. 156. In Hindu law the division of property is curious. It is divided into white, mottled and black; "white" being properly acquired by the mode of livelihood of his own caste, by a member of any caste, "mottled" being property acquired by the mode of livelihood of the caste next below, and "black" by the mode of livelihood of a caste two or more degrees lower.—*Vishnu* lviii v. 1—8. (7, Sacred Books of the East, p. 189).

(2) "Corporeal hereditaments", are such as affect the senses such as may be seen and handled by the body; "incorporeal" are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. Land, pastures, woods, cattle, are examples of the former, and advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents are examples of the latter.

ownership. Thus the holder of an impartible estate subject to the rule of primogeniture has property of an unlimited duration, descendible to a succession of heirs, but he is not on that account its absolute owner. His rights are not unrestricted in point of disposition, and his power of user is necessarily very limited. Then again, it is possible to combine the largest power of user and disposition with only limited duration as if the donor might transfer his whole interest to the donee with the largest power of user and disposition, but with a proviso against succession by the donee's heirs.

36. Then again, when it is said that property is a right unrestricted in point of disposition, it is no doubt true that the owner of absolute property,—*e.g.*, the State has such a right, but when the term is used in its wider sense as denoting the highest form of rights which a subject is capable of holding, the term is subject to necessary legal restrictions. Thus for example, an absolute private owner cannot dispose of his interest in the property so as to violate the rule against perpetuity or the provisions of section 18 of the Act. (1) Similarly public policy demands that a disposition which contravenes the provisions as to *lis pendens* contained in section 52 should not be permitted. All these restrictions will have to be considered more in detail later on.

Transfer of property.

37. From the brief review of the history of property given in the foregoing pages it will be readily seen that the only mode of acquisition now possible is that by alienation or transfer. The history of the Law of Transfer is from its very nature fraught with many complications and difficulties. For as the right of user is susceptible of infinite variety and is capable of unlimited division—each fraction of the right being capable of being vested in a separate individual and divested upon the happening of the contingencies which may be stipulated for, it follows that the rules governing transfers must necessarily be complex. In England, the Law of Transfer is the result of gradual growth. Indeed, at first the very right was not conceded. In course of time, however, while the right had to be conceded, it was subjected to many restrictions and limitations. Indeed, even up to date the law in this respect is not there uniform. For while in and about the centres of commerce, as for example Middlesex, many of the restrictions have had to be swept away, in the backward countries of England there exist up to day customs and modes of transfer which more savour of the days of feudalism than of the twentieth century.

38. Similarly in this country the history of transfer has had to pass through a varied and chequered state of existence. Under the old Hindu rule the power of transfer of property was regarded as a natural incident of full ownership. (2) "Land passes" it is stated in the Mitakshara "by six formalities; by consent of townsmen, of kinsmen, of neighbours and of heirs, and by gift of gold and water. Consent of townsmen is required for the publicity of the transaction, but the transaction is not valid for want of such a consent. The approbation of neighbours serves to obviate any dispute as to boundary. The consent of kinsmen and heirs is naturally required in a community where joint family system is the rule, and individual property only the exception.

39. Sale as such does not appear to have been permitted in archaic Hindu society, but gifts were highly commanded:—"Both he who accepts land, and he who gives it, or performers of a holy deed, and shall go to a region of

(1) See § 815, *post*.

(2) Anonymous writer cited in Mitakshara, Ch. I, s. 2, §§ 31, 32.

bliss," (1) and "if a sale must be made, it should be conducted for the transfer of immoveable property, in the form of gift delivering it with gold and water to ratify the donation." (2) Under the Muhammadan rule transfers were permitted, but it must needs have been accompanied by possession. The transfer of possession was, indeed, in all ages essential. Possession is the badge of ownership and invests the fact with notoriety that a transfer has taken place. As will be seen later on, although registration has in many cases taken the place of possession, possession still continues to be a most important overt act by which a transfer of ownership is witnessed. No other formalities appear to have been enjoined to effectuate a transfer.

40. If any dispute arose between the parties, it was referred to the *panchayat* which settled it according to its own lights. **Decline and fall of the village communities.** Indeed, the existence and growth of village communities in this country to whose ultimate arbitrament the disputants referred their controversies was a predominant factor in regulating the transfer of property. "The village communities," writes Sir Henry Maine, "is in India itself the source of land-law which, in bulk at all events, may be not unfairly compared with the real property law of England. This law defines the relations to one another of the various sections of the group and of the group itself to the Government, to other village communities, and to certain persons who claim rights over it." (3) But the village communities were not wholly independent of the codified or tribal and traditional law. But each case as it arose was deliberated upon and decided in accordance with well-known albeit unwritten canons of which the village elders were regarded as the natural custodians. These communities naturally wielded vast influence over village economy, and have continued to live in spite of the change of Governments, and the change of policy that waited upon its train. The establishment of the British power in India has been, however, followed by a decline of these communities as independent centres of political life, which is sometimes regretted but was plainly inevitable.

41. In providing for the growth of society as a whole, and favouring individual enterprise, the Government had to limit the **Its causes.** authority once exercised by the small communities, and once the necessary stay of their corporate existence, but which became in the presence of a higher organization a means only of isolation and obstruction. Restricted in its power to enforce rules by the predominating influence of the ubiquitous "Sarkar," the village assembly soon lost the capacity to invent them. It ceased to be an effective organ alike of the public strength and of the public will. This atrophy in its turn necessitated an increased energy on the part of the Government and centralized legislation took the place of customary law, as it alone could provide for the extended relations springing from a freer and wider-ranging activity. As a community advances, the extension of its territory, the separation of employments, the multiplied forms of individual development, enfeeble the common consciousness of legal right which made its earlier law. In the subordinate aggregations which form towns and villages as in those divisions of the people which compose different classes, a unity of feeling springing from local neighbourhood, similar pursuits or identity of moral tendency still gives birth from a contract with new circumstances, to usages whose fitness is recognized and causes their reception as rules of custom. In the wider sphere of general law the requisite development have to be effected

(1) *Brahma Vaidarta* cited in *Mitakshara*, I, s. II, § 32.

(2) *Ib.*, § 32.

(3) "Village Communities," p. 18.

by scientific evolution from the earlier established principles insensibly modified by the medium in which courts and jurists work, or by positive legislation on the part of the sovereign authority. The capacity for a spontaneous development of law in the people wanes as the facts to be regulated grow more complex. A sense of comparative imbecility in the presence of the more definite and palpable embodiment of the public force deprives its law-creative faculty of liveliness and vigour. The cloudy suggestions which come from this source encounter as to all the great interests of society the clear-cut provisions of a written law. New ideas grow up, new discoveries are made, giving rise to new institutions, fashions and employments. As individualism and independence of action have meanwhile become possible and prevalent which submit to no control less powerful than that of the whole State, it is then the legislature alone which can pronounce the doom of effete laws and perform a work of reconstruction answering to the spirit and needs of each successive generation.

42. At first when this necessity arose, and there was no systematized enactment bearing the *imprimatur* of the sovereign power, recourse was instinctively had to the English law as it furnished the requisite and ready solutions, and its decisions once admitted in a few cases exacted conformity throughout a wide area to the principles on which they rested in order to preserve a semblance of uniformity or at least to prevent obvious and glaring contradictions. And this was naturally to be expected of Judges who by nationality, education and associations were English and as such only familiar with the lore of the Reports. The courts were no doubt directed to follow no particular system of law, but were to regulate their decisions in accordance with "justice, equity, and good conscience," but these comprehensive words could convey to the English Judge no better idea than that he was to follow the rules of English real property, which was to him the quintessence of wisdom and of justice, equity and good conscience. But such a state of affairs naturally engendered uncertainty, and the law became a luxury for the rich or a gambling excitement for men on the brink of insolvency. Legislature was imperatively called on to regulate the new development on a rational appreciation of the principles to be adopted or rejected, of the forms in which they should be grouped, and of the proper place of each greater chapter in the general system of law. A code, in short, had become necessary in order to prevent the endless litigation, the ruinous losses, the manifold embarrassments and the discouragements to traffic and enterprise which would attend the slow formation of a complete body of law by the wasteful process of natural selection. Such a code to be useful, must be a work of cautious discrimination as well as of organization.

43. "The principles," wrote the Law Commissioners to whom the Act was referred for opinion, "which we attempt to introduce in our legislation and especially in a Code, should be comparatively few, carefully chosen and thoroughly approved. They should be cast in a form as far as possible resembling that of rules already accepted or appearing as the logical outcome of already recognized doctrines. The new law would thus link itself naturally to the law previously existing, blend with it imperceptibly, and form a basis for a new departure. It is the characteristic of sound and fruitful principles to embrace an ever widening mass of details within their operation; contradictory rules and reasoning are either modified or perish before them. Those principles which in themselves are consistent with the elementary facts of human nature are sure as matters progress to be recognized as the proper complement of others already accepted. Thus, from

step to step a logically organized system is formed while by a process of reaction, the character of the community itself in which the process is going on is moulded insensibly to a development in which the maximum of its beneficial energy can be put forth in the manifold lines of activity which the law leaves invitingly open in every direction consistent with the common welfare." (1) A complete Code embracing all the domains of civil law must relate to (i) Public and Political law; (ii) Absolute Rights and Duties; (iii) Obligations; (iv) Property; (v) Personal Law; (vi) Family Law, and (vii) Succession, out of which the most marked deficiencies were noticed under heads (ii) and (iv), and it was deemed desirable to introduce a short Bill containing the positive rules as to rights in the substantive civil law which was sure to have the effect of presenting a uniform system of propositions and rules applicable to the whole country. "It is desirable," wrote the Law Commissioners, "that the superior Courts should be provided with a uniform body of rules applicable to the chief relations of social life, in order that inconsistencies and contradiction of decision may be prevented and the great difficulty averted which must eventually arise from irreconcilable system completely established in different parts of the country." (2) Such a law to be useful must contain an orderly and systematic arrangement of the rules relating to the jural rights and duties of the persons affected by it.

44. The advantages of codification are now universally recognized. A code ensures among the individual members of the society a more intimate acquaintance with their civil rights and obligations, tending to increase and facilitate business relations and to promote the natural welfare of the community. It offers great additional means of legal education from which a higher standard of professional excellence may be expected. Prospectively a Code promises uniformity of jurisdiction which contributes to diminish litigation and to add to the security and stability of our civil rights. A well-framed Code should not only reduce the necessary bulk of law-libraries, but should focus the wisdom and acumen of many learned expositors upon identical points of construction and detailed development. In such a concourse of intelligence the better interpretation, the sounder principle must prevail; and its ultimate result is sure to be the diffusion of accurate conceptions of legal problem and a rational and effective method of dealing with them. It is needless to state that the Hindu mind is from its association naturally trained to an intelligent appreciation of a Code. His greatest lawgiver, Manu, was the author of a Code, which in spite of the ravages of time would still take its place amongst the standard Codes of the world. The Emperor Justinian in further West strove to produce a Code which is still regarded as an ideal Code for the world. The Codes of Napoleon in France and of Frederick in Prussia are monuments of wisdom, legal acumen and research. In modern time, all civilized countries have attempted at the codification of their laws and even in England, whose laws are not yet codified, the necessity for codification has been again and again reiterated. The advantages of codified law are its symmetry and certainty, and its chief drawback is its artificial rigidity.

45. So far as this country is concerned, it owes its Codes to the initiative genius of Lord Macaulay. "I believe," he wrote in 1833, "that no country ever stood so much in need of a Code of law as India, and I believe also that never was a country in which the want might be so easily supplied." "Our principle," he added, "is

(1) Report, § 20.

(2) Report, § 43.

simply this—uniformity when you can have it, diversity you must have it, but, in all cases certainty." These views were readily acceded to by the Parliament, and an Act⁽¹⁾ was soon afterwards passed appointing a Law Commission in India with the fullest powers to inquire and report. This Commission, composed of Lord Macaulay and three others, met for the first time in 1834 and employed themselves in preparing the draft of a Criminal Code, which was subsequently passed as the Indian Penal Code—an exemplary piece of legislation, which for its clearness and general excellence stands to this day as the premier enactment of India. Another Charter Act⁽²⁾ passed in 1852-53 enabled another Commission under the presidency of Sir John Romilly, M. R., to prepare the plan of a new system of judicature with drafts of the Code of Criminal⁽³⁾ and Civil⁽⁴⁾ Procedure which were subsequently passed into law in the years 1861 and 1859 respectively, the Law of Limitation being also the outcome of the year last named. In 1861 a third Commission was appointed for the purpose of preparing a Code of substantive law on the basis of the laws of England. This Commission composed of several eminent jurists under the presidency of Sir John Romilly, M. R., did much useful work and issued several reports containing the drafts of the proposed legislation. Of these the first issued in 1863, contained the draft Succession Act; the second issued in 1863, the draft Contract Act; the third issued one year later a draft Negotiable Instruments Act, and the two reports issued successively in 1868 and 1870 contained a draft Evidence Act, and a draft of the Transfer of Property Act. All these drafts were ultimately accepted as the models upon which subsequent legislation was founded.

46. But while the Succession Act and all the other earlier Acts were within a year or two passed into law, the draft Transfer of Property Act though discussed, reported upon and revised again and again, had to remain in abeyance for a period of twelve years before it was enacted in 1882. From the time (1870) that it was sent out to this country by the Duke of Argyll, then the Secretary of State for India, the Bill may be said to have passed through the hands of the ablest jurists of the day. Originally drafted by Sir John Romilly, M. R., and the other eminent Commissioners associated with him, its chapter on Powers was redrawn by Sir Arthur Hobhouse, then the Law Member of the Viceroy's Council. The draft thus revised was in 1877 sent back to England, and in the following April the Government received permission to proceed with it. Sir Arthur Hobhouse having however in the meantime vacated his office, the draft was entrusted to his successor, Mr. Whitley Stokes, who subjected it to renewed examination in conjunction with the then Legislative Secretary, Mr. A. Phillips. In June 1877, Mr. Stokes introduced the Bill into the Legislative Council, which in due course referred it to a Select Committee, composed of Sir Edward Bayley, Sir A. Arbuthnot, Mr. Cockerell and Maharaja Jotindra Mohun Tagore, to whom Mr. (afterwards Sir Charles) Paul, the then Advocate-General and Mr. (afterwards Sir Griffith) Evans, were subsequently added. In February 1878, the Committee presented a preliminary report stating that, in revising this important measure, they had been guided by the three principles by which the Government of India desired to regulate its policy of codification; namely, first, that as little change as possible should be made in the existing law, whether established by the Legislature or declared by judicial decisions; secondly, that no additions should be made to the law which were not either necessary or clearly expedient; and, thirdly, that

(1) 3 & 4 Wm. IV, Ch. 85, s. 53.

(2) 16 & 17 Vict., C. 95.

(3) Act XXV of 1861.

(4) Act VIII of 1859.

interference with contracts fairly made and usages long established, was, *prima facie* undesirable. The Bill thus revised was republished and widely circulated.

47. The principal objections taken to the Bill in its second form were, first, that, as a whole, it was heterogenous, and secondly that certain parts of it were neither necessary nor expedient. It was said, for instance, that though the bulk of the Bill dealt with the transfer of property *inter vivos* by act of parties, it also treated of conditions in wills, and of succession to a deceased person. It was said, again, that the chapters dealing respectively with the rights and liabilities of owners of limited interests and with property held by several persons belonged rather to the subject of the *enjoyment*, than to that of the *transfer* of property. It was urged that settlements (in the conveyancer's sense of the term) were hardly ever made in India; that what are technically called "powers" were almost unknown; that the chapters dealing with these subjects were certainly not necessary and could hardly be said to be expedient. Besides the matters thus objected to, there were others, such as registration and trust, which, it was said, were still more foreign to the proper subject of the Bill.

48. The Committee felt the force of the above objections, and they said that if the Bill was to go on at all, it must be strictly confined to the subject of transfer of property by act of parties, that is, by contract or gift. They accordingly omitted Chapters VII to XII, both inclusive, which dealt with settlements, powers, and the other matters noticed above. They added, on the margin, references to the reported decisions of the Indian Courts and the Judicial Committee which justified the rules contained in the Bill, thereby disproving the assertion that the Bill would introduce a mass of new law into India. In fact, the Bill hardly introduced any new substantive law, and it did not (except in the case of the procedure relating to mortgages) displace any existing enactment. To the body of local usages and contractual incidents which in India, as in other countries, existed as to the transfer of land, the tenderest care was shown by the Bill. Not only was local usage expressly saved by sections 98, 106, and 108, but the effect of section 2, clause (a), was to maintain intact the stationary force which the Legislature had given to local usage in those two *pays de coutumes*, the Punjab and Oudh; and throughout India all the many incidents of a mortgage or a lease, which were not inconsistent with the provisions of the Bill, remained wholly unaffected.

49. The Bill was then simultaneously circulated for the third time to the Local Governments and referred to a Commission composed of Sir Charles Turner, the then Chief Justice of Madras, Mr. Justice West of the Bombay High Court, and Mr. Stokes of the Legislative Council. The Commission made several amendments both in the wording and substance of the Bill, but the important additions were only three. First, they set out in full on the face of the Bill, several rules applying to transactions between living persons, which in the original draft were only expressed by way of reference, *mutatis mutandis* to certain sections of the Indian Succession Act dealing with matters, such as election, contingent bequests, conditional bequests, and bequests with directions as to application and enjoyment, and which, therefore, could never have been applied by unprofessional Judges without risk of serious error. Secondly, they required, at the suggestion of Sir Henry Sumner Maine, who was a strong advocate of the conditional system of a public register of land, a written and registered instrument in certain cases of sale, mortgage, lease, exchange and gift of immoveable property. Thirdly, at the suggestion

of one of the Hindu critics of the Bill, they inserted a chapter on Gifts. The report of the Indian Law Commissioners, 1879, was duly communicated to the Select Committee which then consisted of Mr. Pitt Kennedy (a very eminent master both of English and Irish law), Messrs. Colvin and Stokes, and Maharaja Jotindra Mohun Tagore, and they carefully considered it as well as the mass of comments on the Bill which had come from all parts of India. On the subject of sales, they agreed with Sir Henry Sumner Maine as to the desirability of rendering the system of transfer of immoveable property a system of public records; and they were inclined to go a little further in this direction than seemed good to the Law Commissioners. Thus, they thought that, in the case of a reversion or other intangible thing, though its value might be less than Rs. 100, the transfer should be effected only by a registered assurance; they altered section 54 accordingly, and this alteration was approved by the Government of India in its executive capacity.

50. As to mortgages, the Committee agreed with the Law Commissioners that registration would not only discourage fraud and facilitate investigations of title, but that it would also preclude some difficult questions of priority. A majority of them, however, thought that, when the principal sum secured was less than Rs. 100 the mortgage-deed need not be registered, and they altered the Bill accordingly. A majority of them also thought that equitable mortgages by deposit of title-deeds should be valid when made in the Presidency-towns, Rangoon and Karachi. ⁽¹⁾ This too was approved by the Government of India, and, accordingly, a proviso to that effect was added to section 59. Recently, however, the propriety of dispensing with registration in the case of mortgages below Rs. 100 again attracted the notice of the legislature, and the section was amended so as to make registration of delivery of possession essential for their validity the only exception allowed being where the mortgage is a simple one. ⁽²⁾

51. As to leases they all thought that the chapter would be of practical use in the case of buildings, gardens, and mines, and they all agreed with the Law Commissioners that it should not of itself apply to agricultural leases, in other words, to the relations between zemindar and ryot.

52. As to gifts they agreed with the Law Commissioners that registration should be required in the case of gifts of immoveable property of whatever value. Such gifts were, as a rule, made by a written instrument and as, under the Registration Act, the registration of such instruments was compulsory, the change of the existing law here proposed was almost nominal. Both the Government of India and the Select Committee approved of the proposed requirements of writing and registration in the case of most transactions relating to immoveable property. The Bill was then republished in the *Gazette of India*, with the Committee's third report. It was also published in the Local Gazettes in English and (except in Burma), also in the vernacular languages. About this time the law of Conveyancing and Property Act ⁽³⁾ was placed upon the legislative anvil in England, and from it some useful hints were borrowed. Indeed, while the framers of the Bill repudiated any desire to strike out into a region not thoroughly pioneered, or to "follow the unsafe guidance of English law," ⁽⁴⁾ it had to be ultimately conceded that "the function of the Bill was to strip English law of all that was local and historical, and to mould the

(1) To which Rangoon, Moulmein, Bassein and Akyab were added by an Amending Act (Act VI of 1904, s. 4).

(2) S. 3, Transfer of Property Amendment

(Act VI of 1904).

(3) 44 & 45 Vict., C. 41.

(4) Law Commissioners' Report, 1879, § 3.

residue into a shape in which it would be suitable for an Indian population, and could be easily administered by non-professional Judges." (1) This was certainly the form which the draft had assumed at the time it was ready to be passed into law. Out of the original draft only five sections remained in the Act, the rest had suffered from the blue pencil or had undergone transformations beyond recognition. It was then brought up in the Council on the 5th January 1882, but after prolonged discussion, the passing of the Bill was deferred in order to give it greater publicity, and on the 17th February 1882, the Bill—the result of two and ten years' labours—was finally placed upon the Indian Statute-book.

53. It would be churlish to deny that an Act which had passed through the hands of the ablest lawyers of the day, during the eighteen years that it has been in force, has not amply justified the hope of its sponsor that the Bill may prove to be a "systematic and useful arrangement of the existing law" (2) regulating the transmission of property between living persons. The Act has had since, however, to be three times amended, and it cannot be said that even after these amendments the enactment is altogether free from appreciable defects. The first amendment was made three years later—in 1885,—its main object being to give a more workable form to the power of exemption which it gave in one of the introductory sections of the Act. The effect of the amendment was to substitute for racial exemption, local exemptions in regard to sections relating to the various modes of transfer,—one or two other amendments were also simultaneously made.

54. Again in 1900 the second Amending Act was passed with the result that Chapter VIII relating to actionable claims was entirely recast, and one or two other verbal alterations were made in the two preliminary sections, sections 3 and 6.

The last Amending Act, passed in 1904, has virtually placed mortgages on the same level with sales as regards registration, whilst it has introduced drastic changes on similar lines as regards leases. This Act was avowedly intended to cut the gordian knot of controversy as to the priority of registered over unregistered documents. But, while it will, to a certain extent certainly accomplish this object, it may be doubted whether the hardship it will entail on poor debtors will not more than outweigh any good it may do in another direction. The force of a current cannot be stemmed by building a wall across it, and it may be gravely doubted whether the Legislature was well advised in amending the law in spite of the views of the majority of the Select Committee on the question on a former occasion (§ 50.)

55. Another Act passed in 1895, called the Crown Grants Act, (3) had the effect of exempting from the operation of the Act all grants and transfers made by or on behalf of the Secretary of State for India in Council.

56. The enactment as it now stands is divided into eight chapters: of these, Chapter I is preliminary and consists of four sections. **Act IV of 1882, Chap. I.** Section I of the Act defines the extent, and operation of the Act, and while exempting Bombay, the Punjab and British Burma from the immediate operation of the Act, empowers the several Local Governments to extend the Act to those territories. Such a power of delegation

(1) Mr. Stokes' Speech, Proceedings of the G. G's Legislative Council (*see* Appendix).

(2) Mr. Stokes' Speech, Proceedings of the G. G's Legislative Council (*see* Appendix).

(3) Act XV of 1895.

was at one time doubted, but the point has been now settled by the Privy Council. (1) In the exercise of this power the Act has been extended to Bombay and Rangoon, and it is partially at least about to be extended also to the Punjab, the Government of India having decided against the validity of objections regarding the existence of local customs on account of which the enactment was not before extended to that Province. Whether a particular province is or is not placed under the jurisdiction of the Act is not very material, since its provisions in so far as they enunciate the rules of equity and good conscience have been applied even to them by the highest tribunal of the Privy Council. Paragraphs 5 and 6 are new, and were enacted by Act III of 1885. Their object is to exclude the operation of the sections relating to compulsory registration from areas where the Registration Act itself is not in force. Section 2 repeals certain Acts rendered obsolete by the passing of the Act. But since the enactment is admittedly fragmentary, it expressly leaves unaffected "any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force." There is also a clause against the retrospectivity of the Act. As it is, this clause was scarcely necessary, since no Act can have a retrospective operation unless it is clearly intended so to operate: *Nova constitutio futuris formam imponere debet, non præteritis*. (2) It is a fundamental rule of English law that no Statute can have retrospective operation unless it is expressly and clearly declared to have had that effect, and even in this case, it is not to be construed so as to have a greater retrospective operation than its language renders necessary. (3) "Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain." (4) Similarly, pending cases are not to be affected by any change in the law. But when it is said that the Act is not retrospective, all that is implied is that it shall not operate so as to prejudicially affect vested rights, or the legal character of past transactions, or impair contracts already made. It therefore, follows, as is the law, that in matters of procedure a new enactment is always retrospective, unless there be some good reason against it, as where its application would prejudice rights acquired under the old law or would involve a breach of faith between the parties.

57. The section further excludes from the purview of the Act involuntary transfers "save as provided by section 57, and Chapter IV,"

Saving of personal laws.

which apply to all transfers howsoever made or effected.

The rules of Hindu, Muhammadan or Buddhist laws are also saved wherever they collide with the provisions of the Act. Such rules, it may be stated, are not many and the tendency since the passing of the Act has been in the direction of conformity with its provisions rather than with the divergent rules therein saved. Section 3 is an important section and would have to be carefully studied. It defines certain terms used in the Act, and by a recent amendment the definition of "actionable claims" has also been transposed thereto. The reason for the amendment is stated to be that the terms has been used elsewhere in the Act. But could it have been forgotten that by the transposition the very scheme of the Act has been destroyed? Hitherto the several

(1) *E. v. Buvak*, I.L.R. 4 Cal., 127 (182) P.C.

(2) "A legislative enactment ought to be prospective, and not retrospective, in its operation," 2 Just, 292.

(3) *Per* Lindley, L.J., in *Laurie v. Renard*, [1892], 3 Ch. 421.

(4) *Per* Bowen, L.J., in *Reid v. Reid*, 31 Ch. D. 409; *Maxwell on the Interpretation of Statutes* (3rd Ed.), 298.

chapters were prefaced by the definition of the particular form of transfer they dealt with, but now while this would still hold good as regards the other chapters, that on "actionable claim" has been doctored of its corresponding section defining the very term "actionable claim" which has been buried in the interpretation section of the Act. As to the reason given for the change it is sufficient to say that if the reason as to the use of the term in the earlier part of the Act be any reason at all, sections 54, 58, 105, 118 and 122 have no reason to exist where they are, but should have been also transposed to section 3, since these terms are in many places used before they are defined.

58. No attempt has been made in the section to *define* the terms "immovable property," "instrument" and "registered" which are negatively described, it being assumed that the terms being well known required no definition in the Act. By section 4, the sections which relate to contracts are to be taken as a part of the Indian Contract Act and those relating to registration as supplemental to the Indian Registration Act. All contracts of transfer would thus be governed by the Contract Act. A contract according to the Indian Contract Act is an agreement enforceable by law. Every promise and every set of promises, forming the consideration of each other, is an agreement. A promise in its turn consists of two parts, *viz.*, a proposal and its acceptance. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise. A contract then is *really* nothing more than a promise. If *A* say to *B* buy my land, and *B* assents to buy it, there is a promise to buy on the part of *B*, and to sell on the part of *A*, which constitutes a contract as between them. Every contract is a promise, but every promise is not a contract, for according to the Contract Act, only such promises as are enforceable by law are designated contracts. Other agreements which are not so enforceable are either "void" or "voidable" contracts according to whether they are wholly unenforceable or are only unenforceable at the instance of one of the parties. The word "contract" is thus used in an arbitrary and conventional sense in the Contract Act, as importing only such agreements as are legally enforceable. One great requisite of a valid contract is consideration, which is something done or promised, by the promisee, at the desire of the promisor. In this respect the term is allied to the notion of *causa* of the Roman Law. "Consideration," said Patterson, J., "means something which is of some value in the eye of the law moving from the plaintiff: it may be some benefit to the plaintiff or some detriment to the defendant."⁽¹⁾ A transfer whether by sale, exchange, lease, mortgage or assignment would thus, according to the Contract Act, be clearly a contract. But a transfer by gift would not be a contract, in this sense. No doubt in a gift as in a contract there are two consensual minds both directed towards the same object, but in a gift the donor or donee makes no promise, and there is no consideration in the sense the term is strictly used in the Contract Act. Thus then with the exception of gifts which do not fall into the category of a contract, all other transfers belong legitimately to the domain of contracts, by the law of which they are declared by the section to be governed.

(1) *Thomas v. Thomas*, 2 Q.B., 851 (859) ; 114 E.R. 330 (339).

59. Chapter II consists of 49 sections and is divided into two parts, the

first part containing rules as to the transfer of property

generally whether moveable or immoveable, and the second

part relating solely to immoveable property. The Chapter starts with the definition of "Transfer of Property" without defining "Property" as has been noticed before. The term transfer of property is used to denote an act by which a living person conveys property, in present or in future, to one or more living persons, or to himself and one or more other living persons. There can then be no transfer without at least one other person. A person cannot transfer a property to himself alone. The very Act implies that the person called the transferor divests himself of his rights which are invested by him in the person called the transferee. These investitive and divestitive acts constitute a "transfer." Taken in this large sense transfer of property to a person yet unborn would be "transfer," had not the Act expressly limited the term to apply only to a transaction as between living persons. The transmission of property by will would therefore not be within the scope of the Act. The term "person," as used in the section does not only mean an individual, but also corporation, company or association, or any body of individuals whether incorporated or not. A person in its juristical sense even extends to such things as "images," "hospital" or "charity" but in such cases there can be of course no transfer except through the intervention of a trust. An image or a god, or charity must then be regarded as *living* persons within the meaning of the Act. A transfer may relate to property *in presenti* or *in futuro*, but if it relates to the latter, it must conform to certain conditions which will be noticed hereafter.

60. The next section (section 6) enacts that "property of any kind may be transferred" except as otherwise provided in the Act or by other law for the time being in force. Alienation of property is favoured by law which discountenances every attempt to tie up property unreasonably, or, in other words to create a perpetuity. (1) In the history of property the right of alienation has been always regarded as its most vital incident. Without such a right, property would lose its greatest charm, and there would be an end to all commerce and industry. In England, a temporary check was given to this right by the introduction of feudalism with the Conquest, but even then, sub-infeudation, whereby a new and inferior feud was carved out of that originally created, was practised and permitted, (2) and this in turn led to the alienations of land under the colour of sub-infeudation. Gradually the right had to be extended and by the statute *Quia Emptores* (3) it was expressly enacted "that from henceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as his feoffee held before." This important statute was in its turn succeeded by other statutes which further enlarged the right of alienation. The statute *De Donis* (A.D. 1285) (4) encouraged gifts by providing "that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death or shall revert unto the giver, or his heir, if issue fail." The statute was, however, evaded by the Judges who were reluctant to give full effect to it. This became,

(1) "*Alienatio rei præfertur juri accrescendi.*" Alienation is favoured by the law rather than accumulation. Co. Litt., 185a.

(2) *Magna Charta*, Ch. XXXII.

(3) 18 Edw., 1st I.C., I.

(4) 19 Edw., 1st.

however, impossible after the passing of the Act for abolishing fines and recoveries (1) and the Settled Estates Act. (2) Then the *potestas alienandi*, i.e., right of alienation had to be firmly and finally recognized in England. It is a right necessarily incident in contemplation of law, to an estate in fee simple; it is inseparably annexed to it, and cannot, in general, be indefinitely restrained by any proviso or condition whatsoever. Hence it is laid down that "if a man makes a feoffement on condition that the feoffee shall not alien to any, the condition is void because, where a man is enfeoffed of land or tenements, he has power to alien them to any person by the law; for, if such condition should be good, then the condition would oust him, which would be against reason and therefore such condition is void." (3)

61. But public policy dictates that an exception should be made to the free alienation of all property. For while, it is no doubt conducive to good citizenship and policy that property as a rule should be subject to the incident of alienation, it would thwart the very object which the Law has in view of the result of transfer is to encourage fraud or foment litigation. Hence it is laid down in the section that a mere chance of succession (*spes successionis*), a right of re-entry, an easement, an interest of the nature of a personal grant, a mere right to sue cannot be transferred, nor can a transfer for an unlawful object or consideration be permitted. It is again consonant with public policy and conducive to the efficiency of public service that public offices and stipends allowed to military and civil pensioners should not be trafficked in. Where a transfer is unobjectionable it may be made by any person who is *sui juris*, or is competent to contract, and in the event of his incompetency, transfer may under certain circumstances, be made by his manager, curator or guardian. The section is silent in not defining the qualifications necessary to enable a man to contract, but this has been designedly omitted, as the subject has been exhaustively dealt with in the Indian Contract Act. The operation of a transfer is described in the next section, which is an enlargement of the rule—*cujus est solum ejus est usque ad celum*. (4) A transfer clothes the transferee with all the rights of the transferor, unless the latter has reserved some of them. Where the property transferred is land, all the easements, rents and profits accruing after the transfer, and all other annextures or things essential for its complete enjoyment necessarily pass with it, and it is not necessary to convey them by enumeration. The next section (section 9) enacts that a transfer may be made by parol where writing is not deemed to be essential. Now on turning to the subsequent sections it will be perceived that transfer by sale or mortgage, if the property conveyed is of less value than Rs. 100, may be made orally, provided the transaction is evidenced by delivery of possession. An exception in the case of a simple mortgage is, however, in this respect allowed. A lease for less than a year may be made by an oral agreement accompanied by delivery of possession, (5) but one made from year to year, or for any term exceeding one year, must needs be made in writing. A gift of moveable property may be made either by seisin or a registered instrument. But a gift of immoveable property can only be made by a registered instrument. Finally an assignment of a chose-in-action can be effectuated only by writing. It would thus appear that except in the case of an assignment all other transfers whenever required to be made by writing, must be

(1) 3 & 4 Will. 4, C. 74.

(2) 19 & 20 Vict., C. 120.

(3) *Mildmay's Case*, 6 Rep., 42; Co. Litt., 206b.

(4) "He, who possesses land possesses also

that which is above it." Co. Litt., 4a.

(5) S. 107, as amended by s. 5 of The Transfer of Property Amendment Act (Act VI of 1904). Prior to this Act the accompaniment of possession was not necessary.

also registered. The next few sections then proceed to lay down general rules governing the transfer of immovable property.⁽¹⁾ Their tenor is to encourage free and unrestricted alienation of property by declaring invalid conditions restraining the alienee from exercising the right of alienation, and which, if permitted, would end in fettering most of the property with the condition, and thus defeat the very object of the law which favours free alienation. An exception is, however, made to this rule in favour of marriage-settlements made in favour of a woman, who is not a Hindu, Muhammadan or Buddhist; but the clause in restraint of anticipation would in such a case only operate during coverture, but not after dissolution of the marriage. In this respect, the rule embodies the corresponding rule of the English law,⁽²⁾ the object no doubt being to ensure uniformity in the laws of the two countries. Another exception made in the same section is where the transfer effected is by a lease and the restriction made against alienation is intended for the benefit of the lessor or his representatives. The same rule is enacted in section 108 and is implied in the section.

62. Again, if a man absolutely transfers his property to another, he cannot fetter his enjoyment by imposing on him a condition that he shall enjoy the property in a particular manner. In other words, an interest cannot be absolute and conditional at the same time. Of course, such a rule is quite distinct from that by which the owner of two adjoining lands may upon the transfer of one of them restrain the purchaser from using it in a manner prejudicial to its neighbour. Such rights are of the nature of easements which are universally admitted and are essential to the very beneficial enjoyment of property which it is the object of law to promote.⁽³⁾

63. From the tendency of law to favour alienations several deductions may be made. In order that there may be alienation, there must be an owner, and consequently law always countenances the vesting of estates. Again there is *a priori* nothing against an owner of an estate, transferring his interest to a series of persons for their respective lives to take effect one after the other. Such an alienation would create a series of contingent bequests dependent upon the determination of the interests preceding them, and it may tie up the property *ad infinitum*. It is therefore enacted in England that no one can postpone the vesting of the fee simple for a longer period than the life or lives of a person or persons living and twenty-one years afterwards. And the Indian rule, which is only the English rule slightly modified, similarly enacts that no one can transfer property for a longer period than the life or lives of a person or persons living and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong. Now, since the age of majority has been fixed in this country to be eighteen years, the Indian rule only adopts the English rule with the variation necessitated by the different standard of majority in this country. But there is another difference between the two rules, for while in England the ultimate remainder may go to *any person of any age*, before the expiration of twenty years calculated from the termination of the last life, under the Indian law, the person who is to take the ultimate remainder must be the person *at the expiration of whose minority* the ultimate remainder is to vest. This is the rule against perpetuities contained in section 14, and is subject to the only exception made in favour of bequests made

(1) Ss. 10, 12.

(2) Married Women's Property Act (Act III of 1874).

(3) Ss. 11, 40.

for the benefit of the public. (1) In England, the rule is contained in no Act of Parliament, and is "an invention of the Chancellors, but it is all the same now a most useful branch of the law of property. Where a transfer is made for the benefit of an unborn person, it must extend to the whole of the remaining interest of the transferor in the property. Thus, if *A* transfer property to *B* for life, and the remainder over to *C*, the bequest would be valid, but if instead, he transfer the remainder over to *C* for life and after *C*'s death to *D*, the bequest would be void, (2) for there cannot be a possibility upon a possibility. This rule has nothing to do with the rule against perpetuities, for it is possible that the bequest may not offend against the latter, though it may do so against the former.

64. Then again, the Act provides against the accumulation of funds. (3) which is also opposed to the fundamental principle before enunciated. The section forbids all accumulations of income for more than one year next after the date of the transfer. Section 19 defines "vested interest," and section 21 defines "contingent interest." A vested interest is qualified in point of time, and a contingent interest takes effect only on the happening of a specified uncertain event. The subsequent sections (22 to 27) lay down the rules regulating such conditions, and sections 28 to 34 enact the law regulating dispositions subject to conditions. The next section 35 introduces the doctrine of election which is novel to this country. Substantially it enacts that a person shall not claim an interest without giving full effect to that instrument as far as he can. The principle of election rests upon the doctrine that the donee is not permitted to approbate and reprobate. A man cannot be permitted to pick and choose by repudiating the onerous, whilst he accepts the beneficial conditions attaching to the subject-matter of the legacy or devise. The doctrine strictly so called is derived from the Civil law and is the obligation imposed upon a person to choose between two inconsistent or alternative rights, or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both. Every case of election therefore presupposes a plurality of gifts or rights, with an intention expressed or implied, of the person who has a right to control one or both, that one should be a substitute for the other. The person who is to take has a choice, but he cannot enjoy the benefits of both. The next section (section 36) relates to the equitable doctrine of apportionment and is taken from the English Apportionment Act of 1870. (4) Section 37 relating to the apportionment of benefit of obligation on severance lays down a rule the justice of which is self-evident.

65. The second part of this Chapter relates exclusively to immoveable property. Section 38 protects a *bona fide* transferee from a transferor, who being authorized only under certain variable circumstances to transfer, conveys a property in the absence of those circumstances. A *bona fide* transferee from an ostensible vendor is similarly protected by section 41, and sections 42, 43 and 44 must be regarded as cognate. The next section (section 39) is declaratory of a continuing charge on the property in respect of maintenance, or a provision for advancement or marriage, which may be enforced against a transferee with notice or a volunteer, but not against any other transferee, unless the right to maintenance has been declared by a decree, in which case, it may be enforced even against a transferee for consideration. (5) Sections 45, 46 and 47 lay down

(1) S. 17.

(2) S. 13.

(3) S. 18.

(4) 33 & 34 Vict., C. 35.

(5) *Kulada Prosad v. Jageshwar Koor*, I. L. R., 27 Cal., 1904.

the rule regulating a transfer made by or in favour of two or more persons. Section 48 is the exposition of the equitable maxim *qui prior est tempore, potior est jure*. (1) When two competing claims are otherwise equal, the only thing by which a right can be preferred is its priority, unless the priority has been acquired as a result of fraud, in which case, it is only reasonable that the party so guilty should not be permitted to reap the fruit of his own turpitude. It is therefore provided that a transfer so tainted shall vacate its priority in competition with the subsequent transfer which is free from it (section 53). The right of a *bona-fide* purchaser to emblements upon eviction by a person having a better title is declared by section 51, whilst section 49 protects the transferee in the case of destruction or deterioration of an insured property, in so far as it empowers him to compel the transferor to apply the insurance money to its reinstatement. The doctrine of *lis pendens* enunciated in section 52 is founded upon the principle that if transfers *pendente lite* were allowed the very object of litigation may be frustrated.

66. A classified analysis of the chapter made on the basis of the subjects it deals with would show that sections 10 to 37 give typical instances for the conditions and contingencies affecting a transfer in its relation to the transferee, whereas sections 38 to 48 similarly afford cases of transfer in its relation to the transferor. The first group of sections lays down the rules enunciating the limits within which a transfer may be made subject to a condition or restriction. The latter group affords examples of how far a transfer is affected by a defect in the title of the transferor. Taken together these sections provide for the only two important contingencies possible in a transfer, and these sections therefore naturally form the substructure upon which the subsequent sections rest.

67. A further analysis of these sections would show that they provide for the following cases: (i) Where a transfer is burdened with a condition circumscribing the power of enjoyment or disposition by the alienees (sections 10, 11, 12). (ii) Where the transfer is made for the benefit of unborn persons (section 13). (iii) Where the transfer is made contingent upon the happening of an event certain or uncertain (sections 21-34). Then follow the sections which appeal to a different state of circumstances. (iv) Section 35 lays down a rule of how far a transferee is estopped from questioning a transfer made of his own property, when as a part of the same transaction some benefit has been conferred on him (section 35). (v) The Act next lays down the law governing transfers made by transferors with defective title. Under this head the subject presents cases of great variety and complexity. But the sections naturally deal only with the leading types of these cases. These are (a) where the transfer is made by a person who is authorized only under certain circumstances to transfer. (2) The case of a Hindu widow who is only empowered to alienate for legal necessity is an example. (b) Where the transfer is made to defeat a right of maintenance charged on the property (3) or is made *pendente lite*, (4) or in fraud of creditors. (5). (c) Where the transfer is made by an ostensible owner. (6) (d) Where the transfer is made by a person having no present interest, but who subsequently acquires interest in the property transferred (7). (e) Where the transfer is made

(1) "He has the better title, who was first in point of time." Co. Litt., 14a.

(2) S. 38.

(3) S. 39.

(4) S. 52.

(5) S. 53.

(6) S. 41.

(7) S. 42.

by a co-owner; (1) or several co-owners. (2) (f) Or where it is made by several co-owners having distinct interest in the property. (3)

As regards the transferee the following cases are provided for: (i) Where the transfer is made to several transferees. (4) (ii) The transferee's right under policy. (iii) The right of transferees with defective title to compensation for improvements. (5) And the corresponding right of persons who have paid rents and profits to such transferee. It would thus appear that the chapter in a great measure lays down rules of its own which are applicable to all transfers. To these if were added (i) law as to persons who may enter into a contract; and (ii) law as to the subsequent equities, the whole law on the subject would have been practically traversed. In this work an attempt has been made to supply these omissions by supplementing the commentary with a brief dissertation on them.

68. Having laid down the general principles governing all transfers, the Act then deals with the various modes of transfer. In this respect the Act professedly confines itself only to voluntary transfers *inter vivos*, and excludes from its scope all other kinds of transfers, *viz.*, involuntary transfer by order of Court or by operation of law, and transfer to take effect after death. Of voluntary transfers the Act recognizes six kinds, *viz.*, by sale, gift, exchange, assignment of actionable claims, lease and mortgage. The first four modes of transfer are absolute and convey in favour of the transferee all the rights which the transferor is capable of passing. The remaining two modes convey only limited rights, or *jura in re aliena*, in the property. Section 54 defines a sale, which, according to the section, may be effectuated by either registration, or delivery of possession. The necessity of possession was no doubt more universal at a time when the system of public registry was unknown. And it may safely be surmised that, with the general establishment of public registry, the importance, if not the necessity of possession, would proportionately diminish. The necessity of the change of possession was, as has been observed before, calculated to give publicity to the transaction as it was necessary for the enjoyment of the property. In the sale of property valued at less than Rs. 100 delivery of possession is still an essential pre-requisite of a valid transfer. There is no difference between the nature and incidents of a transfer by sale, exchange, or assignment, and accordingly in the more scientific arrangement of the Code Napoleon, all these modes of transfers have been dealt with under the head of sale. (6) A gift irrespective of value must be registered and must moreover be signed by at least two witnesses. An assignment may, however, be not registered, but must in every case be evidenced by writing. But an exchange and a partition of immoveable property are in this respect governed by the same rule as a sale, with, however, this difference in the case of partition that, since its registration is compulsory only under the Registration Act, it need not be registered, if it is not in writing. It is also to be noted that while the chapter on sale in the Act deals only with immoveable property, those on exchange and gift apply equally to moveable as well as immoveable property. The last chapter on "Actionable claims" relates only to moveable property.

69. The chapter on sale opens with a definition of the term, which is to be distinguished from what may be no more than a mere "contract for sale". (6) The former is a perfected transfer, whereas the latter only creates the burden of an obligation and is in no case

(1) S. 44.

(2) S. 47.

(3) S. 46.

(4) S. 45.

(5) Richard's Translation, pp. 448 *et seq.*

(6) In the English law a contract of sale

tantamount to a transfer. In this view of the law, the Act makes a noticeable departure from the rule of English law by which from the moment of contract the property in the thing is held to pass from the vendor to the purchaser, and, if therefore the former still retains possession thereof, his position is regarded *pro tanto* as of a trustee for the purchaser. The necessity of registration has been for the first time brought about by the Act. Therefore, a sale of immoveable property of whatever value made before the Act was and is valid if made without any writing. A sale of *moveable* property may be still "effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods together with payment of the price or delivery of the goods; or with tender, part-payment, earnest or part delivery; or with an agreement, express or implied, that the payment or delivery, or both shall be postponed." (1) A contract apart from the sale only creates a right *in personam* entitling either party to bring a suit for specific performance, or for rescission of the contract, or for the refund of purchase-money or damages: but it does not give the right *in rem*. In both cases therefore the law in this country is consistent. When there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer until it is ascertained, made, or finished. (2) And it is declared in the Contract Act that where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property. (3) As soon as ownership in a thing passes to, the purchaser, the latter is entitled to the profits accruing therefrom, as he is also liable for the loss arising from its destruction or deterioration. (4)

70. A sale transaction naturally divides itself into two parts, *viz.*, *first*, when the parties are bound by a contract, and *secondly* Elements of sale. when the sale has actually taken place. (5) In the first stage the rights and liabilities of the contracting parties are entirely different from those acquired upon completion of the sale. So long as the actual transfer has not taken place, the parties thereto are under mutual obligations to bring about the transfer. Hence if either party resiles from the agreement, the other party may enforce it by a suit for specific performance, or damages, or both. But so long as the requirement of law as to conveyance and registration or delivery of possession has not been complied with, the transfer is not complete, and the property has not passed in law to the purchaser. After the conveyance or delivery, however, the case assumes a different aspect for then the transferee acquires all the rights of the transferor. Indeed upon transfer all the rights of the transferor automatically pass to the transferee. *Intention* to convey property is in every case essential, for without it there can be no transfer, even though the other formalities may have been complied with. (6) But if the vendor has intended to pass the property it is of no consequence that he has not received his purchase-money, for the transfer is complete as soon as the sale is effected in accordance with the formalities of law and the price is paid or *promised*. (7) But should the price be not paid the seller is entitled to a charge upon the subject-matter of the sale. The rights and duties of the

is often used to denote both the contract to sell as well as a sale out and out.—Holland's Jurisprudence (7th Ed.), 225.

(1) S. 78, Indian Contract Act (IX of 1872).

(2) *Ib.*, §§ 79, 82.

(3) Indian Contract Act, s. 85.

(4) *Ib.*, ss. 86 & 85 (a).

(5) *Manladien v. Raghunandan*, I. L. R., 27 Cal., 7.

(6) *Saggi v. Namder*, I. L. R., 23 Bom., 525.

(7) S. 55 (4) (b).

vendor and purchaser are given in section 55, which lays down what truths a seller must, and what falsehoods he may utter. Generally speaking the vendor is bound to disclose all the material defects in the property. But there is not exactly *uberrimæ fides* ⁽¹⁾ between the parties, as in the case of a partnership or a Marine or Life Insurance.

71. "If the person," said Lord St. Leonards, "to whom you sell was aware of all the defects in the estate, of course, he cannot impute bad faith to you in not repeating to him what he already knew, neither will you be liable if you were yourself ignorant of the state of the property; and even if the purchaser was at the time of the contract ignorant of the defects, and you were acquainted with them, and did not disclose your knowledge to him, yet he will be without a remedy if they were such as might have been discovered by a vigilant man; if, however, you should, during the treaty, indirectly prevent the purchaser from seeing a defect which might otherwise have been easily discovered, the contract would not bind the purchaser."⁽²⁾ Any omission to make such disclosures as the purchaser is required to make, the section denounces as "fraudulent"—a harsh term, says Sir F. Pollock, "to use without any discrimination of wilful concealment from mere inadvertence or even pure accident."⁽³⁾ But it overlooks the fact that the term has been used in the sense in which it is defined in section 17 ⁽⁴⁾ of the Indian Contract Act as importing certain consequences as the result of the non-disclosures without any thought of the moral turpitude of the act. The section as a whole becomes only applicable when the parties have not entered into a specific contract otherwise. Where therefore the contract is on the points explicit the section would be inoperative.

72. An exchange is in the main governed by similar rules. But a "gift" of immoveable property differs from it in many important particulars. For in a gift no contractual obligations exist or can be created on either side. But the consent of the donee is always an essential pre-requisite. All then that is necessary to complete a gift is consent on the part of the donee and conveyance. The chapter which deals with the subject of "gifts" excepts the rule of Mahomedan law to the contrary, and excepting the provisions of section 123, which apply equally to Hindus, the rules of Hindu and Buddhist laws are also exempted from its provisions. Under the Brahmanic law "gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of another man's right is completed on that other's acceptance of the gift, but not otherwise."⁽⁴⁾ Acceptance of the gift, was therefore essentially requisite to complete this mode of transfer. But this would appear to be no longer essential. The law of Hindu and Mahomedan gifts is in many respects the same as is enacted in the Act, and will be found exhaustively treated in its proper place. A transfer by assignment of a chose in action has been dealt with in Chapter VIII. By the recent amendment "a chose in action" has been carefully defined, and the whole chapter on the subject has been recast and more exhaustively dealt with. This chapter borrows its main idea from the Code Napoleon ⁽⁵⁾ the provisions of which are in this respect analogous. An actionable claim can now be transferred only by writing. Registration is not compulsory. Upon assignment the assignee is clothed with all the rights of the

(1) "Utmost good faith."

(2) Lord St. Leonards' Handy Book of Property Law, p. 16.

(3) Tagore Lectures on Fraud (1894), p. 98.

(4) Mitakshara, Ch. 3, s. 6.

(5) Arts. 1690—1701.

assignor, and it may be added he is equally liable in respect of all the equities that may be subsisting as against the original creditor.

73. All these modes of transfer convey to the transferee the aggregate of rights called ownership. There then remain the other modes of transfer in which the transferor does not convey his entire interest, but carves out another estate out of his own. Such rights known in the Civil law as *jura in re aliena* may, according to the Act, be created by way of lease or mortgage. The subject of lease has been dealt with in Chapter V (sections 105—117) and of mortgage in Chapter IV (sections 53—104). The Act, however, does not profess to deal with agricultural leases which have been made the subject of special local enactments. The Act has thus in providing for non-agricultural leases introduced a novelty, for there was no distinctive law regulating such leases before. The subject is one of great importance in non-rural places such as towns and centres of commercial activity. Indeed, the rules contained in the chapter would *prima facie* apply to every lease unless it is shown to be agricultural and one to which some other enactment has been made specially applicable. Moreover, the recent amendment of section 117 enables the Local Governments to extend such of its provisions as may be found appropriate even to agricultural leases, or to any class of such leases. (1)

74. A lease in the Civil law was said to fall under the general law of letting and hiring or *locatio et conductio*—a lease of property being designated *locatio conductio rerum*, the landlord being called the *locator* and the lessee the *conductor*. The lessee of different species of property received distinctive appellation, as for example, the lessee of a farm was called a *colonus* and that of a house an *inquilinus*. The consideration payable in respect of a lease was called *merces pensio* or *reditus*, according to the nature of the property let, whether it was a house or a farm; the term *reditus* being always restricted to denote the rent payable in respect of an agricultural farm (*proedum rusticum*). The contract of letting on hire was said to resemble sale and was subject to the same law. It was said that as in a sale the price is fixed, so it is also in a lease. (2) The rights and duties of the parties were also regulated upon the same analogy. The rights and liabilities of a lessor and lessee are almost the same as are now set out by the Act. The owner was bound to keep the thing in repair, and the lessee had a right to ask for a release from the contract or may claim a reduction of rent, but this did not include trifling repairs which had to be executed by the hirer. He was, of course, bound to deliver the thing to the hirer and to secure to him quiet possession during the term, and in default the lessee was held entitled to recover compensation (*id quod interest*). But if the lessee be evicted through no fault of the lessor, he was entitled to no more than a remission of the rent. There was an implied covenant of title on the part of the lessor. Thus, if Titius let pasture-land that produced poisonous or injurious herbs, if Titius was not aware of the defect, he was bound no more than to remit the rent; but if he did know he would be mulcted in damages. The owner was to permit the lessee to carry away any fixtures put upon the land by him, as well as any moveables brought by him, but in so doing he was not to injure the property, but was to leave it in as good a condition as before. The corresponding duties of the lessee were prescribed to be to pay the rent agreed upon together with interest if the payment fell in arrear. He was bound to keep

(1) Act VI of 1904, s. 5.

(2) Justinian, Bk. 3, 24 pr. Gaius, Bk. 3, 142.

possession of the thing for the contracted period and use it in as reasonable a manner and as a man of ordinary prudence. But he was not responsible for unavoidable accident, nor, in the case of moveables, if the thing was carried away by force. He was however, liable if it was only stolen. Upon expiration of the term the lessee was bound to surrender up possession, and Zeno punished a recalcitrant lessee with fine and banishment if he did not yield up possession even though he may have claimed the property as his own—in the latter case however, he was permitted to recover it by a separate suit. An agreement not to keep fire in the house made the lessee liable if he kept a fire. And an agreement not to fell, burn or peel the trees imposed on him the duty of not only observing the covenant himself, but also of taking means to prevent any one from causing the same injury. If the tenant used the land in an unhusband-like manner he was liable not only to eviction, but also to make good any deficiency arising from a second lease; but not to excess, for the covenant was construed only in favour of the landlord. The benefit of a contract of lease was transmitted to the heirs and representatives of a deceased heir. It will thus be observed that the Civil law contained all the cardinal principles which have been bodily incorporated into modern jurisprudence.

75. The French law of lease (*lonage*) is substantially the same, and the

Modern law
of lease.

English law may be said to be its faithful replica. Even the Mahomedan law of *ijara* (or lease) is grounded upon the same simple and natural principles.⁽¹⁾ The law of leases in India borrows many of its provisions from the English law with but a few noticeable differences. In English law no lease can be made for a longer period than the interest of the lessor. But in this country a lease may be made for any period, and even in perpetuity so that the lessor retains nothing more than a *nuda proprietas*. Such a tenure was the *emphyteusis* of the Civil law. In England such a transfer would constitute an assignment, and not a lease. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument. All other leases may be made either by a registered instrument or by oral agreement accompanied by possession.⁽²⁾ A lease may be made for any period definite or indefinite. But since the lessor does not relinquish his entire interest in the property his rights and duties in relation to the lessee necessarily vary from those of a vendor. A lessor may, for instance, dispose of the property in any manner consistent with the lease. And there may be cases in which he may determine the lease and re enter upon the premises as where the lessee has broken an express condition on the breach of which he has stipulated to re-enter, or where he has renounced his character as such and has set up an adverse title. He is entitled to receive the rent, that may have been fixed, and in default of which payment he may determine the lease. The Act does not recognise the levying of distress by the landlord in any case. The lessor is entitled to all the accessions made to the property and the lessee must disclose to the lessor any fact enhancing its value. As regards the duties of the lessor to the lessee it may be stated that he is bound to secure to him quiet possession, and in this respect his liability is similar to that of a vendor. He must moreover disclose to the lessee any material defect in the property of which the former is and the latter is not aware. He is bound to repair the property during the continuance of the lease and otherwise adhere to the terms

(1) 3 Hamilton's Hedaya, 325.

(2) S. 107.

of his contract. The lessee on his part is entitled to quiet enjoyment of the property with all the accession made thereto. He may transfer his interest, but by doing so he cannot get over his liabilities. He must use the property in a reasonable manner and must not commit destructive acts, and whenever it requires repairs he may either call upon the lessor to make them or he may make them himself, recovering the costs with interest out of the rent due, or in any other manner from the lessor. He must not put up any permanent structures on the property; any other structures put up by him he may remove, provided that he does not thereby deteriorate the premises. And above all he must duly observe the covenants by which he may be bound, must pay up the rent regularly and must not repudiate his lessor. A surrender whether express or implied, puts an end to the lease, but the lessee cannot surrender and deliver up the property whenever he chooses, for surrender cannot be made except with the consent of the landlord. The rights of an under-lessee are protected by sections 109 and 115. Generally speaking a sub-lessee holds under the lessee and is bound to him in the same manner as he is in his turn bound to his landlord. But if the sub-lessee has attorned to the landlord the intermediate lessee is then discharged from his liabilities which are transferred to the sub-lessee.

76. In its logical sequence the last mode of transfer is that by mortgage which has been treated of in Chapter IV of the Act. The subject presented many points of great complexity, and it has been the object of the Act as far as possible to simplify them.

77. The law of mortgage must have trodden close upon the heels of the first right in favour of the alienability of property. Indeed there even authority for supposing that a transfer by mortgage must have been allowed long before sale, if for the reason that partial transfer must have preceded an absolute alienation. Thus according to an old precept cited in the Mitakshara sale was not allowed but mortgage was.⁽¹⁾ And similar texts are to be found both in the institutes of Manu and Narada reprobating sale but regarding mortgages as a matter of course:⁽²⁾ "Neither a pledge nor a deposit," reasons Manu, "is lost to the owner by lapse of time, they are both recoverable though they have long remained with the bailee."⁽³⁾ And so he lays down that if the pledge is destroyed or deteriorated, the pledgee is liable to make good the loss unless it was due to the act of God or of King. This is acceded to by Katayana, but Brahaspati would even in such a case compel the pledgee to give another pledge or pay the principal and interest.⁽⁴⁾ In regard to several pledges of the same thing at the same time Vasishtha gave the pledge to him who was the first to take possession. Redemption was allowed until the expiration of a fortnight from the date of the stipulated term, after which the mortgage forfeited and the creditor was allowed to sell in the presence of witnesses, but not without notice to the debtor. In archaic society these simple formulae were found to be adequate. But as society grew, law had to keep pace with it, and in Roman law while the oldest form of the contract of pledge was that of *mancipatio*, or absolute sale of the thing subject to the contract of *fiducia* or agreement for redemption,⁽⁵⁾

(1) Mitakshara, Ch. I, s. 1, § 32.

(2) Manu, Ch. VII, v. 194; Narada Yajnavalkya, Ch. II, v. 58.

(3) Manu, Ch. VIII, P. 145.

(4) Yajnavalkya, Ch. II, v. 59.

(5) Institutes of Justinian (Sandar's Narada Ed.) 225. note.

gradually the contract was diversified, and the contract as well the procedure for enforcing it assumed a more definite and complicated character.

78. The forms most in use were, however, only two, that is, *pignus* (1) and *hypotheca*. *Pignus* was the general term and had for its object moveable as well as immoveable property and might relate to things both corporeal as well as incorporeal. *Pignus*, according to Ulpian, may be made without delivery, but this was the exception rather than the rule. For a transaction unaccompanied by a change of possession was designated *hypotheca* which appears to have been its distinctive characteristic. By *pignus* the creditor acquired a right *in rem* which could be asserted upon failure of the pledgor to discharge the security. This he might do by selling the property to recover the amount of his advance, and if he could not find another purchaser he was not precluded from constituting himself its owner. (2) A creditor in possession of the *pignus* was bound to take care of the thing and to restore it to the debtor by the *actio pigneratitia*. But if it was lost by some accident the creditor was not accountable for it, and he was not on that account prevented from suing for his debt. (3) The right of sale was the necessary incident of this contract and it appears that the creditor could not contract himself out of that right. This was recognized even by Ulpian who, in spite of a condition, *ne liceat distrahere*, conceded to the creditor the right of selling off the property, though in such a case he was required to give notice to the debtor three times. (4) This provision was subsequently improved upon by Justinian who allowed sale after two years' notice, and if no purchaser was then forthcoming then the vendor was after a further grace of two years, allowed to constitute himself its owner. Priority was determined according to the date of contract and not from the date of possession. Writing and registration were not essential, but the Emperor Leo passed an edict conferring a privilege on certain kinds of written contracts.

79. A mortgage (*l'hypothèque*) may by the French law be either legal, judicial or conventional. (5) The term legal hypothecation of moveable property must be distinguished from liens upon property as arise by implication and intendment of law. (6) By judicial hypothecation is implied that description of charge or claim upon property which results from the judgments of the Courts of Justice, and from judicial acts; (7) and a conventional hypothecation is that which is founded purely upon contract and "can only be consented to by an act passed in authentic form before two notaries or before one notary, and two witnesses." (8)

80. In English law, mortgage appears to have been introduced at first as a clandestine device to evade the law against alienation. In its inception it was an estate upon condition, that is to say, an estate whose existence depended upon the happening or not happening of some uncertain event, whereby the estate might be either originally created, or enlarged or finally defeated. A mortgage came under the denomination of that kind of estate which became defeasible upon condition subsequent. (9) But between the time of lending the money and the time allotted for payment, the estate was conditional, and the mortgagee was called tenant in

(1) From *pignus*, a fist, because things which are given in *pignus* are made over with the hand.

(2) Justinian, Bk. II, Tit. VIII, 1.

(3) *Ib.*, Bk. III, Tit. XIV, 4.

(4) Digest 13, 7, 4.

(5) Art. 2116, Code Napoleon.

(6) *Ib.*, Art. 2117.

(7) Art. 2117, Code Napoleon.

(8) Cod. Civ., L. III, Tit. 18, 2117.

(9) Stephen's Blackstone, 303 *et seq.*

mortgage. As soon as such an estate was created, the mortgagee could immediately enter upon the lands to be dispossessed upon performance of the condition by payment of the mortgage-money on the day limited. Estates held *in vadio* in gage, or pledge, were of two kinds, *vivum vadium*, or living pledge: and a *mortuum, vadium*, dead pledge. "*Vivum vadium*," or living pledge according to Blackstone "is when a man borrows a sum (suppose £200) of another and grants him an estate, as, of £20 *per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living, it subsists and survives the debt; and, immediately on the discharge of that, results back to the borrower.⁽¹⁾ But *mortuum vadium*, a dead pledge, or mortgage (which is much more common than the other) is where a man borrows of another a specific sum (*e.g.*, £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200, on a certain day mentioned in the deed, then the mortgagor may re-enter on the estate granted in pledge; or as is now the more usual way, that the mortgagee reconvey the estate to the mortgagor: in this case the land, which is so put in pledge, is by law, in case of non-payment at the time limited for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional but absolute."⁽²⁾ But though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at common law, the Courts of Equity, will interpose, if the estate be found to be of greater value than the sum lent thereon, and allow to the mortgagor what is called the *equity of redemption*, that is, a right to call on the mortgagee who has possession of his estate to deliver it back upon payment of the whole debt and interest. This right conferred by equity upon defaulting mortgagees has the effect of turning the *mortuum* into a kind of *vadium*. But while equity gave to the mortgagor the right of redemption, it also gave to the mortgagee the right to compel the sale of the estate, in order to get the whole of his money immediately; or else to call upon the mortgagor to redeem his estate presently, or, in default thereof to be for ever foreclosed from redeeming the same; that is, to lose his equity of redemption without the possibility of recall. In England mortgagees did not, as a rule, take possession of the mortgaged estate, unless where the security was precarious or small. A mortgage without possession thus resembled closely the *hypotheca*, as that with possession corresponded to the *pignus* of the Roman law. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporeal tradition of the lands, no gage or pledge of lands was good unless it was accompanied by possession. This was said to be necessary to prevent subsequent and fraudulent pledges of the same land. But a transfer by which the owner was deprived of its enjoyment and the facility for disincumbering the estate, was in spite of Blackstone's lament,⁽³⁾ not expected to be much favoured by the mortgagors. And it was therefore only natural that possessory mortgages should be sparingly executed and that livery of seisin be regarded as by no means the *sine qua non* of a valid pledge. The modern English law of mortgage is partly based upon the common law (*lex non scripta*) and the practice of the Equity Courts, and some of its provisions have since been embodied in the Conveyancing and Law of Property Act.⁽⁴⁾ The law as it now stands confers upon the mortgagee the power of sale similar to that conferred by section 69 of the Act. In all other respects it differs but little from the Act.

(1) 2 Black, Comm., pp. 157, 158.

(2) Co. Litt., 205.

(3) 2 Black, Comm., p. 160.

(4) 44 & 45 Vict., C. 41.

The law of mortgage in this country before the passing of the Act was by no means uniform. Indeed, it was on account of its unsettled state, consequent upon the Courts being left to administer according to justice, equity and good conscience, that the necessity for codification was felt to be urgently pressing.

81. The Act has now codified the law relating to mortgages of immoveable property and charges, and while it no doubt deals with almost all the principal forms with a claim to exhaustiveness, it has left out of account mortgage of a thing which may come into existence *in futuro*,—as for example an indigo crop. Such a mortgage is, however, valid although it has not been recognized in the Act and does not fall within the scope of the Indian Contract Act which deals only with the pledges of *existing* moveables. (1) “A mortgage,” as defined in the Act, “is the transfer of an interest in immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, and existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.” (2) This conception of a mortgage is more comprehensive than of the English text-books. Thus according to Fisher “Mortgage (proper) is an assurance to the creditor of the whole or part of the debtor's general property, in real or personal estate, conditional upon the non-payment and redeemable at law upon payment of a debt at a fixed time; and upon breach of the condition becoming absolute at law, and redeemable in equity, until the expiration of a certain period; unless the right of redemption be sooner foreclosed by judicial process at the suit of the creditor or be destroyed by sale under judicial process, or under a power incident to security.” The Act divides mortgages into four classes, namely, (1) simple mortgage; (2) mortgage by conditional sale; (3) usufructuary mortgage; and (4) English mortgage to which alone Fisher's definition would apply. These are, however, only the pure forms of mortgages, and it is quite possible to combine two or more of these, in which case, the resultant mortgage is an anomalous mortgage which has been dealt with in section 98. The combination of the third mortgage with the first or the second does not, however, give rise to an anomalous mortgage. Excepting then the case of an anomalous mortgage in which the rights and liabilities of the parties are determined by their contract as evidenced in the mortgage-deed, subject to local usage and such other mortgage as has not been provided for in the Act, all other forms of mortgage of whatever character are subject to the rules contained in the Act. A mortgage should be differentiated from a “charge.” Indeed the two terms are so closely related to each other that a confusion is often engendered by using them interchangeably as they appear to have been before the Act. But the two terms, at any rate as now defined, appear to be capable of a clear differentiation.

82. Charge is a generic term, of which mortgage is a species. A charge results as soon as the property of one person is made security for the payment of money to another. This is also the object of a mortgage, and this is therefore the common feature of both. But this is the only common factor in the two, excepting which the two terms have little else in common. A charge may arise in two ways, namely, by act of parties or by operation of law. But a mortgage can never be created by operation of law. In mortgage the property transferred is *specific*, but this is by no means necessary to constitute a “charge.” Then, again, a

(1) Indian Contract Act (Act IX of 1872),
172—179.

(2) S. 58, *post*.

mortgage is always a security for a *debt* or the performance of an engagement, but a charge is only a security *for the payment of money to another*, which may be due either as a debt or a claim, as for example, a claim to maintenance in the case of a Hindu widow. Then, again, while there is a *transfer* of an interest in a mortgage, there is no transfer in a "charge" which is only pledged as a *collateral* security. In its remedial incidents a charge closely approaches a simple mortgage. Indeed, the distinction between the two is in many cases hardly perceptible. But a charge must as far as possible be always distinguished from a mortgage, since on the question of limitation, the distinction was until recently one of practical importance, and in view of the promised legislation it may again assume that importance.

83. The rights and duties of a mortgagor and mortgagee vary with the kind of security as well as its character as a possessory or non-possessory mortgage. They are somewhat similar to those of the lessor and lessee. Thus, for instance, in the absence of a contract to the contrary, the mortgagor is deemed to make the covenant of his title, and if the mortgage is possessory, also of quiet enjoyment. (1) With this purpose in view, the law requires him to defend his own title or enable the mortgagee to do so if it is assailed by any adverse claimant. He is further enjoined to continue paying public charges until the mortgagee is actually put in possession of the property. He cannot be allowed to raise money on the security of his property and then fritter it away or allow it to be forfeited. To allow this would have been to set a premium upon dishonesty and fraud: and no mortgagee would be found to risk his money if its payment is left to the mercy of the debtor. It has been therefore provided that if a mortgagor break any of the conditions, the mortgagee may then hold him personally liable for his money. (2)

84. Again, if the mortgagee enters into possession of the property mortgaged to him, he is equally bound to use it in a prudent and careful manner, and he is made liable to the mortgagor both for commissive and permissive waste. He must therefore strive to collect rents and profits thereof, out of which he must pay the Government revenue and other public charges, the surplus being appropriated to the payment of interest on his money and on necessary repairs. (3)

He is also entitled to expend such sums as may be necessary for the due management and preservation of the property entrusted to his possession. (4) A mortgagee may assign or sub-mortgage his interest, in which case, the assignee or sub-mortgagee stand in the same position to the mortgagee as the latter stands to the mortgagor.

85. If a suit becomes necessary, then either party must follow the procedure enacted by the Act. This is not uniform for all classes of mortgage. In a simple mortgage, the mortgagor pledges the credit of his person and the property mortgaged for the satisfaction of the debt. On default, the mortgagee is entitled to institute a suit for sale of the property, to which if he is so advised, he may also join a claim to personal recovery. A conditional decree will then be passed in his favour calling upon the mortgagee to pay up within a period fixed within six months, and if the mortgagor still defaults, the mortgagee may then apply to confirm the decree by obtaining an order absolute after which the mortgagor can no

(1) S. 65.
(2) S. 68.

(3) S. 76.
(4) S. 72.

longer redeem. On the passing of this decree, the mortgagee becomes entitled to execute it, and thus bring the property to sale. The proceeds are paid over to him in the discharge of his debt, the residue, if any, being made over to the mortgagor. But should the proceeds prove insufficient, the mortgagee is entitled to recover the unpaid balance from the mortgagor personally. This is the procedure in all cases where the mortgagor's remedy is by sale. And it is a procedure which applies equally to an English mortgage, though he possesses the power of sale which he may exercise without the intervention of the Court.

86. The procedure for realizing security in a mortgage by conditional sale is somewhat different. In this class of mortgage, the mortgagor does not stipulate for a personal liability nor can the mortgagee look for the satisfaction of his debt to anything beyond the property mortgaged. If therefore it becomes necessary to invoke the assistance of the Court, he must, as in the case of a simple mortgage, obtain a conditional decree for foreclosure, and if the debt is not paid within the period of grace, the mortgagee must then apply and obtain an absolute order for foreclosure which has the effect of investing the mortgagee with all the rights of the mortgagor. A foreclosure once made is final and cannot be re-opened in this country, although the procedure in England is in this respect different. The terms "foreclosure" and "redemption" are terms of the English Equity Courts which extend to the mortgagor an indulgence to enable him to pay off the debt when he cannot do it legally. For instance, if the debtor stipulate with the creditor that on default of payment, the latter may re-enter upon the property as its legal owner and that the estate would become forfeited or foreclosed to him, there is nothing in law against the mortgagee literally enforcing the covenant had not the law provided against the condition having its effect by prescribing a procedure to which both the parties must conform.⁽¹⁾ This indulgence favoured of equity which enables a defaulting mortgagor to buy back the estate is called the equity of redemption. And when this right which is his estate in equity is forfeited, it is said to be foreclosed.⁽²⁾ The law regards this right with such favour that the mortgagor cannot be even permitted to contract himself out of it.

87. In an "English mortgage" the mortgagee is on the one hand entitled to the double remedies of foreclosure and sale, while on the other hand, an usufructuary mortgagee is not entitled to sue for either. But whatever may be the nature of the security, a mortgagor is invariably entitled to sue for redemption, though not before the mortgage-money has become payable and, then too he must redeem the entire mortgage and not any part of it at his option.

88. It has been remarked before that neither in this Chapter nor anywhere else in this or any other Act has any reference been made to the mortgage or hypothecation of moveable property. In England, such transactions are provided for in the Bills of Sale Act. But in spite of the want of legislative sanction, the mortgage of moveable property is perfectly valid and may be made by an optionally registered instrument, with the priority conferred by a registered instrument against any oral agreement or declaration relating to such property except where the agreement or declaration accompanied by possession.⁽³⁾ A hypothecation is

(1) See *per* Jessel, M. R., in *Carter v. Waks*, 4 Ch. D., 605 (606).

(2) To "foreclose" means literally to "shut out" or "exclude" from *L. Foris* outside and *claudere*, to shut. To "foreclose a mortgagor"

is then to shut him out from power of redemption.

(3) S. 48, Indian Registration Act (III of 1877).

there used to comprehend all such charges and "pledge" which is "the bailment of goods as security for payment of a debt or performance of a promise." A pledge must always be accompanied by transfer of possession in favour of the pawnee. "There are three kinds of security," said Willes, J., "The first a simple lien: the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and mortgage, *viz.*, a pledge—where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt." (1)

89. A transfer once completed cannot be modified or rescinded in law but it may be in equity, the provisions of which are contained in the Specific Relief Act, Chapter IV. But the subsequent equities arising out of a transfer are no part of the law of the Transfer of Property dealt with in the Act.

(1) *Halliday v. Holgate*, L. R., 3 Ex., 299 (304); following *Donald v. Suckling*, L. R., 1 Q. B. 58.

REGULATION XVII OF 1806.

A regulation for extending to the Province of Benares the rates of interest on future loans and provisions relative thereto contained in Regulation XV. 1793 ; also for a general extension of the period fixed by Regulations I. 1798 and XXXIV. 1803, for the redemption of mortgages and conditional sales of land, under deeds of Bye-bil-waffa, Kutcabalah or other similar designations. Passed by the Governor-General in Council on the 11th September, 1806.

1. The rules prescribed Regulation I. 1798, for preventing fraud and injustice in conditional sales of land under deeds of bye-bil-waffa or other deeds of the same nature were declared to extend to Benares, as well as to the Provinces of Bengal, Behar and Orissa ; and under the terms of section II of that Regulation might be considered, from the time of its publication, to have established the general limitation of interest at the legal rate of " twelve per cent. per annum." As, however, the provision relative to a limitation of interest, contained in Regulation XV. 1793, and re-enacted for the ceded and conquered Provinces by Regulation XXXIV. 1803, have never been expressly extended to Benares and as it appears that the limitation of twelve per cent. per annum has not yet been considered in force within that province, it is necessary that an express rule should be enacted for extending to Benares the same limitation of interest and provisions connected therewith, as are in force throughout the other provinces under this Presidency. It is further requisite, for the purpose of preventing improvident and injurious transfer of landed property at an inadequate price, by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid within a stated period (which description of mortgage is common throughout the country. Under deeds of bye-bil-waffa, kutcabalah, and other similar designations) that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period, on payment of the principal sum lent with interest thereupon if the mortgagee shall not have been put in possession ; the Governor-General in Council has accordingly enacted the following rules, to be in force, from the time of their promulgation, in the several provinces therein specified respectively.

2. The provisions contained in the several sections of Regulation XV.

Reg. XV. 1798 extended to Benares with modifications.

1793, are hereby declared to extend to the province of Benares, from the commencement of the ensuing year 1807 A.C. corresponding with the 19th Poos of the Bengal year 1213, and 7th Poos of the Fusli year 1214, subject to the following modifications.

3. Instead of the limitation of interest specified in sections II and III. (Regulation XV. 1793), if the cause of action shall have arisen

Rates of interest
to be decreed by Civil
Courts.

before the period stated in the preceding section, the Courts of civil judicature are to decree whatever rate of interest may have been voluntarily stipulated; or if interest be payable in any case wherein a specific rate may not have been stipulated, according to the law and usage of the Province in conformity with the spirit of section IX. Regulation VII. 1795, which directs with respect to bills of exchange, receipts, or notes of hand, that the custom of the country is to be abided by, and with respect to dealings and money transactions amongst mahajans and shroffs, that the established customs observed and enforced amongst them are to be adhered to by the Courts in their inquiries and decisions.

4. Repealed by Act XXVIII. 1855.

5. The forfeiture of interest for stipulation of a higher rate than what is

Forfeiture of prin-
cipal and interest
not applicable to
certain cases.

authorized, enacted by section VIII. Regulation XV. 1793. and the forfeiture of principal and interest, in cases of attempts to elude the prescribed rules, by deductions from the principal or other devices, provided against by section IX. Regulation XV. 1793, shall not be considered applicable to any loans actually and *bona fide* contracted, or to any bonds or other instruments voluntarily given for the evidence and security of such loans, previously to the period stated in section II of this regulation.

6. Repealed by Act XXVIII. 1855.

7. In addition to the provisions made in the Provinces of Bengal, Behar,

Redemption of
mortgages and con-
ditional sales of
land.

Orissa and Benares, by Regulation I. 1798, and in the ceded and conquered Provinces by Regulation XXXIV. 1803, for the redemption of mortgages and conditional sales of land, under deeds of *bye-bil-waffa*, *kutcabalah* or any similar designation, it is hereby provided, that when the mortgagee may have obtained possession of the land, on execution of the mortgage-deed or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale or of the balance due if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed in the manner provided for by the following section; that is to say, at any time within one year (Bengal, Fusli or Willaity, according to the era current where the mortgage may take place) from and after the application of the mortgagee to the Zillah or City Court of Dewanny Adawlat for foreclosing the mortgage and rendering the sale conclusive in conformity with section VIII of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and mortgagee or his

legal representative; or that the amount due be deposited, within the time above specified in the Dewanny Adawlat of the Zillah or City in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by section II. Regulation I. 1798, and section XII. Regulation XXXIV. 1803, the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this regulation.

8. Whenever the receiver or holder of a deed of mortgage and conditional

How mortgagee or holder of deed of conditional sale to proceed, when desirous of foreclosing mortgage or rendering conditional sale conclusive.

sale, such as is described in the preamble and preceding sections of this regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakils of the Court, to the Judge of the Zillah or City in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor, or his legal representative to be furnished, as soon as possible, with a copy of it; and shall at the same time notify to him, by a perwannah under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section, within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive.

THE TRANSFER OF PROPERTY ACT, 1882.

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THE TRANSFER OF PROPERTY ACT, 1882.

ACT IV OF 1882.

(As amended by all subsequent Acts up to date.)

RECEIVED THE G.-G.'S ASSENT ON THE 17TH FEBRUARY 1882.

An Act to amend the Law relating to the Transfer of Property by Act of Parties.

Preamble. WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties ; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title. 1. This Act may be called "The Transfer of Property Act, 1882."

Commencement. It shall come into force on the first day of July 1882.

Extent. It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act [or any part thereof] to the whole or any specified part of the territories under its administration.

[And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three.]

[Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act or otherwise.]

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, liabilities, &c.

(a) the provisions of any enactment not hereby expressly repealed :

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or

(d) save as provided by section fifty-seven and Chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction :

and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

Interpretation-
clause.

3. In this Act, unless there is something repugnant in the subject or context,—

“immoveable property”

“immoveable property” does not include standing timber, growing crops or grass :

“instrument”

“instrument” means a non-testamentary instrument :

“registered”

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“attached to the earth”

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

[“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent ;]

and a person is said to have “notice” of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry

“notice.”

or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section two-hundred and twenty-nine.

Enactments relating to contracts to be taken as part of Contract Act.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

[And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877.]

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A.)—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

What may be transferred. 6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

- (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (e) A mere right to sue cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.
- (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) [for an unlawful object or consideration within the meaning of section twenty-three of the Indian Contract Act, 1872,] or (3) to a person legally disqualified to be transferee.
- (i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee.

7. Every person competent to contract and entitled to transferable property or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. A transfer of property may be made without writing
 Oral transfer. in every case in which a writing is not expressly required by law.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restriction repugnant to interest created.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B, in trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

Transfer to class, some of whom come under sections thirteen and fourteen.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

Transfer to take effect on failure of prior transfer.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer in perpetuity for benefit of public.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immovable or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case, on the happening of the event ; in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only seventeen years of age, without C's consent. The transfer to D takes effect.

. Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the Act.

Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act, time being specified.

Election.

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

Election when necessary.

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000, pay Rs. 800 to B,

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion

Apportionment of benefit of obligation on severance.

to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes, unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 80 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C. and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D, severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D, may join in giving.

(B.)—Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39. Where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land,

or of obligation annexed to ownership but not amounting to interest or easement.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by ostensible owner.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations.

(a) A, owing a moiety, and B and C, each a quarter share, of mouza Sultanpur, exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mouza.

(b) A, being entitled to a life-interest in mouza Atrali, and B and C to the reversion, sell the mouza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion, Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created by transfer.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage, by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's right under policy.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent *bona-fide* paid to holder under defective title.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

Improvements made by *bona-fide* holders under defective titles.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property pending suit relating thereto.

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Fraudulent transfer.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

"Sale" defined. 54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
Sale how made.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract for sale,

It does not, of itself, create any interest in or charge on such property.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold :
Rights and liabilities of buyer and seller.

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents ;

- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs; provided that, where the property is sold free from incumbrances, the buyer

may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
 - (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.
- (6) The buyer is entitled—
- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;
 - (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

- 56.** Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

Discharge of Incumbrances on Sale.

- 57. (a)** Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,—

Provision by Court for incumbrance and sale freed therefrom.

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs,

expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment of transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

"Mortgage,"
"mortgagor,"
"mortgagee,"
"mortgage-money,"
and "mortgage-deed" defined.

58. (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Mortgage by conditional sale.

(c) Where the mortgagor ostensibly sells the mortgaged property—

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void,
or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, [Rangoon, Moulmein, Bassein and Akyab], by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee(a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgage.

61. A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Right of usufructuary mortgagor to recover possession.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property,—

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
- (b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money,—when the term (if any), prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Renewal of mortgaged lease.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

Implied contracts by mortgagor.

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;
- (d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by a lease, or if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;
- (e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate ; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Waste by mortgagor in possession.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

- (a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale ; or
- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure ; or
- (c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale ; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only :—

- (a) where the mortgagor binds himself to repay the same :
- (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor :
- (c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and if the mortgagor fails so to do, may sue him for the mortgage-money.

69. A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property, or any part thereof without the intervention of the Court, is valid in the following cases [and in no others], namely :—

- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist [or a

member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette] ;

(b) where the mortgagee is the Secretary of State for India in Council ;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi, [Rangoon, Moulmein, Bassein or Akyab].

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees' and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, [or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette].

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mortgaged property.

Illustrations.

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security B is entitled to the house as well as the plot.

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mortgaged lease.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

Rights of mortgagee in possession.

- (a) for the due management of the property and the collection of the rents and profits thereof;
- (b) for its preservation from destruction, forfeiture or sale;
- (c) for supporting the mortgagor's title to the property;
- (d) for making his own title thereto good against the mortgagor; and
- (e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Charge on proceeds of revenue sale.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Right of subsequent mortgagee to pay off prior mortgagee.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

- (a) he must manage the property, as a person of ordinary prudence would manage it if it were his own ;
- (b) he must use his best endeavours to collect the rents and profits thereof ;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;
- (e) he must not commit any act which is destructive or permanently injurious to the property ;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;
- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, if any, shall be paid to the mortgagor ;
- (i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Loss occasioned
by his default.

77. Nothing in section seventy-six, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Receipts in lieu of
interest.

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Postponement of
prior mortgagee.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure
uncertain amount
when maximum is
expressed.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Tacking abolished.

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Marshalling secu-
rities.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Contribution to
mortgage-debt.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section eighty-one to the claim of the second mortgagee.

Deposit in Court.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Power to deposit
in Court money due
on mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to money
deposited by mort-
gagor.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Cessation of in-
terest.

Suits for Foreclosure, Sale or Redemption.

* **85.** Subject to the provisions of the Code of Civil Procedure, section four hundred and thirty-seven, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Parties to suits
for foreclosure, sale
and redemption.

Foreclosure and Sale.

* **86.** In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

Decree in foreclo-
sure-suit.

¹ Sections 85-90 and 92-94, 96, 97 and 99 of this Act, being sections relating to procedure, have been repealed from this Act and are re-enacted in the Code of Civil Procedure as Order XXXIV, rr. 1-6, 7, 8, 10 and 12-14 respectively.

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

Procedure in case of payment of amount due. * 87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Order absolute for foreclosure. If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Power to enlarge time. Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 129, for the words "final decree," the words "decree absolute" shall be substituted.

Decree for sale. * 88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Power to decree sale in foreclosure-suit. In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Procedure when defendant pays amount due. * 89. If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment

* Vide note on p. 86, *supra*.

is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Order absolute for sale.
*** 90.** *When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.*

Redemption.

Who may sue for redemption.
91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption, of the mortgaged property:—

- (a) any person (other than the mortgagee of the interest sought to be redeemed), having any interest in or charge upon the property;
- (b) any person having any interest in or charge upon the right to redeem the property;
- (c) any surety for the payment of the mortgage-debt or any part thereof;
- (d) the guardian of the property of a minor mortgagor on behalf of such minor;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;
- (g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

Decree in redemption-suit.
*** 92.** *In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—*

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

In case of redemption, possession. * 93. If payment is made of such amount, and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In default, foreclosure or sale. If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished :

Power to enlarge time. Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.

Costs of mortgage subsequent to decree. * 94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this Chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Charge of one of several co-mortgagors who redeems. 95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Sale of Property subject to Prior Mortgage.

Sale of property subject to prior mortgage. * 96. If any property the sale of which is directed under this Chapter, is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Application of proceeds. * 97. Such proceeds shall be brought into Court and applied as follows :—

first, in payment of all expenses incident to the sale of property incurred in any attempted sale ;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section fifty-eight, clauses (b), (c), (d) and (e).

Attachment of Mortgaged Property.

*** 99.** Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section forty-three.

Attachment of mortgaged property.

Charges.

100. Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two, † [and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property] shall, so far as may be, apply to the person having such charge.

Charges.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

* Vide note on p. 36, *supra*.

† The words in [] were repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Sch. V., *ibid*.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by any person incompetent to contract, such notice may be served, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

"Lessor," "lessee,"
"premium," and
"rent" defined.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

[All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession :

Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.]

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

(A.)—Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B.)—Rights and Liabilities of the Lessee.

(d) if during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit, for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth : provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee :

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. A lease of immoveable property determines—

(a) by efflux of the time limited thereby:

(b) where such time is limited conditionally on the happening of some event—by the happening of such event:

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

(f) by implied surrender :

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

112. A forfeiture under section one hundred and eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

113. A notice given under section one hundred and eleven, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice to quit.

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture ; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Relief against forfeiture for non-payment of rent.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless

Effect of surrender and forfeiture on under-leases.

the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section one hundred and fourteen.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

Illustrations.

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable [in the case of all or any of such leases], together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

124. A gift comprising both existing and future property is void as to the latter.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person. A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations.

(a) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. (1) The transfer of an actionable claim shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not :

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer as prescribed in section one hundred and thirty-one, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (4) of section one hundred and thirty and to the provisions of section one hundred and thirty-two.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Notice to be in writing, signed.

Liability of transferee of actionable claim.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations.

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

In capacity of officers connected with Courts of Justice.

Saving of negotiable instruments, &c.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression “mercantile document of title to goods” includes a bill-of-lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

THE SCHEDULE.

(a) STATUTES.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10 ...	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances.	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances...	The whole.
4 Wm. and Mary, c. 16 ...	Clandestine mortgages ...	The whole.

(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IX of 1842 ...	Lease and release ...	The whole.
XXXI of 1854 ...	Modes of conveying land.	Section seventeen.
XI of 1855 ...	Mesne profits and improvements.	Section one; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866 ...	Indian Trustees Act ...	Section thirty-one.
IV of 1872 ...	Punjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 ...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ...	In sections thirty-five and thirty-six, the words "in writing."

(c) REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts; Interest; Mortgagees in possession.	Section fifteen.

THE CODE OF CIVIL PROCEDURE, 1908.

(ACT V OF 1908.)

THE FIRST SCHEDULE.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

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THE CODE OF CIVIL PROCEDURE, 1908.

(ACT V OF 1908).

THE FIRST SCHEDULE.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.
- Parties to suits for foreclosure, sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Preliminary decree in foreclosure-suit.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property.

3. (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule ten, the Court shall pass a decree—
- Final decree in foreclosure-suit.

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,
- (b) ordering him to re-transfer the mortgaged property as directed in the said decree,
and, also, if necessary,
- (c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property :

Power to enlarge time. Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time, postpone the day fixed for such payment.

Discharge of debt. (3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a Preliminary decree in suit for sale. decree to the effect mentioned in clauses (a), (b) and (c) of rule two and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

5. (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule ten, the Court shall pass a decree—
Final decree in suit for sale.

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,
- (b) ordering him to re-transfer the mortgaged property as directed in the said decree,
and also, if necessary,
- (c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule four.

Recovery of
balance due on mort-
gage.

6. Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

Preliminary decree
in redemption-suit.

7. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—

- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold.

Final decree in
redemption-suit.

8. (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule ten, the Court shall pass a decree—

- (a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,
- (b) ordering him to re-transfer the mortgaged property as directed in the said decree, and also, if necessary,
- (c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him, be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Power to enlarge time.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule seven, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him ; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Decree where nothing is found due or where mortgagee has been overpaid.

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree.

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Right of mesne mortgagee to redeem and foreclose.

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

Application of proceeds. 13. (1) Such proceeds shall be brought into Court and applied as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule twelve shall be deemed to affect the powers conferred by section fifty-seven of the Transfer of Property Act, 1882 (IV of 1882).

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule two.

Suit for sale necessary for bringing mortgaged property to sale.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882 (IV of 1882), has not been extended.

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section one hundred of the Transfer of Property Act, 1882 (IV of 1882).

Charges.

THE TRANSFER OF PROPERTY ACT

BEING
ACT IV OF 1882.

(As amended by all subsequent Acts up to date.)

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 17th February 1882.)

*An Act to Amend the law relating to the Transfer of Property
by Act of Parties.*

Preamble. WHEREAS it is expedient to define and amend certain parts
of the law relating to the transfer of property by
act of parties: It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title. 1. This Act may be called “The Transfer of
Property Act, 1882”;

Commencement. It shall come into force on the first day of
July 1882;

Extent. It extends in the first instance to the whole of British India
except the territories respectively administered
by the Governor of Bombay in Council, the
Lieutenant-Governor of the Punjab and the Chief Commissioner
of British Burmah.

But any of the said Local Governments may, from time to
time, by notification in the local official Gazette, extend this Act

or any part thereof⁽¹⁾ to the whole or any specified' part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively, or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three.⁽²⁾

Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act, or otherwise.⁽³⁾

1. Analogous Law.—Prior to the passing of the Act the state of law relating to transfers was in a hopelessly chaotic state. Under the guise of following the delusive light of justice, equity and good conscience the High Courts in India appear to have laid down diametrically opposite principles till the matter attracted the notice of the Privy Council,⁽⁴⁾ who vigorously advocated the codification of law on the subject with which the Act deals. Before the Act the law on the subject was for the most part fragmentary and was confined to the enactments mentioned in the Schedule which have been now superseded and revealed by the Act.⁽⁵⁾ This Act, though the first of its kind introduced in India, does not entirely create new rights or impose new obligations. Although it does not professedly do more than "define and amend" the law relating to the transfer of property by act of the parties, it is in reality not merely an amending Act, but a Code, more or less self-contained but by no means exhaustive, to interpret which reference to the pre-existing law is not permitted where the language of the sections is itself

(1) The words "or any part thereof" were added by the Transfer of Property Amending Act (VI of 1904), s. 2. The amended words were added at the instance of the Government of Burma to enable it to extend from time to time any part of the Act which may appear to it to be suitable to any part of the Province.

(2) The whole of this paragraph is substituted by Act III of 1885, s. 1, for the following: "And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories ad-

ministered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven and one hundred and twenty-three." No exemption has yet been notified under this clause.

(3) Added by Act III of 1885, s. 2, which declared that it "shall be deemed to have been added to the first section of the said Act (i.e., the Transfer of Property Act, 1882) from the date on which it came into force."

(4) *Thumbuswamy v. Hossain Rowthen*, I. L. R., 1 Mad., 1, P. C.

(5) S. 2.

plain and unequivocal. ⁽¹⁾ Indeed, to interpret a statute in the light of the pre-existing law is to reverse the process of logical ratiocination which has been always justly deprecated. ⁽²⁾ The Act relates to the transfer of property *inter vivos* as the Indian Succession Act relates to the devolution of property after death. In the words of the framers "read with the Contract Act" this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos* of interests in property and for the convenience of the practitioner it could hardly be enacted in a more accessible form." ⁽³⁾ This act is based mainly upon the English law of real property, and many of its provisions are borrowed from the various enactments which it supersedes and repeals. ⁽⁴⁾

2. Amendments.—From the table of amendments printed before, it will be seen that the Act has undergone several amendments since its first enactment. The effect of these amendments will be more fittingly discussed under the various sections to which they relate; but the more general principles by which amendments generally are construed may be set out here. Where, of course, there is no doubt as to the meaning of the amended enactment, there is no occasion for the application of rules, which are brought into requisition only when the language chosen is ambiguous, uncertain or defective. It sometimes happens that the language of a statute though clear is susceptible of a misinterpretation, in which advantage is taken of the amendment, by improving the phrasing without intending any alteration in the sense. As was observed in a case: "Amendments are often made to clear up ambiguities, and such amendments which are intended to prevent misinterpretation do not in themselves alter the law in any way."⁽⁵⁾ But this is by no means frequently the purpose. The fifth paragraph beginning with the words "and any" has been substituted by the Amending Act (III of 1885) for the following:—"And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt either retrospectively, or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely: sections 41, 54, paragraphs 2 and 3, 59, 69, 107, and 123." The alteration no longer allows racial exemptions, but still permits territorial exemption. The object of this alteration was to prevent diversity in the application of the provisions of this Act.

The last paragraph is entirely new, and has been added to this section by section 2 of the Amending Act ⁽⁶⁾ which provides that this "paragraph shall be deemed to have been added to the first section of the said Act (IV of 1882) from the date on which it came into force." It removes the hardship often felt in the backward provinces on account of the restrictive provisions contained in these sections.

(1) "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." *Gokul Mandar v. Pudmanund*, I. L. R., 29 Cal., 707 (715), P. C.; following *Duchess of Kingston's case*, 2 S. L. C. (10th Ed.), 713.

(2) *Lalla Suraj Prosad v. Golab Chand*, 5 C.W.N., 640 (646), following *Narendra Nath v. Kamalbhashini*, I. L. R., 23 Cal., 571,

P. C.; *Raj Narain v. Ashutosh Chuckerbutty*, I. L. R., 27 Cal., 649; cf. *The Irrawaddy, &c., Co. v. Bugwandas*, I. L. R., 18 Cal., 620 (624, 629), P. C.

(3) Report, 1879.

(4) *Tajjo Bibi v. Bhagwan Prasad*, I.L.R., 16 All., 295; and *Mata Din v. Kazim Husain*, I. L. R., 13 All., 432 (453), F. B.

(5) *Secretary of State v. Purnendu*, I L.R., 40 Cal., 123 (136).

(6) Act III of 1885.

3. Meaning of words.—"Whereas it is expedient to define and amend":—The preamble shows that the Act was intended to stereotype and amend the existing law and had not for its object the introduction of any novel principles. (1) As it is, the Act hardly introduces any new substantive law, and does not, except in the case of the procedure relating to mortgages, displace any existing enactment. From the preamble it would appear that the Act professes to be no more than a partial measure. (2) If the Act had purported to be exhaustive, the preamble would have run thus: "Whereas it is expedient to consolidate, define and amend, &c." (3)

"*Transfer of Properties by Act of Parties.*"—"Transfer of Property" is defined in section 5 where the meaning of the term will be fully discussed. "*By act of parties*" implies that the scope of the Act is limited to law relating only to voluntary transfers between living persons as contradistinguished from a transfer by operation of law (*ex lege*), as for example in case of forfeiture, insolvency or sale in execution of a decree. "*It extends in the first instance to the whole of British India*":—By its own force the Act is applicable to the territories comprised in the term "British India" which is defined to mean all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. (4) The North-Western Frontier Province is thus a part of and within British India. The term "British India" should be distinguished from "British possession" which is defined to be any part of His Majesty's dominions, exclusive of the United Kingdom; and, where parts of those dominions are under both a central and a local legislature, all parts under the Central legislature, shall, for the purposes of this definition, be deemed to be one British possession. (5) "*Any of the said Local Governments*":—A Local Government is defined "to mean the person authorized by law to administer executive Government in the part of British India in which the Act or Regulation containing the expression operates, and shall include a Chief Commissioner." (6) "*Notwithstanding, &c.*:" This Act is contemplated to work hand in hand with the Indian Registration Act so far as regards its provisions relating to registration.

4. General Rules for Construction of Acts.—In the construction of statutes "in the first instance, the grammatical sense of the words is to be adhered to;—if that is contrary to, or inconsistent with, any expressed intention, or any declared purpose, of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must then be modified, extended or abridged so far as to avoid an inconvenience, but no further. (7) "I think," said Lord Herschell, "the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with

(1) *Tajjo Bibi v. Bhagwan Prasad*, I. L. R., 16 All., 295 (298).

(2) *The Irrawaddy, &c., Co. v. Bugwandas*, I. L. R., 18 Cal., 620 (628), P. C. See *Kuverji v. Great Indian Peninsula Ry. Co.*, I. L. R., 3 Bom., 109 (113), in which Westropp, C. J., so construed the preamble to the Indian Contract Act (17 of 1872); but cf. *Lalla Suraj Prasad v. Golab Chand*, 5 C. W. N., 640 (646).

(3) *Collector of Gorakhpur v. Palakdhari*, I. L. R., 12 All., 36.

(4) S. 3 (7), General Clauses Act (X of 1897).

(5) *Ib.*, s. 3 (8).

(6) S. 3 (7), General Clauses Act (X of 1897), s. 3 (29).

(7) *Promotho Nath v. Kali Prasanna*, I. L. R., 28 Cal., 744 (748).

enquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a Code of particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."⁽¹⁾ Another rule of construction given as a foremost rule by Lord Coke for arriving at the most natural and genuine exposition of a statute is that construction is to be made of all the parts of a statute together, and not of one part only by itself,⁽²⁾ and in the Lincoln's College Case it was resolved by the Common Pleas that the office of a good expositor of an Act of Parliament is to make construction of all parts together, and not of one part only by itself.⁽³⁾

Again, it must not be forgotten that an Act is the will of the Legislature, and the fundamental rule of interpretation,⁽⁴⁾ to which all others are subordinate is, that it is to be expounded "according to the intent of them that made it."⁽⁵⁾ Of course, the question of interpretation would only arise where the sense is not manifestly clear, and in that case only, resort must be had to the principles which the wisdom of ages has laid down as the safest guide for judicial interpretation. A mass of case law has clustered round these principles, but they may all ultimately be reduced to a few simple canons which should be found for ordinary purposes sufficient.

5. These rules are—

- (i) that the Act must be construed literally according to the rules of grammar; technical terms being construed according to

Rules stated.

their technical import, and other words as used in popular language. When the words admit of but one meaning the Court is not at liberty to speculate on the intention of the Legislature, and construe them according to its own notions of what ought to have been enacted,⁽⁶⁾ and from which it follows that nothing should be added to or subtracted from a statute, unless there are clear grounds to justify the inference that the Legislature intended something which it omitted to express.⁽⁷⁾ But where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction, inconvenience or hardship, injustice or absurdity—presumably not intended, a construction may be put upon it which modifies the meaning of words, and even the structure of the sentence.⁽⁸⁾ Thus the conjunction "or" may be read to mean "and" and *vice versa*.⁽⁹⁾

(1) *Bank of England v. Vagliano*, L. R., (1891), A.C., 107; followed in *Narendra Nath v. Kamalbhosini*, I. L. R., 23 Cal., 563 (571), P.C.; *Raj Narain v. Ashutosh Chuckerbutty*, I.L.R., 27 Cal., 649; *Lalla Suraj Prosad v. Golab Chand*, 5 C. W. N. 640 (646).

(2) Co. Lit., 381a.

(3) Rep., 59b.

(4) "Interpretation of Statutes" (3rd Ed.), 16, 40.

(5) 4th Inst., 390, *Sussex Peerage*, 11. Cl. and F., 143, cited in Maxwell's "Interpretation of Statutes" (3rd Ed.), 1.

(6) *York and N. Midland R. Co. v. R.*, 22

L. J. Q. B., 225; *Matangini v. Mokura*, I. L. R., 19 Cal., 674, F.B.; *Le mesurier v. Moid Hossain*, I. L. R., 29 Cal., 890 (901), F. B.

(7) Maxwell's "Interpretation of Statutes" (3rd Ed.), 18.

(8) *Jub v. Hull Dock Co.*, 9 Q. B., 443; *Migton v. Smith*, 16 Q. B., 503; *Ex parte Rashleigh*, 2 Ch. D., 9; *Deo Narain v. Kukur Bind*, I. L. R., 24 All., 319 (337, 341), F. B.

(9) *Fowler v. Paget*, 7 T. R., 50; *R. v. Morblake*, 6 East., 397.

(ii) But it is but seldom that language is so precise as to be free from all ambiguity. It is, therefore, provided that the construction must harmonise with the context, ⁽¹⁾ general frame and the real intention of the enactment. ⁽²⁾ And for this purpose it is allowable to consider (a) the law before the Act, (b) the mischief or defect it was intended to cure, (c) the remedy the Legislature has appointed, and (d) the reason therefor.

(iii) It is provided that the construction must be so far as possible beneficial, that is, such as shall suppress the mischief and advance the remedy. ⁽³⁾

(iv) It is always presumed that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares. Any construction which would offend against this rule would be abandoned, even though it be otherwise grammatical, and liberal, for it is more reasonable to hold that the Legislature expressed its intention in a slovenly manner, than that it intended something which it is presumed not to intend. So a change in the wording of a section of an enactment must not be regarded as necessarily involving a change in the law, as amendments are often made to clear up ambiguities, and such amendments which are intended to prevent misinterpretations do not in themselves alter the law in any way. ⁽⁴⁾

(v) The construction must again be such as shall defeat all attempts to evade it. Thus an usurious contract howsoever disguised should be treated as such; ⁽⁵⁾ and "if a contract be a wager in substance, no matter how the end is brought about, it would be void, though the object were ever so cunningly concealed in the form given to the transaction." ⁽⁶⁾

(vi) No construction should be placed upon a statute which would lead to abuse of powers, as by exercising or refraining from exercising them in cases not intended by it. ⁽⁷⁾

(vii) There is always a presumption against ousting established jurisdiction, and creating new one, it being supposed that the Legislature would not make so important an innovation, without a very explicit expression of its intention. ⁽⁸⁾ It is perhaps a corollary of this rule which is usually stated in the form that the Crown is not bound by a statute unless named in it. ⁽⁹⁾

(viii) The language of an enactment must be construed consistently with itself, and every other statute from which it does not expressly deviate. But if any two statutes are irreconcilably inconsistent the latter Act must prevail. ⁽¹⁰⁾ It sometimes happens that the conflict between statutes is apparent

(1) *Madan Chandra v. Jaki*, 6 C. W. N., 377; *Deo Narain v. Kukur Bind*, I. L. R., 24 All., 319 (337), F. B.

(2) *Hough v. Windus*, 12 Q. B. D., 224 (235).

(3) Maxwell's Interpretation of Statutes (3rd Ed.), p. 95; *Hayden's case*, 3 Rep., 7b; *Turtle v. Hartwell*, 6 T. R., 429; *Twycross v. Grant*, 2 C. P. D., 530; *Re Dick*, [1891] 1 Ch., 426; *R. v. St. Mary Abbots* [1891], 1 Q. B., 378; *France v. Dutton*, [1891] 2 Q. B., 208.

(4) *Secretary of State v. Puvendū*, I.L.R., 40 Cal., 123 (135).

(5) *Floyer v. Edwards*, 1 Cowp., 114

(6) *Grizewood v. Blane*, 11 C. B., 538; *Jeffries v. Alexander*, 8 H. L. C., 594; *Read v. Anderson*, 13 Q. B. D., 779.

(7) *Biddulah v. St. George's Vestry*, 33

L. J. Ch., 411.

(8) Maxwell's Interpretation of Statutes (3rd Ed.), 178.

(9) *Attorney-General v. Donaldson*, 10 M. & W., 117; *R. v. Wright*, 1 A. & E., 434.

(10) *West Ham v. Fourth City Building Society*, [1892] 1 Q. B., 654; *Sims v. Doughty*, 5 Ves., 243; *Constantine v. Constantine*, 6 Ves., 100; *Morral v. Sutton*, 1 Phil., 533; *Brown v. Great Western Ry.*, 9 Q. B. D., 753; *Co. Litt.*, 112; *Shep. Touchstone*, 88, Grot., Bk., 2 Ch., 16, s. 4; cf. *Livy Bk.*, 9 Ch., 34:—*Leges posteriores priores contrarias abrogant. Ubi autem contrariæ leges sunt, semper antiquæ abrogantur.* *Rangacharya v. Dasacharya*, I.L.R., 37 Bom. 231 (242, 243); *Muthammal v. Secretary of State*, 24 M. L. J., 405.

only, as their objects being different, the language of each is confined to its own limited object. Not infrequently the difference in language is in this country the result of careless drafting by non-professional legislators.

(ix) A general Act must not be construed so as to abrogate a special Act; *Generalia specialibus non derogant*.⁽¹⁾

(x) In cases of doubt or ambiguity the intention which is consonant with reason, justice and legal principles must be invariably favoured. An argument drawn from inconvenience is no more forcible in law than one drawn from injustice.⁽²⁾ It has been accordingly laid down that a construction which would have the effect of enabling a person to defeat or impair the obligation of his contract or otherwise profit by his own wrong, would, if possible, be rejected.⁽³⁾

(xi) No statute should be construed to apply retrospectively unless it is expressly made so applicable. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws or creates new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed out of respect to the Legislature, to be intended not to have a retrospective operation, unless from the language a contrary effect is clearly intended.⁽⁴⁾ But alterations in the procedure are always deemed to be retrospective unless there be good reason against it.⁽⁵⁾

(xii) Statutes encroaching on private rights or imposing burdens must be strictly construed, and if possible, so as to respect such rights.⁽⁶⁾

(xiii) A benevolent construction of a taxing statute cannot be permitted in favour of the Crown.⁽⁷⁾ And according to the uniform course of Indian legislation, statutes imposing duties or taxes equally bind the Government, unless they are from their very nature inapplicable to it.⁽⁸⁾

6. English Cases.—The decisions of their Lordships of the Privy Council, being decisions of the Court of ultimate appeal from this country are, of course, always binding upon the Courts here,⁽⁹⁾ so long as the enactment upon which they were based remains unaltered. But cases determined by the other English Courts, though frequently referred to and followed by that high tribunal and the Courts of this country, do not possess the same authority. Of course, being cases decided under a different enactment they could not afford any assistance in the construction of an Indian Act, unless

(1) "General words do not derogate from the special." *Garnett v. Bradley*, 3 App. Cas., 950; *Kamalammal v. Peera Meera*, I. L. R., 20 Mad., 481.

(2) Co. Litt., 97a.

(3) *Dutton v. Atkins*, L.R., 6 Q.B., 673; *R. v. Justice of Cinque Ports*, 17 Q. B. D., 191.

(4) *Per* Kent, C., in *Dash v. Van Kleeck*, 7 John. 502; *per* Storey, J., in *Society. de. v. Wheeler*, 2 Gallison, 139; *Mahammad Abdus Samud v. Qurban*, I. L. R., 26 All., 119 (129), P. C.; *Kala Tihari v. Narayan*, 13 C. P. L. R., 143. *Munjhoori Bibi v. Akel Muhmud*, 17 C. L. J., 316; *Ramakrishna v. Subbaraya*, 24 M. L. J., 55.

(5) *Biddulph v. St. George's Vestry*, 33

L.J. Ch., 411; *Munjhoori Bibi v. Akel Muhmud*, 17 C. L. J., 316.

(6) *Gardner v. Lucas*, 3 App. Cas., 603; *Kimbray v. Draper*, L. R., 3 Q. B., 160.

(7) *Attorney-General v. Selbourne*, (1902) 1 K. B., 388; *Bell v. The Municipal Commissioners*, I. L. R., 25 Mad., 457.

(8) *Bell v. The Municipal Commissioners*, I. L. R., 25 Mad., 457.

(9) *Per* Sir J. W. Colville, *Srimathoo alias Kattama v. Dorasinga*, 15 B. L. R., 83 (99), P. C.; *per* Sir Barnes Peacock, *ib.*, at p. 89; *Trimble v. Hill*, 5 App., Cas., 342 (344); *Per-shad Singh v. Ram Pertab*, I. L. R., 22 Cal., 77.

the two enactments are in *pari materia*,⁽¹⁾ in which case they possess as much persuasive value as the decisions of the superior courts of this country.⁽²⁾ Even when an Act of the Indian Legislature is in substance founded upon an English Statute, or the common law, still it does not thence follow that the two are so closely analogous as to be identical. In such case of course the English precedents would be delusive, if the difference in the statutory law is not kept in view.⁽³⁾ Again, in resorting to the English law regard must be had to what is but the elucidation of the general principle, as distinguished from what is local and peculiar to the English law of constitution. So it has been held that where in the absence of any law applicable to a party, his rights are to be determined according to justice, equity, and good conscience, the Courts would well be guided by the principles of English law applicable to a similar state of circumstances.⁽⁴⁾ But here, again, there is a disturbing element, for the circumstances may appear to be the same or similar, but they may be very dissimilar in reality. For instance, there is very little in common between the present Act and the English Law of real property, and it would be as fallacious as misleading to elucidate the one from deductions drawn from the other. This caution has been repeated in several cases, and so far as they refer to the Act, they will be referred to here. So it has been held that the English law against the competency of aliens to hold land, has never been applied to this country⁽⁵⁾ nor has the rule about forfeiture of the personal property of persons committing suicide been extended to the natives of India.⁽⁶⁾ So while the Indian rule sometimes attains the same result as the English rule against champerty and maintenance, the latter is not even substantially the law of this country.⁽⁷⁾ So while trusts are recognized in the Hindu as well as in the English system of law, and while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to prescribe a detailed procedure for giving effect to its principles. Consequently, while the Court observes the principles of Hindu law relating to trusts so far as they go, it has to draw upon the English law as a matter of equity as regards the duties of trustees, and the rights of beneficiaries, and generally to supplement the Hindu law.⁽⁸⁾ So the English law of escheat in favour of the Crown as the *ultima heres* has been held to apply here,⁽⁹⁾ but this is equally the effect of Hindu law.⁽¹⁰⁾

7. So the rule that a party is precluded from recovering on a document materially altered is essentially an English rule⁽¹¹⁾ but it has long since been recognized as an equitable rule equally applicable to this country.⁽¹²⁾ So also is the rule that a beneficiary can recover property in the hands of his benamidar even though he had transferred it to him to compass a fraud if it remained

(1) *Ezra v. Secretary of State*, I.L.R., 30 Cal., 36; O. A. I. L. R., 31 Cal., 605, P. C.; *Balkishan v. Legge*, I. L. R., 22 All., 149, P. C.; *Surab Sundari v. Uma Prosad*, I.L.R., 31 Cal., 628.

(2) *Pershad Singh v. Ram Pertab Roy*, I. L. R., 22 Cal., 77.

(3) *Mulchand v. Suganchand*, I. L. R., 1 Bom., 23.

(4) *Mithi Bai v. Liniji*, I.L.R., 5 Bom., 505 (527); *Varden Seth v. Luckputty*, 9 M.I.A., 303.

(5) *Mayor of Lyons v. E. I. Co.*, 1 M.I.A., 175.

(6) *Advocate-General v. Rani Surnomoyee*,

1 W.R., 14, P.C.

(7) *Bhagwat Dayal v. Debi Dayal*, I.L.R., 35 Cal., 420 (426), P.C., following *Ram Coommar v. Chander Canto*, I.L.R., 2 Cal., 233, P.C., *Kunwar Ramulal v. Nil Kanth*, I.L.R., 20 Cal., 843, P.C.; *Achal Ram v. Kazim Husain*, I.L.R., 27 All., 271, P.C.

(8) *Kahandas, In re*, I.L.R., 5 Bom., 154.

(9) *Secretary of State v. Administrator General*, I.L.R., 1 B.L.R. (O.C.), 87 (113).

(10) *Collector of Masulipatam v. Cavalry*, 8 M.I.A., 524.

(11) *Master v. Miller*, 1 Sm. L. C., 871.

(12) *Christacharu v. Karibasayya*, I.L.R., 9 Mad., 399, F.B.

unachieved.⁽¹⁾ Neither the English nor the Indian law recognizes such a right as an easement in gross.⁽²⁾ But while under English law a right of way may be inferred from user which is presumed to be as of right, the same presumption cannot be made as a matter of course in this country where regard must be had to the habits of the people and the other circumstances of the case.⁽³⁾ So the English maxim "once a highway, always a highway" is not applicable in India.⁽⁴⁾

Under Hindu law transfer of possession was always the essential prerequisite of a transfer of property, but by the common law of England, delivery of possession is not necessary for the transfer of ownership in the case of moveables, and although it was at one time necessary in the case of immoveables, it has ceased to be so under the Statute of Uses.⁽⁵⁾ The English rule expressed in the maxim *quicquid plantatur solo solo cedit* does not apply in its entirety in India. For while under the English rule the owner ordinarily recovers not only the land but the buildings erected thereupon, the Indian common law suffers the stranger to remove the materials of his buildings.⁽⁶⁾

Certain presumptions arise based upon the character of the people of the two countries in which the two systems present more contrasts than analogies. For instance, joint family being the normal unit of Hindu Society, which is the very reverse of the condition prevailing in the European countries, there is no room here for the rule of English law in favour of a tenancy in common: the presumption is generally the reverse.⁽⁷⁾ And while it is true that co-sharers in immoveable property in this country do not occupy the same position towards each other as partners under English law;⁽⁸⁾ still both systems of law recognize the underlying equity of the following rule stated by Hardwicke, L.C.: "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole,"⁽⁹⁾ and which has consequently been held to apply to gifts under Hindu law.⁽¹⁰⁾

8. American cases.—But while English cases may be and indeed, are usefully referred to in elucidating an Indian Act, the citation of American cases has been condemned by the highest authority in England. In a case where a claim arose out of a contract made in America and the question was whether the contract was governed by the law of Massachusetts, by the feudal law of the United States, or by the law of England, an attempt was made to cite American cases. But the attempt was promptly repressed by Halsbury, L.C., Fry and Cotton, L.JJ., who protested against the citation of American authorities, Halsbury, L.C., observing: "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of citing American decisions as authori-

(1) *Petherperumal v. Muniandy*, I.L.R., 35 Cal., 551 (559), P.C.

(2) *Municipal Board v. Lallu*, I.L.R., 20 All., 200; s. 6 (c) *post*.

(3) *Shaikh Khoda Buksh v. Shaikh Tajuddin*, 8 C.W.N., 359.

(4) *Municipal Commissioners v. Sarangpani*, I.L.R., 19 Mad., 154.

(5) *Gungalurry v. Raghubram*, 14 B.L.R., 307.

(6) *Premji v. Haji Cassum*, I.L.R., 20 Bom. 298, *Narayan v. Bholagiri*, 6 B.H.C.R. (A.C.), 80.

(7) *Ran Bahadur Singh v. Luchu Koer*, I.L.R., 11 Cal. 301 (310), P.C.

(8) *Ram Lall v. Dehinder Nath*, I.L.R., 8 Cal., 8 (11). This case was decided in 1881, before enactment of S. 20 of the Indian Trusts Act (Act II of 1882) though the case would have been rightly decided even under that Act, as the claimant was the defaulter and the purchase was therefore not *qua* co-sharer, but in his individual capacity.

(9) *Humphrey v. Topleur*, Ambel, 138.

(10) *Nandi Singh v. Sita Ram*, I.L.R., 16 Cal. 677 (682), P.C.

ties, in the same way as if they were decisions of our own Courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject in which the point arises is the same as our own." (1) To which Fry, L.J., added: "I also have been struck by the waste of time occasioned by the growing practice of citing American authorities." (2) In another case upon an appeal to the Privy Council from Australia where the question arose as to the right of a trade protection society to publish information amongst its members injurious to the character of another, Lord Macnaghten said: "It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question which must be decided by English law. In the dearth of English authority, it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded, and with the utmost deference to the learned Judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle." (3) Here of course, their Lordships' view was at variance with the American Courts: but even if it were otherwise, the authorities cited would then have been superfluous. If then American cases are no authorities in England, and its colonies, it naturally follows that their citation for the purpose of elucidating Indian statutes is nothing more than a "waste of time" so feelingly deplored by the English Judges. (4)

9. Proceedings of the Legislature.—Proceedings of the Legislative Council were formerly freely referred to by the Indian High Courts (5) for the purpose of construing the enactments to which they referred, and for this purpose it had grown into a practice to refer to the history of previous legislation and of the passage of the Act through the Council, reports of the Indian Law Commissioners, and of the Select Committees of the Councils, the language of the draft Bill and of the statements of objects and reasons thereto appended, and even to the speeches made in the Legislative Council. But this practice, of what may be called the historical method of construction, was reprobated by the Privy Council, (6) the result of whose decisions seems to be

(1) *Swamirao v. Kashi Nath*, I. L. R., 15 Bom., 419; followed in *Balaji v. Saktharam*, I. L. R., 17 Bom., 555 (558).

(2) *In re Missouri Steam Ship Co.*, 42 Ch. D., 321 (330, 331).

(3) *Mackintosh v. Dun*, (1908) 12 C. W. N., 105; P.C.

(4) *In re Missouri Steamship Co.* 42 Ch. D., 321 (330). [The observations of Cockburn, C.J., in *Senramanga v. Stamp*, L. R., 5 C. P. D., 295 (303), must now be regarded as no longer authoritative. The same remarks apply to *Braddon v. Abbott Tay*, and Bell's Rep., 342 (359); *Malcolm v. Smith*, ib., 283 (288).

(5) *Mothooran v. India General Steam Navigation Co.*, I. L. R., 10 Cal., 166; *Fahamid-unnessa v. Secretary of State*, I. L. R., 14 Cal., 670 a, I. L. R., 17 Cal., 590, P. C.; *Queen-Empress v. Kartick Chunder*, I. L. R., 14 Cal., 721 (728); *Romesh Chunder v. Hiru*, I. L. R., 17 Cal., 852; *Fadhu v. Gour Mohun*,

I. L. R., 19 Cal., 514; *Administrator-General v. Prem Lall Mullik*, I. L. R., 21 Cal., 732; *Chunilal v. Bomanji*, I. L. R., 7 Bom., 310 (315); *Prabhakarbhut v. Vishwambhat*, I. L. R., 8 Bom., 313 [pre-existing law—chief means of construction]; *Yesu v. Balkrishna*, I. L. R., 15 Bom., 583 (585), but *contra* held in *Shahk Moosa v. Shahk Essa*, I. L. R., 8 Bom., 241 (Bill cannot be referred to); *Gopal v. Sakhojirao*, I. L. R., 18 Bom., 133 (debate cannot be referred to); *Queen-Empress v. Babulal*, I. L. R., 6 All., 509 (previous law considered); *Queen-Empress v. Ghulati*, I. L. R., 7 All., 44 (Report of Law Commissioners referred to) but *contra* in *Kadir Baksh v. Bhawani*, I. L. R., 14 All., 145 (objects and reasons not to be referred to); *Q. v. Gopal Das*, I. L. R., 3 Mad., 271 (previous law consulted); *Ramchandra v. Hazi Kassim*, I. L. R., 16 Mad., 207.

(6) *The Administrator-General v. Prem Lall Mullik*, I. L. R., 22 Cal., 789, P.C.

against obtaining extraneous aid in order to construe a clear and positive statute, so as to qualify or neutralize its effect. But in case of ambiguity or doubt, it is still permissible to call in aid reports of the Indian Law Commissioners, ⁽¹⁾ proceedings of the Council, ⁽²⁾ though it would seem that the draft Bill ⁽³⁾ and the statements of objects and reasons ⁽⁴⁾ may not be referred to. And it would appear that reference to reports of the Select Committees is also interdicted, though the opinions on this and indeed on all other points are by no means uniform.⁽⁵⁾

10. Title of Act—as aid to its construction.—The title of an Act of Parliament is to be read as part of the enactment, ⁽⁶⁾ and this may also be predicated of an Indian Act. But the title of this Act is somewhat too wide. For though it is called the "Transfer of Property Act," it is not exhaustive either as to the transfer of the property.⁽⁷⁾ For example, it does not deal with settlements and trusts ⁽⁸⁾ not with the mortgage of moveables, of pledges of decrees, Government Promissory Notes, policies of insurance and the like ⁽⁹⁾ in all of which cases the Courts act upon its general power of enforcing contracts ⁽¹⁰⁾ subject to the rule of equity, justice and good conscience.

11. Preamble.—The preamble makes it clear that the law codified is by no means exhaustive and that the Act does not purport to *consolidate*, but only defines and amends certain parts of the law. Even as to its subject, it does not profess to be complete as it relates only to the transfer of property by act of parties. "By act of parties" is to distinguish transfers by operation of law, *e.g.*, in case of insolvency, forfeiture or sale in execution of a decree.⁽¹¹⁾ The Act is strictly confined to the transfer by act of parties—*i.e.*, by contract or gift; ⁽¹²⁾ and even as such it does not profess to be exhaustive; for instance it does not deal with pledges of tangible moveable property, Government promissory notes, policies of insurance and the like,⁽¹³⁾ in which case if there is no other statutory law, then the Courts will have to act upon the principle of justice, equity and good conscience, in enforcing the contracts in accordance with their true tenour.⁽¹⁴⁾ The preamble of an act is usually of great importance in construing the extent of the operation

(1) *Per* Lord Westbury *In re Mew*, 31 L. J., Bank 87.

(2) *Per* Lord Westbury *In re Mew*, 31 L. J. Bank, 87; *Hobbert v Purchas*, L. R., 3 P. C., 648 (649); *Q. v. Bishop of Oxford*, 4 Q. B. D., 585, but *contra* in *Queen-Empress v. Srichurn*, I. L. R., 22 Cal., 1017 (1022).

(3) *Shankh Moosa v. Shankh Essa*, I. L. R., 8 Bom., 241, *contra* in *Queen-Empress v. Kartick Chunder*, I. L. R., 14 Cal., 729.

(4) *The Administrator-General v Prem Lal Mullick*, I. L. R., 22 Cal., 788. P. C.

(5) *E.g.*, they were referred to by Turner, L. J., in *Drummond v. Drummond*, L. R., 2 Ch. A., 32 (45); and Lord Davey in *Hilder v. Dexter*, [1902] A. C., 474, held that in construing a statute the state of the antecedent law may be properly considered with a view to ascertain the mischief against which the enactment is directed.

(6) *Frieden v. Morley Corporation*, [1899] 1 Ch. O. A., [1900] A. C. 138.

(7) *Kishori Lal v. Krishna*, (1907) 5 I.C.

500 (502); *Bunsee Dass v. Gena Lal*, 14 C.L.J., 530 (536).

(8) *Ariyaputhira v. Muthukumaraswamy*, 15 I.C. 343 (344); s. 5, Indian Trusts Act (II of 1882).

(9) *Subbaraya v. Kuppusamy*, (1909) 1 I.C. 535 (538).

(10) *Id.* p. 538.

(11) R. S. C., 19th Feb., 1879, para 6. *Golak Nath v. Mathura Nath*, I. L. R., 20 Cal., 273 (278); *Gaya Prasad v. Baijnath*, I. L. R., 14 All., 176; *Tojjo Bibi v. Bhagwan Prasad*, I. L. R., 16 All., 295 (298); *Krishnan v. Prachan*, I. L. R., 15 Mad., 383.

(12) R. S. C., 1879.

(13) *Subbaraya v. Kuppusamy*, (1909), I.C., 535 (538); *Kishori Lal v. Krishna Kamini*, (1910) 5 I. C., 500 (502); *Bunsee Das v. Gena Lal*, 14 C. L. J., 530 (536).

(14) *Subbaraya v. Kuppusamy*, (1909), I.C., 535 (538).

of the law and should be read with its section.⁽¹⁾ It is the introduction to the Act a "key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy,"⁽²⁾ and it lays down the limitations and restrictions subject to which the enactment is passed, it being always permissible to refer to it for the purpose of keeping the effect of the Act within its real scope as it usually states or professes to state the intention of the Legislature in passing the enactment.⁽³⁾

But unless there be something inconsistent with the spirit of the Act, the preamble cannot be taken to have cut down its express provisions.⁽⁴⁾ And indeed, the enacting words of a statute may be carried beyond the preamble, if the words be found in the former strong enough for the purpose.⁽⁵⁾ Where the language of the enacting sections of a statute is clear, the terms of a preamble cannot be called in aid to restrict their operation, or to cut them down. It is only to be resorted to ascertain the intention of an Act when the enacting part is ambiguous.⁽⁶⁾ Though it is not conclusive as a statement of extrinsic fact.⁽⁷⁾ The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act, but it may well happen that these general terms will not indicate or cover all the mischief which, in the enacting portions of the Act itself, are found to be provided for. Nevertheless the effect of a preamble must be understood to overlie the whole Act⁽⁸⁾ giving colour to and controlling its provisions, and by shewing the intention of the Legislature supplying *pro tanto* the rule for their interpretation.⁽⁹⁾

12. Headings.—It will be seen that this Act contains headings prefixed to sets of sections. Such headings may be regarded as preambles to them, and they may be legitimately considered for the purpose of determining the sense of any doubtful expression in the sections ranged under them.⁽¹⁰⁾

13. But while the preamble is a necessary part of the Act, the marginal notes appended to the sections or not the necessary part thereof and should not be looked into for the purpose of construing the sections,⁽¹¹⁾ much less to vary its meaning.⁽¹²⁾

Marginal notes.

(1) *Fulchand v. Set Kishmesh Koer*, 4 C. W. N. ccxvi.

(2) *Salkeld v. Johnstone*, 5 Q. B., 313.

(3) *Tarquand v. Board of Trade*, 11 App. Cas., 286.

(4) *Thistleton v. Frewer*, 31 L. J. Ex., 230; *Young v. Hughes*, 4 H. & N. 76; *Gujarat Trading Co. v. Trikumji*, 3 B. H. C. R. (O. C.), 45; *Mukund v. Ladu*, 3 Bom. L.R. 548.

(5) *Per Bowen, L. J.*, in *Sutton v. Sutton*, L.R., 22 Ch. D., 511 (520, 521); *Chinna v. Mahomed*, 2 M. H. C. R., 322.

(6) *Salkeld v. Johnstone*, 5 Q. B., 313; *Fellows v. Clay*, 1 Haro, 196; *Chinna v. Mahomed*, 2 M. H. C. R., 322.

(7) *Narandas v. Parshotam*, 4 Bom. L. R., 550 (553); following *Emp. v. Indrajit*, 1 L. 11 All., 662; *Collector v. Samaldas*, 9 B. C. R., 205 (215); *Waghela v. Sheikh Musdin*, 1 L. R., 11 Bom., 551 (562).

(8) *Per Jessel, M.R.*, in *Taylor v. Corpo-*

ration, L. R., 4 C. D., 395 (404).

(9) *Per Straight, J.*, in *Q. v. Inderjit*, 1 L. R., 11 Ali., 262 (266).

(10) *Eastern Countries Railway Co. v. Marriage*, 9 H. L. C., 32; *Hammersmith and City Ry. Co. v. Brand*, L. R., 4 H. L. 171; *Ram Shankar v. Ganesh*, 4 A. L. J. R., 273, F. B.

(11) *Udu Begam v. Imam-ud-din*, 1 L. R., 2 All., 74 (90); *Crawford v. Spooner*, 4 M. L. A., 179 (187); *Daimodee v. Kaim Taridas*, 1 L. R., 5 Cal., 300 (303); *Alangamonjori v. Sonamoni*, 1 L. R., 8 Cal., 637 (639, 643); *Kadir Baksh v. Bhawani Prasad*, 1 L. R., 14 All., 145 (154); *Balraj Kunwar v. Jagat Pal Singh*, 1 L. R., 26 All., 393 (406), P.O.; *Claydon v. Green*, L.R., 3 C. P., 511; *Sutton v. Sutton*, 22 Ch. D., 511 (overruling *contra* in *Ravenour's Settled Estates*, 2 Ch. D. 522).

(12) *Q. F. v. Mahomed*, 2 Bom. L. R., 918 (923).

14. Punctuation.—In England Bills were formerly engrossed without punctuation⁽¹⁾ but this practice was abandoned in 1849, but punctuation is nevertheless still not taken as a part of the statute. It is, however, unlikely that punctuation which often plays an important part in the interpretation of an Indian enactment would be disregarded as an integral part of the statutes passed in this country.

15. Illustrations.—As regards the value of illustrations appended to sections by the Legislature, it has been laid down that "although attached to, they do not in legal strictness form part of the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and other respects they may be useful, provided they are correct."⁽²⁾ And where the section itself is clear it is immaterial that the illustration is in apparent conflict with it. "The illustrations are only intended to assist in construing the language of the Act,"⁽³⁾ "but they ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, when the effect would be to curtail a right which the section in its ordinary sense would confer."⁽⁴⁾

16. Definitions.—The definitions of certain terms used in the Act are expressly stated to be given only for that limited purpose⁽⁵⁾ which is usually the case also with other Acts.⁽⁶⁾ But a collection of cases have now clustered round certain terms which define their sense and illustrate their practical applicability to concrete cases, and which must therefore be regarded as that true legal significance, rendering them terms of art in which their special import does not harmonize with their etymological or popular meaning.

17. Retrospectivity.—The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are an exception. The law as to the acquisition of a right is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of suit. Care must, however, be taken to distinguish between laws which are merely processual, and such as under the fictitious appearance are really material. To declare a certain right, which would be validly created by certain matters of fact, not creatable without the addition of some other, is material and not former law.⁽⁷⁾

Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle of Legislation by which the conduct of mankind is to be regulated. Law ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon

(1) *Svayambu v. The Municipal Council*, 1 M. L. J. R., 37; *Dukhi Mullah v. Halway*, I. L. R., 23 Cal., 55; *Punardeo v. Ram Sarup*, I. L. R., 25 Cal., 863, but contra *Kameshar v. Bikan*, I. L. R., 20 Cal., 609 (628). *Sutton v. Sutton*, 22 Ch. D., 511; *Claydon v. Green*, L. R., 9 C. P., 521; *Attorney-General v. Great Eastern Ry.*, 11 Ch. D. 465; *Duke of Devonshire v. O'Connor*, 24 Q. B. D., 478; contra *In re Veneur*, 2 Ch. D., 525 [*Per Jessel, M. R.*, who retracted his opinion in *Sutton v. Sutton*, 22 Ch. D., 511 (513)].

(2) 1 Bl. Com., 183.

(3) *Per Sir Richard Couch, C. J.*, in

Shaikh Omed Ali v. Nidhee Ram, 22 W. R., 367; *Nanak Ram v. Mehni Lal*, I. L. R., 1 All., 487 (495).

(4) *Per Garth, C. J.*, in *Koylash Chunder v. Sonatun Chung*, I. L. R., 7 Cal., 132 (135).

(5) S. 5 post.

(6) *Pandah v. Jenuddi*, I. L. R., 4 Cal., 665 (666); *Duni Chand v. Padman*, (1913) P. L. R., No 71, F.B

(7) *Per Stuart, C. J.*, in *Nanak Ram v. Mehni Lal*, I. L. R., 1 All., 487 (495); *Koylash Chunder v. Sonatun*, I. L. R., 7 Cal., 132; *Kamalamal v. Peera Meera*, I. L. R., 20 Mad., 481.

the faith of the then existing law.⁽¹⁾ Where the law is altered while a suit is pending, the law, as it existed when the action was commenced, must decide the rights of the parties unless the Legislature, by the language used, shows a clear intention to vary the mutual relation of such parties.⁽²⁾ (§ 25.)

18. Commencement and Extent.—An Act comes into operation from the very day it passes,⁽³⁾ unless it fixes a day from which it is to commence. An Act made by the Imperial and local legislative councils is deemed to be passed as soon as it receives the assent of the Governor-General.⁽⁴⁾ This Act came into force on the 1st July 1882, corresponding to the following Indian dates: *Samvat*, Asarh Budi, 15, 1939. *Pusli*, Asarh Sudi 15th, 1289. *Bengali*, Asarh 18, 1289. *Hijree*, 14th Shaban, 1299. *Vilaiti*, 19 Asarh, 1289. The Act is now extended to the Bombay Presidency from the 1st January, 1893,⁽⁵⁾ to Berar from the 1st day of July, 1907,⁽⁶⁾ and to the area within the local limits of the ordinary Civil Jurisdiction of the Recorder of Rangoon.⁽⁷⁾ Its provisions extend also to every cantonment in British India.⁽⁸⁾ It has ceased to be in force in the Naga Hills district, the Dibrugarh Frontier Tract, the North Cachar Hills and the Meikei Hills Tract,⁽⁹⁾ and has not been yet extended to the Punjab and Sindh,⁽¹⁰⁾ Upper and Lower Burmah⁽¹¹⁾ and Pegu.⁽¹²⁾

Section 69 enables the Local Government to specify the classes of persons whose participation in an English mortgage excludes the operation of certain provisions mentioned therein. Section 57 (a) further empowers the Local Government to extend the jurisdiction of Courts for the purpose of that section.⁽¹³⁾ Section 104 empowers the High Courts to make rules to carry out the provisions of this Act relating to mortgages or charges on immoveable property. That the legislature can empower Local Governments to remove a district from the jurisdiction of the High Court or extend the operation of the law to any district is now authoritatively ruled by the Privy Council.⁽¹⁴⁾ Section 2 (d) further enacts that "nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law."

19. After the passing of this Act, the Courts are not to apply the English equitable doctrines to India.⁽¹⁵⁾ It is also to be noted that unless specially extended, the provisions contained in sections 54 (paragraphs 2 and 3), 59, 107 and 123 do not apply to areas for the time being excluded from the operation of the

(1) See *Morris v. Sumbamurthi*, 6 M. H. C. R., 122 (126); following *Phillips v. Eyre*, L. R., 6 Q. B., 30; observing on *Le Roux v. Broune*, 12 C. B. N. S., 801; *ex parte Melbourne*, L. R., 6 A. App., 64.

(2) *Phillips v. Eyre*, L. R., 6 Q. B., 23; *Moon v. Durdan*, 2 Ex., 22; *In re Joseph Suche & Co.*, 1 Ch. D., 48, 150; *Knight v. Lee*, [1893] 1 Q. B., 41; *Tauri v. Renad*, (1882) 3 Ch., 421; *Reid v. Reid*, 31 Ch. D., 469; *Vedavalli v. Marayanma*, 1 L. R., 27 Mad., 538 (539).

(3) *Tupsee v. Ramsaran*, 1 L. R., 15 Cal., 376 (382).

(4) Ss. 20, 40, 24 and 25 Vict., c. 67.

(5) Notification, *Bombay Government Gazette* (1892), Pt. I, p. 1071, dated 27th Oct., 1892; *Chunilal v. Fulchand*, 1 L. R., 13 Bom., 160 (170).

(6) Government of India, Foreign Depart-

ment, Notification No. 1138, dated 16th May, 1907, published in *Central Provinces Gazette*, dated 25th May, 1907, Pt. I, p. 270.

(7) *Burma Gazette* (1892), Pt. I, p. 373.

(8) Cantonment Code, see Act XIII of 1889, s. 32 (1).

(9) *Assam Gazette*, 1884, Pt. II, pp. 212, 705.

(10) *Wadero v. Sajannal*, 3 S. L. R., 17, 1 L. C., 952 (955); *Gulam Murtiza Khan v. Changoomal*, 5 S. L. R., 71.

(11) *Tha Kany v. Ma Htaik*, 3 L. B. R., 241, *Shwe Lok v. Ma Seik*, 4 L. B. R., 232.

(12) *Nagappa v. Marung Po*, 12 I. C., 849.

(13) *Empress v. Burah*, 1 L. R., 4 Cal., 180, P. C.

(14) *Ib.*

(15) *Thumbuswamy v. Hossein Rowshan*, 1 L. R., 1 Mad., 1, P. C.

Indian Registration Act, 1877. Now, as the Registration Act applies to the whole of British India,⁽¹⁾ "except such districts or tracts of country as the Local Government may, from time to time, with the previous sanction of the Governor-General in Council, exclude from its operation,"⁽²⁾ it follows that the provisions of this section will presumably apply to all parts of British India, except where registration is not compulsory. This clause only guards against any conflict that may arise by the enforcement of this Act and the non-enforcement of the Registration Act to which it appeals for validating mortgages and sales of the value of more than Rs. 100, and leases from year to year or for any term exceeding one year, and deeds of gifts of immoveable property. In short, this clause lays down that where the Registration Act is in force, sales and mortgages of over Rs. 100 in value, and leases from year to year or for any term exceeding one year, and gifts irrespective of value shall be made only by a registered instrument. The above sections are to be considered as supplementary to the Indian Registration Act.⁽³⁾

20. Application of its Principles where Act not in force.—

It has been held by the Privy Council that the principles embodied in this Act may, in preference to the English practice, be applied to the provinces where the Act is not in force,⁽⁴⁾ and also to suits instituted on a legal relation arising before the passing of the Act,⁽⁵⁾ since "the Courts cannot have a better guide to their discretion than what the Legislature has stated to be the rule in suits of this kind." Accordingly, though the Act is not in force in the Punjab, its principles have been nevertheless applied to it, it being held that the principles it embodies being founded on equity and justice are of universal application throughout India.⁽⁶⁾ As such, its equitable principles have been applied to Upper⁽⁷⁾ and Lower Burmah,⁽⁸⁾ Sindh,⁽⁹⁾ and Pegu.⁽¹⁰⁾ But these would not include its special provisions as regards attestation and registration⁽¹¹⁾ which though intended to prevent fraud are not the outcome of manifest equity.

2. In the territories to which this Act extends for the time

Repeal of Acts

being, the enactments specified in the Schedule hereto annexed, shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

Saving of certain enactments, incidents, rights, liabilities, &c.

(a) the provisions of any enactment not hereby expressly repealed:

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this

(1) Excepting the Scheduled Districts of the Madras Presidency (*Port St George Gazette*, Oct., 4, 1881, Pt. 1, p. (516).

(2) S. 1, Indian Registration Act (III of 1877).

(3) Amending Act (III of 1885), s. 3.

(4) *Kader Moulou v. C. W. Nepean*, 1 L. R., 26 Cal., 1, P. C.

(5) *Rameshwar v. Syed Mohamed*, 1 L. R., 26 Cal., 39, P. C.

(6) *Lakshmi Narayan v. Tara Singh*, 1 P. L. R., 513; *Nipalchand v. Ali Baksh*, (1907) P. R., No. 9; *Saran v. Bashisha*, (1907)

P. R., No. 148; *Jagannath v. Budhwa*, (1907) P. R., No. 2; *Azizuddin v. Bhagwan Das*, (1912) P. R. (Rev.), No. 6; *Champo v. Shankar*, 14 I. C., 232.

(7) *Mi Nan v. Nga Hmi*, 4 I. C. 755.

(8) *Tha Kaing v. Ma Htaik*, 3 L. B. R., 341; *Shwe Lok v. Ma Serk*, 4 L. B. R., 222.

(9) *Wadero v. Sajannul*, 3 S. L. R., 17, 1 I. C., 952.

(10) *Nagappa v. Maung Po.*, 12 I. C., 849.

(11) *Jairam v. Balkrishna Das*, 3 N. L. R., 72 (75).

Act, and are allowed by the law for the time being in force :

- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or,
- (d) save as provided by section fifty-seven, and Chapter four of this Act, any transfer by operation of law, or by or in execution of, a decree or order of a Court of competent jurisdiction : and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

21. Analogous Law.—The corresponding section of the Indian Contract Act also saves any usage or customs of trade, and any incident of any contract not inconsistent with the provisions of that Act.⁽¹⁾ Thus, the common law obligations attaching to common carriers at the time of the passing of the Carriers Act ⁽²⁾ were and are still in force.⁽³⁾ In introducing this clause the Select Committee reported thus : " We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option, which the Bill, as introduced, expressly preserved, there must be many other incidents of native contracts with which it is desirable not to interfere."⁽⁴⁾ A similar saving clause has been inserted in the Indian Contract Act, and in interpreting which the Privy Council said :—" The Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts. . . . The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. . . . If in codifying the law of contract, the Legislature has found occasion to deal with tort, or with a branch of the law common to both contract or tort, there was all the more reason for making its meaning clear."⁽⁵⁾ The law of pre-emption, for example, and the rule as to *damdupat* which obtains amongst Hindus would thus remain unaffected by the provisions of the Act.

22. Principle of cl. (d).—This clause does not go beyond meaning that the various provisions in the Act regulating and codifying the law as to the actual transfers by act of parties shall not affect transfers made *in invitum*. In other words where the incidents of the latter are different the Act would not affect them.⁽⁶⁾ The term 'affect' requires a cautious interpretation, but it does not go beyond meaning that a transfer made under the circumstances indicated in the clause shall not be affected or

(1) Indian Contract Act, s. 3.

(2) Act III of 1865.

(3) *Mathra v. I. G. S. N. & Co.*, I. L. R., 10 Cal., 166, F. B.

(4) Report, dated 2nd February, 1878, § 3.

(5) *Per Lord Macnaghten in the Irrawaddy Flotilla Co. v. Bugwandas*, I. L. R., 18 Cal.,

620 (628, 629), P. C.; approving *Mothoora v. I. G. S. N. Co.*, I. L. R., 10 Cal., 166, F. B.; overruling *Kuwerji v. Great Indian Peninsula Ry. Co.*, I. L. R., 3 Bom., 109.

(6) *Promotho v. Kali Prasanna*, I. L. R., 28 Cal., 744 (747, 748); distinguishing *Jibanti v. Gokool*, I. L. R., 19 Cal., 760.

validated or invalidated by anything contained in the Act. Hence where the interest of the lessee and the lessor in the whole property becomes united in the same person in the same right, there is a merger of the term under section 111 of the Act. Now such a merger may be occasioned by act of parties or by operation of law, or in execution of a decree. There is nothing in section 111 to indicate that the result in law there stated is only to ensue in the case of transfer by act of parties. Can it then be said that the provisions of this section enunciating a general principle would not apply by virtue of the clause. It cannot be said that it *affects the transfer* by acting on its validity and that therefore the clause would not apply. Any other view would lead to strange anomalies though, if the language of the statute be clear and explicit, the language should be followed disregarding the anomalies it may produce. For instance, a zemindar grants a *putni* to his son; he dies intestate and his son as his heir succeeds him as zemindar; he is also a *putnidar*; the transfer of the zemindari interest is by operation of law, and if the clause applied, there would be no merger, section 111 being inapplicable. But if the zemindar granted his son a *putni*, then granted him the zemindari interest, and died the next day, there would be a merger.⁽¹⁾

23. Meaning of words—"But nothing herein contained shall be deemed to affect . . . any enactment not hereby expressly repealed." The word "herein" has been held to refer only to this section and not the whole Act,⁽²⁾ but this is obviously not the case. For if it had only the limited reference to the section it "affects" nothing and certainly not the rules and enactments specifically mentioned therein. This clause implies that an Act left merely *unrepealed* shall still continue to be of force unless it has been *expressly* repealed. Thus the Indian Contract Act⁽³⁾ without expressly repealing the Common Carriers Act⁽⁴⁾ deals at some length with the subject of bailment, and it was accordingly contended that inasmuch as the delivery of goods by the customer to a common carrier constitutes a bailment to him, the responsibility for non-delivery since the passing of the Contract Act must be determined by the law enacted in sections 151 and 152 which were distinctly inconsistent with the liability under the Carriers Act,⁽⁵⁾ but their Lordships ruled that not having been *expressly* repealed, the Carriers Act remained unaffected: "It seems a strange thing to say that the provisions of an Act are not affected, when the whole foundation upon which the Act rests is displaced and almost every section assumes a different meaning or comes to have a different application."⁽⁶⁾ "*Any terms or incident of contract*:" It should be noted that this clause does not save, as does the corresponding clause of the Contract Act, "*any usage or custom of trade*." Probably the latter proviso was inserted in view of the Contract Act being mostly concerned with moveable property and by which mercantile contracts would ordinarily be regulated. "*Any right or liability, &c.*:" This clause in effect preserves intact substantive rights. "*Any relief in respect of any such right or liability*." The subject will be found discussed in the ensuing commentary. "*Any transfer by operation of law*:" A transfer *in invitum*, as for example in execution of a decree, does not fall within the purview of the Act which is limited in its scope to only "*transfers by act of parties*." Accordingly sales on insolvency, &c., are all within the

(1) *Promotho v. Kali Prasanna*, I.L.R., 28 Cal., 744 (750).

(2) *Per Cox*, J., in *Naba Krishna v. Mobit Kali*, 9 I. O., 840.

(3) Act IX of 1872.

(4) 11 Geo. 4 & 1 Wm. 4.

(5) Act III of 1865.

(6) *Irrawaddy Flotilla Co. v. Bugwandas*, I.L.R., 18 Cal., 620 (629), P. C.

exception. A sale made in execution of a decree by a Court of *incompetent* jurisdiction would, however, fall within the Act. "*Save as provided by section 57:*" This section though occurring in the Act relates to sale by Court, and had therefore to be excepted. "Chapter IV:" relates to mortgages of immovable property and charges, the provisions of which would thus govern all transfers whether made by act of parties or by operation of law.

24. Enactments repealed.—The enactments repealed wholly or partially are specified in the schedule. Except the following eight enactments which have been partially repealed, all the other enactments on the subject have been wholly repealed :

- (1) Modes of conveying land (XXXI of 1854), s. 17.
- (2) Mesne profits and improvements, s. 1; in the title the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
- (3) Indian Trustee Act (XXVII of 1866), s. 31.
- (4) Punjab Laws Act (IV of 1872), so far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
- (5) The Central Provinces Laws Act (X of 1875), so far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
- (6) Oudh Laws Act (XVIII of 1876), so far as it relates to Bengal Regulation XVII of 1806.
- (7) Specific Relief Act (I of 1877) in ss. 35 and 36, the words "in writing."
- (8) Bombay Regulation (V of 1827), acknowledgment of debts, interest, mortgagees in possession, s. 15.

In addition to the enactments specified in the schedule, the Act has further the effect of repealing by necessary implication O. 2, r. 2 (corresponding to old s. 43) of the Code of Civil Procedure in cases to which Chapter IV applies, in that it enables a mortgagee who has already sued the mortgagor personally for the debt, to sue again to enforce his mortgage.⁽¹⁾ A slight alteration was also made in Schedule IV. No. 129 of the last Code of Civil Procedure,⁽²⁾ by substituting the words "decree absolute" for "final decree."⁽³⁾ The change was only verbal and was perhaps dictated by the corresponding terminology of the English practice, which has been more closely followed in the present Code.

25. Effect of Repeal.—The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.⁽⁴⁾ On the other hand no one has a vested right in any particular form of procedure,⁽⁵⁾ which is always retrospective, unless there be some good reason against it.⁽⁶⁾ (§ 17).

Clause (c) lays down in effect what is provided by section 6 of the General Clauses Act. Retro-spective effect is not ordinarily given to an enactment so as to affect *substantive* rights, but provisions affecting mere *procedure* are ap-

(1) See O. 34, r. 14, and the Commentary thereon.

(2) Act XIV of 1882.

(3) S. 87 now repealed, amended and re-enacted as O. 34, r. 3, Code of Civil Procedure (Act V of 1903).

(4) General Clauses Act (I of 1868), s. 6; see also s. 6 of the General Clauses Act (X of 1897), quoted *post*.

(5) *Warner v. Murdoch*, L. R., 4 Ch. D.,

752; *Rongai v. Empress*, I. L. R., 9 Cal., 513; *Jogessurdas v. Asani*, I. L. R., 14 Cal., 553; *Tupsee Singh v. Ramsaran*, I. L. R., 15 Cal., 376; *Javanmal v. Muktabai*, I. L. R., 14 Bom., 516; *Balkrishna v. Bapu*, I. L. R., 19 Bom., 204; *Gungaram v. Punamchand*, I. L. R., 21 Bom., 822.

(6) *Gardner v. Lucas*, 3 App. Cas., 603; *Kimbray v. Draper*, L. R., 3 Q. B., 160.

plied to pending proceedings, and an enactment affecting *rights* of property is not to be so construed as to give retrospective effect unless the intention that it shall have such effect clearly appears.⁽¹⁾

That a law creating a new right ought not to have retrospective effect is not universally true. Ordinarily, no doubt, a new law should affect only future transactions and not past ones. But the rule against retrospective operation is intended to apply not so much to a law creating a new right as to a law creating a new obligation or interfering with vested rights.⁽²⁾ "Every statute," as has been said, "which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be presumed out of respect to the legislature to be intended not to have a retrospective operation."⁽³⁾ The cases on the retro-activity of enactments have been considered and reviewed at great length in a Full Bench case of the Bombay High Court.⁽⁴⁾ The words "proceedings commenced" in section 5 of the General Clauses Act have received a judicial interpretation at the hands of the Bombay High Court.⁽⁵⁾ In this case it was contended that the omission to provide for the disposal of appeals, by the newly-constituted Subordinate Judges from suits decided under the old Act in force prior to the passing of the Bombay Civil Courts Act, indicated that the legislature intended that all appeals should be regulated by the new law. Couch, C.J., however, delivered the following judgment:—"It is clear it was not the intention of the legislature to take away the right of appeal in any case in which it existed at the date of the passing of the Bombay Courts Act. It is true that the existing Regulations by which the procedure in appeal was governed was repealed by that Act, but this does not take away the right of appeal."

26. By section 6 of the General Clauses Act ⁽⁶⁾ it is now declared as follows:—

"6. Where this Act, or any Act of the Governor-General in Council or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears the repeal shall not—

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any enactment so replaced of anything duly done or suffered thereunder; or

(1) *Lal Mohan v Jogendra*, I. L. R., 14 Cal., 636; *Tupsee Singh v. Ram Saran*, I. L. R. 15 Cal., 376; *Uzir Ali v. Ram Komal*, I. L. R., 15 Cal., 333; *Devnaram Dutt v Narendra Krishna*, I. L. R., 16 Cal., 267, F. B.; *Gurish Chundra v. Apurba Krishna*, I. L. R., 21 Cal., 940; *Jogodanund v. Amrita Lal*, I. L. R., 22 Cal., 767; *Hajrat v. Valuhussa*, I. L. R., 18 Bom., 429; *Balkrishna v. Bapu Yesaji*, I. L. R., 19 Bom., 204; *Nagar v. Jwa Bhai*, I. L. R., 19 Bom., 80; *Doshi v. Malek*, I. L. R., 20 Bom., 565 (doubting the last); *Rangasami v. Varasami*, I. L. R., 18 Mad., 477; cf. *Muhammad Yusuf-ud-din v. Queen-Empress*, I. L. R., 25 Cal., 20 P. C.; *Kala Tihari v. Narayan*, 13 P. C. L. R., 14

Uzir Ali v. Ramkomal Shah, I. L. R., 15 Cal., 333 F. B.; *Gurish Chundra Basu v. Apurba Krishna Das*, I. L. R., 21 Cal., 940, F. B. The cases in I. L. R., 14 Cal., 636 and I. L. R., 21 Cal., 940, have been overruled by the Full Bench case of *Jogodanund v. Amrita Lal*, I. L. R., 22 Cal., 767, but on a different point.

(3) Maxwell's "Interpretation of Statutes" (3rd Ed.), 299, citing *per* Chancellor Kent in *Dash v. Fankleek*, 7 John., 504; *In re Ratansi*, I. L. R. 2 Bom., 148, F. B.

(4) *In re Ratansi*, I. L. R., 2 Bom., 148, F. B.

(5) *Ratanchand v. Hanmant*, 6 B.H.C.R., A.C.J., 166.

(6) Act X of 1897; a similar but less comprehensive provision was inserted in s. 6 of the General Clauses Act (I of 1963) since repealed by Act X of 1897.

(2) *Jogodanund v. Amrita Lal*, I. L. R., 22 Cal., 767, F. B. (*per* Bannerji, J.); dissenting from *Lal Mohan Mukerji v. Jogendra Chunder Roy*, I. L. R., 14 Cal., 636, F. B.;

- (c) affect any right, privilege, obligation or liability acquired, accrued, or incurred under any enactment so repealed ; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or
- (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

And any such investigation, legal proceeding or remedy may be instituted, continued or enforced ; any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

27. Proceedings.—"The question is whether the word 'proceedings' is sufficiently comprehensive to include a suit in which a decree has been given A suit is a judicial proceeding, and the word 'proceedings' must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal, but not in execution of a decree."⁽¹⁾ This case was followed by the Full Bench ⁽²⁾ of the same Court later on, where Westropp, C.J., observed : "On the subject of giving such a construction to statutes, Baron Rolfe (afterwards Lord Cranworth) in *Moon v. Durden*,⁽³⁾ a leading case on that topic, said : 'The general rule on this subject is stated by Lord Coke :⁽⁴⁾ *Nova Constitutio futuris formam imponere debet non prateritis* ;⁽⁵⁾ and the principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes, unless where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively." Baron Aldersen pointed out in that case the extensive and dangerous consequence that might follow if the Courts did not abide by that general rule, and Baron Park (Lord Wensleydale) said that it 'is deeply founded in good sense and strict justice and has been acted upon in many cases,⁽⁶⁾ and is now indisputable law.'⁽⁷⁾ The next question that may often arise is—supposing that the proceedings, commenced under the repealed enactments, are not affected by the new statute, by which statute are the pending proceedings to be governed till their determination? Lord Denman and his colleagues of the King's Bench ⁽⁸⁾ have laid down that they were of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in a suit, unless the legislature expresses a clear intention to vary the relation of litigant parties to each other.

28. Statutes affecting vested rights.—There is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in the Courts of Justice, such as that relating to the service of proceedings, or what evidence must be produced to prove particular facts.⁽⁹⁾ Retrospective construction of the Limitation Act does not take away any vested right, and cases decided thereon do not affect the question.⁽¹⁰⁾

(1) *Ratan Chand v. Hannant*, 6 B.H.C.R., 166 ; *Hurrosundari v. Bhojohari*, 1 L.R., 13 Cal., 86 (189) ; *Satghuri v. Mujdan*, 1 L.R., 15 Cal., 107 ; *Deb Narain v. Navendra*, 1 L.R., 16 Cal., 267 (274), F.B.

(2) *In re Ratansi*, 1 L.R., 2 Bom., 148, F.B.

(3) 9 Q.B.D. 672.

(4) 2nd Institute, 292.

(5) "A new law ought to impose form on what is to follow not on the past." A new enactment ought to be prospective, and not

retrospective in its operation.

(6) *Moon v. Durden*, 9 Q.B.D. 672 ; *Doolubdass v. Ramall*, 7 M.I.A., 239 (256) ; Kent's Comm. (10th Ed.), 511.

(7) *In re Ratansi*, 1 L.R., 2 Bom., 148 (158), F.B. ; *Bala v. Narayan*, 13 C.P.L.R., 143.

(8) *Hitchcock v. Way*, 6 A. and E., 943 (951).

(9) 30 L.J., N.S., Ex., 40.

(10) Westropp, C.J., in *In re Ratansi*, 1 L.R., 2 Bom., 148 (170, 171), F.B.

Such cases are decided on regulations affecting procedure only.⁽¹⁾ Retrospective construction of statutes defining or creating rights or affecting vested rights is condemned by the Privy Council.⁽²⁾ "Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature."

29. Acts of three classes.—The effect of Legislative change in the law upon pre-existing rights and proceedings instituted before the change was made may have to be considered in cases which may be divided into three classes :—

(i) The first class of these cases consists of those in which the Courts have had to construe enactments which have altered the law, not by the mere repeal of earlier enactments so as to bring the case under section 6 of the General Clauses Act, but by new affirmative provisions, in which the new enactments contain in themselves no special rule for their own interpretation. In such cases the Courts have applied the settled rule of construction, ordinarily acted upon in the absence of any statutory rule inconsistent with it; namely, that, retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings.

(ii) The second class comprises those in which the enactment to be construed provides its own rule of construction, by expressly or impliedly declaring that it is, or is not to have retrospective operation, or the extent to which it is to affect pending proceedings.

(iii) The third class consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by section 6 of the General Clauses Act⁽³⁾ In a Colonial appeal the Privy Council have laid down against retro-action of an enactment unless "the intention of the legislature that a statute should be retrospectively construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice, that an act legal at the time of doing it, should be made unlawful by some new enactment."⁽⁴⁾ In this case the respondent entered the service of the Government of New South Wales in the year 1835 as a road surveyor at a yearly salary. He continued till 1895, when he was summarily dismissed without compensation. In 1896 he sued the appellant for damages for wrongful dismissal. Five months after his dismissal, the New South Wales Act⁽⁵⁾ had been passed, and section 58 of the Act enacted that "nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it had existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the

(1) These cases are *Towler v. Chatterton*, 6 Bing., 259; *Ramchandra v. Soma*, 1 L. R. 1 Bom., 305; *Abdul Karam v. Munji Hansraj*, 1 L. R. 1 Bom., 245, 302; *Sitaram Vasudeo v. Khanderao Bulkrishna*, 1 L. R. 1 Bom., 286; *Ruckmaboye v. Lulloobhoy*, 5 M. I. A., 234.

(2) *Delhi and London Bank v. Orchard*, 1 L. R., 3 Cal., 47, P. C.

(3) *Debnarain v. Narendra*, 1 L. R., 16 Cal., 267 (271, 272); followed in *Ismail v. J. Leslie & Son*, 1 C. W. N., 188.

(4) *Young v. Adams*, [1899] A. C., 476, quoted with approval in *Foulkes v. Muthusami*, 9 M. L. J. R., 207.

(5) 59 Vic., c. 25, p. 58.

public service." The appellant (Government) maintained that by virtue of this section they were entitled to dismiss any public servant at their pleasure, as they had a right to do before the Civil Service Act of 1884. The Civil Service Act of 1884 had provided that the Government had no power to dismiss its servants except upon the grounds and after the enquiry which the Statute prescribed. The Privy Council held that the Act of 1895 could not be construed retrospectively unless there was an express provision in the Act to that effect, and that since the respondent was dismissed otherwise than in the manner provided by the Act of 1884, he was entitled to damages.

From the principle above enunciated it follows that where proceedings have not commenced under the repealed enactment, the passing of a new Act gives no right.⁽¹⁾ Even where the proceedings have commenced under the regulations, if the plaintiff has not duly followed up the procedure therein laid down, this Act does not save him.⁽²⁾

30. Saving of existing rights and liabilities.—The effect of the passing of an enactment on prior rights and liabilities has been generally

discussed before. The present clause only pointedly saves the same rights and liabilities which could not have been otherwise affected even if the clause had not been enacted, for apart from the presumption against the retrospectivity of a statute it is expressly provided by the General Clauses Act ⁽³⁾ that the repeal of any Statute, Act or Regulation shall not affect anything done, or any proceeding commenced, before the repealing Act shall have come into operation. While then there is ample authority to support the clause, its practical application in an Act where matters both relating to rights and procedure have been freely interspersed may not be so easy.

31. Speaking generally, the clause may come into play in at least four different classes of cases:—

- (i) Where the legal relation is created before the passing of the Act;
- (ii) Where the legal relation is created *subsequently* to its passing, though arising out of prior transactions;
- (iii) Where a decree is obtained after the Act in respect of a right created before it;
- (iv) Whenever there is a dispute as to what is (a) a matter of right or is (b) a matter of mere procedure.

It may be stated that so far as regards the equitable provisions of the Act the law remains unaltered, and transactions whether entered into before or after the Act will be preferably governed by the provisions of the Act. Thus, the principles enunciated in sections 10, 108 (c) and 111 (g) have been held to govern a lease made in 1862.⁽⁴⁾ On the other hand, the provisions of section 108 (j) which empowers the lessee to transfer his lease hold have been held to be inapplicable

(1) **Prior legal relations.**

(1) *Bhobo Sundari v. Rakhal*, 1 L. R., 12 Cal., 583. F.B.; *Ganga Sahai v. Kishan*, 1 L. R., 6 All., 262.

(2) *Setla Baksh v. Lalita Prasad*, 1 L. R., 8 All., 388; *Umesh Chunder v. Chun Chun*, 1 L. R., 15 Cal., 357; *Basu Chandra Sen v.*

Enayat Ali, 1 L. R., 20 Cal., 236.

(3) S. 6, Act I of 1868

(4) *Parameshwari v. Vittappa*, 1 L. R., 26 Mad., 157; *Mofiz Sheikh v. Basiklal*, 12 C L J., 246.

to a lease created before the Act,⁽¹⁾ the transferability of which must be determined by custom or contract. So while section 111 (g) requires that on a forfeiture incurred as therein provided the lease is not determined *ipso facto* unless the "lessor does some act showing his intention to determine the lease," but since no such condition could be held to apply to a lease created before the Act, it has been held that the lessor was entitled to eject the lessee upon a forfeiture of his lease.⁽²⁾ In some respects, however, the Act merely reproduces the pre-existing law, in which case there is no difficulty. Such, for instance, was the common law rule now enacted in section 108 (h) and which differed from the English rule contained in the maxim *quicquid plantatur solo solo cedit*.⁽³⁾ So, of course, the Act could not invalidate a mortgage executed prior to its enactment for want of attestation as required by section 59.⁽⁴⁾

32. With regard to the rights saved it may be premised that the Act saves both investitive as well as divestitive or extinctive rights. Hence where on a mortgage executed in 1865 the mortgagee took proceedings under Regulation XVII of 1806, which entitled him to possession after the year of grace and on the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession unless brought within twelve years from the date "when the mortgagor's right to possession determined" would be barred by limitation,⁽⁵⁾ the mortgagor's right of possession was determined on the 17th February 1866, but he had sold parcels of the mortgaged land down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession. The mortgagee, on the other hand, sold his interest in 1879, and his transferee now sued in 1882 on the coming into operation of the Act for foreclosure and possession. The suit for foreclosure being for the first time introduced by the Act its aid was solicited for the purpose of limitation which allowed sixty years for maintaining a suit for foreclosure,⁽⁶⁾ but it was held that the mortgagor's right of possession having been determined on the 17th February 1866, and the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, viz., on the 17th February 1878,⁽⁷⁾ such right was not revived by the subsequent creation of suits for foreclosure, and that the title of the transferee made through the mortgagee,⁽⁸⁾ to sue the purchasers for possession of the mortgaged land was barred by time.⁽⁹⁾ So where in a suit for foreclosure and possession under a deed of conditional sale, notice of foreclosure was issued under the Regulation, but before the expiration of the year of grace, the Regulations were repealed by the Act, it was held that the pro-

(1) *Ramcharan v. Haricharan*, 7 C.L.J., 107; *Hara Moti v. Annoda*, 7 C.L.J., 553; *Hari Nath v. Rajchandra*, 2 C.W.N., 122; *Modhu Sudan v. Kamru*, I.L.R., 32 Cal., 1023; *Madhab Chandra v. Bejoy Chand*, 4 C.W.N., 574.

(2) *Padmanabha v. Ranga*, 6 I.C., 447; dissenting from *Vencatramana v. Gundaraya*, I.L.R., 31 Mad., 403; *Anandamojee v. Lakhi Chandra*, I.L.R., 33 Cal., 329 on the ground that the distinction noted in the text consequent upon the date of the lease was not considered.

(3) *Mofiz Sheikh v. Basiklal*, 12 C.L.J. 246.

(4) *Jatkar v. Mukemda*, 14 C.L.J., 369.

(5) Art. 125, Sch. II, Act XV of 1877 (now Act IX of 1908).

(6) Art. 147, Sch. II, Act XV of 1877 (now Act IX of 1908).

(7) Art. 135, Sch. II, Act XV of 1877 (now Act IX of 1908).

(8) The title of the transferee had, it should be noted, arisen out of the "legal relation" between him and his vendor. See *Srinath v. Khetter Mohan*, I.L.R., 16 Cal., 693 (701), P.C.

(9) Art. 135, Sch. II, Act XV of 1877 (now Act IX of 1908); *Srinath v. Khetter Mohan*, I.L.R., 16 Cal., 693 (701), P.C.; s. 60 post.

ceedings for foreclosure having been commenced under the Regulation, the effect of the notice was to vest a right in the mortgagee which was saved by the clause under reference.⁽¹⁾ Similarly in a suit on a usufructuary mortgage executed in 1878, the mortgagee's suit for sale of the mortgaged property was dismissed in accordance with the provisions of the Act which disallowed a suit for recovery of the debt or sale of the property.⁽²⁾ But the High Court, relying upon the clause, held that the provisions of the Act did not control the rights and liabilities of the parties, and a decree for the amount claimed and for sale of the mortgaged property was accordingly passed.⁽³⁾

33. Thus again on a hypothecation-bond, dated 1870, which would, from its terms, constitute a simple mortgage as defined in the Act, a question having arisen whether the suit would be governed by Art. 132 of the Limitation Act as one "to enforce payment of money charged upon immovable property" or by Art. 147 which allowed sixty years, it was held that, though the transactions fell within the purview of one or the other of the two prescribed classes of incumbrance, the Act which, for the first time defined and contradistinguished a "charge" from a mortgage and thereby sanctioned different periods of limitation could not retro-act so as to allow the larger period allowed only for "mortgages" which under the Act had assumed a new identity with distinctive incidents. "Prior to the present Act the obligor had only the rights of an ordinary debtor under a hypothecation deed. On the one hand he had no right of redemption, whilst on the other hand the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale they did so as it was the only mode in which a charge could be enforced. There is no doubt that this Act affects the Act of Limitation as to mortgages executed subsequently to July 1882, but, as already remarked, it does so by creating new rights and liabilities in the obligor and obligee with reference to those mortgages."⁽⁴⁾ The difference between a mere pledge or hypothecation of land and mortgage of land was clearly recognized before the Act,⁽⁵⁾ the term 'mortgage' being confined solely to describe transactions in which some interest of the mortgagor in the lands was transferred by the mortgage to the mortgagee, the absence of which was said to create merely a charge.⁽⁶⁾ On a similar principle a decree-holder, who had obtained a decree in 1880 against his judgment-debtor upon a mortgage-bond declaring his lien on the properties hypothecated and authorizing their sale, was held entitled to execute his decree in spite of sections 67 and 99 of the Act under which a fresh suit would have been necessary. The decree of 1880 having constituted a legal relation between the parties thereto, their rights and liabilities could not be affected by the Act which was subsequently enacted.⁽⁷⁾ In a similar case the decree being obtained on the 20th November 1881, and the property attached in execution on the 9th March 1882, the order of sale being passed in the following month, the decree-holder was

(1) *Gudhari v. Mt. Jugree*, 2 C P. L. R., 180.

(2) S. 60, *post*.

(3) *Nanu v. Raman* I L. R., 16 M. d., 335 (938); *Golan v. Raghunath*, 4 A. W. N., 269.

(4) *Alba v. Nanu*, I. L. R., 9 M. d., 218; following *Mahammad v. Chalke*, I L. R., 7 All., 120; *Shiblal v. Ganga*, I. L. R., 6 All., 551, F. B.; *Lallu v. Naran*, I L. R., 6 Bom., 719; *Davani v. Ratna*, I L. R., 6 M. d., 417; confirmed in *Rangasami v. Muttukumarappa*, I L. R., 10 M. d., 509, F. B.; following *Lallubhai v. Naran*, I. L. R., 6 Bom., 719;

dissenting from *Shiblal v. Ganga Prasad*, I. L. R., 6 All., 551 (554), F. B.

(5) *Chetti v. Sundaram*, 2 M. H. O. R., 51; *Rangasami v. Muttukumarappa*, I. L. R., 10 M. d., 509, F. B.

(6) *Rangasami v. Muttukumarappa*, I. L. R., 10 M. d., 509 (513), F. B.

(7) *Dinendra v. Chandra Kishore*, I L. R., 12 Cal., 436, distinguishing *Ganga Sahai v. Kishen Sahai*, I. L. R., 5 All., 262, on the ground "that the identical point raised in this case was not that which was raised in that case" (p. 438).

held entitled to sell under the order, which right he would have forfeited under section 99 if the Act had been retrospective.⁽¹⁾ So, where before the Act, the mortgagee obtained a money-decree against his mortgagor and in execution sold the mortgaged property which was purchased by his son, and the mortgagor's heirs thereupon sued for redemption and setting aside the sale as made in contravention of the provisions of section 99, it was held that the section could not invalidate a sale held and sanctioned previously thereto.⁽²⁾ But the result would have been different if the decree had been obtained after the Act came into operation, for then the liability, which section 99 attaches to the mortgagee, would have disentitled him from bringing the property to sale "otherwise than by instituting a suit under section 67 of the Act."⁽³⁾ The time fixed for redemption in a decree passed before 1882, could not for a similar reason be enlarged as provided in section 93.⁽⁴⁾ Prior to the passing of the Act the doctrine of merger now enunciated in section 111 (d) was not applied to leases. And so it was held that a *putni* interest could not merge in the zemindari interest if the two came into the same hands, but in a case decided since the passing of the Act, the principle of merger was held to be applicable to a *putnidar*, although a *putni* lease is scarcely within the comprehension of the Act.⁽⁵⁾

34. Turning now to the second group of cases before classified, namely, that in which the legal relation is created *subsequently* to the coming into operation of the Act, though arising out of pre-existent rights, it is clear that the clause does not save them.

(2. Subsequent legal relation.

Thus the assignment of a mortgage-bond made after the Act came into operation would be governed by its provisions, even though the mortgage-bond itself may have been executed before.⁽⁶⁾ Similarly an assignment of a registered bond executed before the Act, after it came into force, would be subject to the rule laid down in Chapter VIII⁽⁷⁾ but an assignment anterior in date to the passing of the Act would not be so subject.⁽⁸⁾ In another case where the liability was incurred before the Act, the creditor sued under the Act claiming interest at the stipulated rate with directions for sale in case of non-payment in six months. The mortgagors appealed to the Privy Council and contended that as the claim related to a transaction prior to the Act, section 86 was inapplicable, failing which the first Court, which had exercised its discretion under section 209 of the Code of Civil Procedure in reducing the rate from twelve to four per cent., was right, but their Lordships seemed to have inclined to the view that, since the suit was filed after the Act, a decree under sections 96 and 83 of the Act allowing the rate of interest provided by the mortgage up to the date of realization could not be impugned.⁽⁹⁾ But the decree was upheld upon the ground that, even if the Act did not apply, the judicial discretion given to

(1) *Waranappa v. Somacharlu*, I.L.R., 19 Mad., 332; following *Dunendra Nath v. Chandra Kishore*, I.L.R., 12 Cal., 436.

(2) *Husein v. Shankargiri*, I.L.R., 23 Bom., 119; explaining *Martand v. Dhondo*, I.L.R., 22 Bom., 624.

(3) S. 99, *Kaveri v. Ananthayya*, I.L.R., 10 Mad., 129; *Sathurayyan v. Muthusami*, I.L.R., 12 Mad., 325; *Durgayya v. Anantha*, I.L.R., 14 Mad., 74, explained in (but not quite accurately); *Husein v. Shankargiri*, I.L.R., 23 Bom., 119.

(4) *Chennaya v. Malkapa*, I.L.R., 20 Bom., 279; *Day v. Kelland*, [1900] 2 Ch., 745.

(5) *Jibanti v. Gookool Chunder*, I.L.R., 19 Cal., 760; explained in *Promotho Nath v. Kali Prasad*, I.L.R., 28 Cal., 744 (750).

(6) *Lala Jugaldeo v. Brij Behari*, I.L.R., 12 Cal., 505 (503); followed in *Subhramal v. Venkatram*, I.L.R., 10 Mad., 289.

(7) *Rathnasami v. Subramanya*, I.L.R., 11 Mad., 56.

(8) *Rathnasami v. Subramanya*, I.L.R., 11 Mad., 56, 59, 60.

(9) *Rameshwar v. Mahomed*, I.L.R., 26 Cal., 39 (45), P. C.

Courts could not have been better exercised than in accordance with what the Legislature has stated to be the rule in suits of this kind, "and the Courts cannot have a better guide to their discretion."⁽¹⁾

35. Thirdly, where a decree is obtained after the Act in respect of a right created before it, the authorities appear to be unanimous in favour of the applicability of the Act.⁽²⁾ But this is not because it requires a decree to create a jural relation between the parties, for it is created by the contract,⁽³⁾ but rather because the proceedings under the Act relate to procedure which is always retrospective in its operation.⁽⁴⁾ Hence if the plaintiff applies in proper time, i.e., before the trial, a suit for possession by a mortgagee under a deed of conditional sale may be converted into one for foreclosure under the Act,⁽⁵⁾ if the Court is satisfied that all the proper parties are before it.⁽⁶⁾ This ushers in another question, which not infrequently presents some practical difficulties in its application, as to what are the rules which affect vested rights as distinguished from those which merely affect procedure. It is indeed conceivable that the rules which immediately regulate the practice and procedure of the Courts, may also affect rights. Thus where the proceedings were commenced under the Regulation and notice of foreclosure had been served on the mortgagor, and as against him the year of grace had expired, but in the suit for possession a third party, who had purchased the mortgaged property at an execution-sale and obtained possession before the commencement of the foreclosure proceedings and on whom the necessary notice had not been served, intervened, it was held that, although the procedure laid down in the Act would apply, but it shall be subject to the restriction that it should not "affect any right or liability" and that since the purchaser would have been entitled to a year's notice under the repealed Regulation, a decree passed in the terms of section 86 of the Act should be drawn up, but substituting "one year" for "six months" therein prescribed.⁽⁷⁾ This case, however, came up for discussion before the Full Bench,⁽⁸⁾ when it was opined by Garth, C.J., that the clause⁽⁹⁾ was not intended to include rights depending upon the procedure of Courts, for example, the right to notice, or to serve it in a particular way; but subsequently he acceded to the view taken by the majority of the Court "as the balance of convenience would seem to be in favour of that view," which finally was that the provisions of the Act were to apply to the foreclosure of a mortgage dated previous to the Act.⁽¹⁰⁾ The case, where, during the time limited by the notice given under the Regulation, the Act comes into force, is simpler, for the passing of the Act would not prevent such notice taking the legal effect provided for by the Regulation.⁽¹¹⁾

(1) *Per* Lord Hobhouse in *Rameshwar v. Mahomed*, 1 L. R., 26 Cal., 39 (45), P. C.; *Kadir Moudin v. Nepean*, 1 L. R., 26 Cal., 1, P. C.

(2) *Kaveri v. Ananthayya*, 1 L. R., 10 Mad., 129; *Durgayya v. Ananthu*, 1 L. R., 14 Mad., 74.

(3) *Srinath v. Khetter Mohun*, 1 L. R., 16 Cal., 693 (701), P. C.

(4) "No suitor has any vested interest in the course of procedure." *Per* Mellish, L. J., in *Republic of Costa Rica v. Erlinger*, 3 Ch. D., 69; *Warner v. Murdoch*, 4 Ch. D., 750; *Wright v. Hale*, 30 L. J. Exch., 40; see cases cited *supra*.

(5) *Sitla v. Lolta*, 1 L. R., 8 All., 388; *Pargash v. Mohib*, 1 L. R., 11 Cal., 582 (overruled on another point in) *Bhabhusundari v. Rakhal*, 1 L. R., 12 Cal., 543.

(6) *Doma v. Nothar*, 1 L. R., 13 Cal., 50.

(7) *Pargash v. Mahabir*, 1 L. R., 11 Cal., 542.

(8) *Bhobo Sundari v. Rakhal Chunder*, 1 L. R., 12 Cal., 583, F. B.

(9) S. 2, cl. (c).

(10) *Bhobo Sundari v. Rakhal Chunder*, 1 L. R., 12 Cal., 583, F. B.; following *Gunga Sahai v. Kshen*, 1 L. R., 6 All., 262, F. B.

(11) *Brijnath v. Sheobaran*, 14 A. W. N., 2; *Gokul Singh v. Brijlal*, 5 A. W. N., 130.

36. One cannot help regretting that the language of the clause is by no means clear. (1) On the other hand, its words are so vague and indefinite that one almost despairs of trying to interpret them. (2)

37. Right, Liability, Relief.—The question whether the provisions of the Regulation as to the time within which the mortgagor could redeem and the corresponding provisions of the Act are provisions affecting right, or are merely provisions of procedure, is material for the purpose of considering the question as to the retrospectivity of the Act. For if the former, the clause saves its provisions, but not so, if the latter. The solution of the question depends upon what is comprehended in the terms "rights," "liability" and "relief" as used in the clause. It is, therefore, necessary to ascertain what, in strictness of language, is the right of the mortgagor, what is his liability, and what is the relief in respect of such right or liability. Clearly the *right* of the mortgagor is to have back his property on payment of the mortgage debt. The *liability* of the mortgagor is to have his property sold or foreclosed. The *relief* in respect of the mortgagor's right is the reconveyance or giving back of his property to him. The *relief* in respect of the mortgagee's right (which is equivalent to the mortgagor's liability) is the payment of the mortgage-money, or, in case of non-payment, the foreclosure of the mortgagor's equity of redemption. "There is," observed Trevelyan, J., "a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The rights and liabilities of the mortgagor and mortgagee and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it." (3) So far then as the question of reliefs and procedure is concerned, the Act would apply equally to transactions entered into before it came into operation. (4)

The right of repurchase conferred on persons whose immoveable property has been sold by section 310 A of the Code is, however, more than a mere matter of procedure and must be regarded as saved by the clause. (5)

38. Transfer by operation of Law.—Not only are the transfers by operation of law not governed by this Act, which is, as stated in the preamble, avowedly enacted "to define and amend certain parts of the law relating to the transfer of property by act of parties," but many transfers *inter partes* and a transfer by succession are not dealt with therein. (6) A transfer by operation of law may take place in various ways, e.g., on insolvency, forfeiture, or sale in execution of a decree. And since the clause expressly exempts such transfers, a registered conveyance is not necessary to give validity to them. (7) The question whether a transfer is by act of parties or is one effected by operation of law is usually not a matter of difficulty, for transfers by operation of law are governed by a well-defined set of rules to which transfers made under the Act are not

(1) *Per* Wilson, J., in *Bhobo Sundari v. Rakhal Chunder*, 1 L. R., 12 Cal., 583 (586), F. B.

(2) *Ib.*, p. 586.

(3) *Per* Trevelyan, J., in *Bhobo Sundari v. Rakhal Chunder*, 1 L. R., 12 Cal., 583 (589), F. B.; following *Gunga Sahai v. Kishen Sahai*, 1 L. R., 6 All., 262, F. B.

(4) *Mota Dm v. Kazim Husain*, 1 L. R., 13 All., 432, F. B.; *Gunga Sahai v. Kishen Sahai*, 4 A. W. N., 79.

(5) *Malikarjunedu v. Lingamurti*, 1 L. R., 25 Mad., 244 (275), F. B.

(6) *Kishore Lal v. Krishna*, 5 I C., 500 502.

(7) *Buloji v. Dajiba*, 2 C. P. L. R., 137.

ordinarily subject. But where a transfer, in order to be valid, is required to be sanctioned by the Court, it may be a question whether it fell within the first class of transfers treated of by the Act, or within the clause hereby exempted. Thus where in the course of the winding up of a company the official liquidator, with the sanction of the Court, sold by auction the remainder of a lease for a long term of years reserving a rent, but no written assignment was ever executed, and the question was whether the lease was invalid because not in writing and registered as required by section 107 of the Act, or whether it fell within the clause, the Court observed: "It is undoubted that every thing was done to make him assignee of the lease unless the case comes within the Transfer of Property Act. It is by no means easy to say whether or not the sale in the present case was within the meaning of section 2 (d) of that Act, a transfer by or in execution of an order of a Court of competent jurisdiction. Certainly without the order sanctioning the sale the defendant would have got no title from the official liquidator. In one sense it might be considered that the transfer in question was in execution of the order which was made."⁽¹⁾ It can scarcely be said that a transfer which is sanctioned by the Court is made by or in execution of its order. It may be that the sanction required is a mere formality or that it is necessary in order to safeguard the interests of the public, but would these facts alone take the transfer out of the operation of the Act?

39. The clause leaves intact the following species of transfer :—

(i) Sale made under section 57.

(ii) Law relating to mortgages of immoveable property and charges, contained in Chapter IV, and which would thus equally apply to mortgages and charges created by operation of law.

(iii) A transfer made by a Court of *incompetent* jurisdiction would obviously be governed by the Act.

(iv) Hindus, Mahomedans and Buddhists would all be governed by the Act, but are not subject to the rules contained in Chapter II in so far as they may be inconsistent with the rules of their own personal laws. An analogous provision ⁽²⁾ further exempts Mahomedans from the rules contained in Chapter VII relating to gifts, and save as provided in section 123 Hindus and Buddhists are likewise exempted from the provisions of that Chapter.

40. Who are the Hindus—Although the term "Hindu" is popularly understood to comprise only such people as follow the Hindu religion or rather its ceremonial observances, a wider class of people are subject to Hindu law. And while it may be truly said of a Hindu—*nascitur non fit*, still it is often difficult to reconcile the juristic conception of the term with its popular notion. Persons who would be unequivocally repudiated as non-Hindus have for a time immemorial been following Hindu law though not Hindu religion. It is not therefore essentially necessary that a follower of Hindu law should be a Hindu in the popular acceptance of the term. Kutchi Memons ⁽³⁾ who are Mahomedans by religion, Jains ⁽⁴⁾ who are dissenters from Hinduism, Mohsalam

(1) *Per Edge, C.J.*, and *Tyrell, J.*, in *Gaya Prasad v. Baij Nath*, I. L. R., 1 All., 176

(2) S. 129, *post*.

(3) *Moosa Haji v. Haji Abdul*, I. L. R., 30 Bom., 197 (2001); *Haji Saboo v. Ally Mahomed*, I. L. R., 30 Bom., 270; *Ashabai v. Tyeb Haji*, I. L. R., 9 Bom., 115; *Abdul Cadur v. Turner*, I. L. R., 9 Bom., 158, but see in

re Ismael, I. L. R., 6 Bom., 452; *Abdul v. Hanud*, 5 Bom. L. R. 1010

(4) *Lalla Mahabeer v. Kundun Koor*, 8 W. R., 116; *Chotay Lal v. Chunno Lal*, I. L. R., 4 Cal., 744; *Bachebi v. Makhan Lal*, I. L. R., 3 All., 55; *Bukhab v. Chumilal*, I. L. R., 16 Bom., 347; *Mandil Koer v. Phool Chand*, 2 C. W. N., 154.

Girasias⁽¹⁾ who were originally Rajput Hindus subsequently converted to Mahomedanism, Nihangs who belong to the brotherhood of celibates,⁽²⁾ Sadhs⁽³⁾ and Sikhs,⁽⁴⁾ and even Suni Borah Mahomedans,⁽⁵⁾ are all *prima facie* governed by the Hindu law in matters of succession and inheritance. And a low caste Hindu does not cease to belong to his caste merely because he has been converted to Mahomedanism or Christianity, unless he has abandoned his caste, that is, its ceremonials, customs, manners, moral standards and ideals. The question of abandonment is one of fact and may be proved by the adoption of the moral standards of Christianity, instead of those of his caste, his assimilation of his ideas to those of the Christian community which he joins, acceptance on his part of the authority of his pastors and teachers, in place of that of the headman of the caste, his abstention from the distinctive meetings and ceremonies of the caste or other similar circumstances incontestably shewing renunciation of the caste.⁽⁶⁾ A man does not cease to be a Hindu if he takes beef or eats food cooked by Mahomedans, Christians and low caste cooks or follows other heterodox practices. The result is not a renunciation of religion, but at most the infliction of a social punishment. A non-Hindu may become a Brahmo, and a Brahmo therefore need not be a Hindu, and a Hindu may become a Brahmo and need not cease to be a Hindu. Before a man can be declared to have ceased to be a Hindu by adopting another faith the fact of his conversion ought to be proved. If a Hindu has an admiration for the tenets of Christianity and attends Church service, he does not cease to be a Hindu; and his personal law does not cease to be binding on him without baptism. A declaration by a Brahmo under Act III of 1872, which provides for the civil marriages of persons other than Hindus, Jains, Sikhs, Christians, Buddhists and Mahomedans does not make a man a non-Hindu.⁽⁷⁾

41. In the absence of any custom to the contrary, or of any satisfactory evidence to show what form of Hindu law they have adopted, By what school governed. the members of a family who have adopted the Hindu religion are governed by the school of Hindu law in force in the locality where they reside.⁽⁸⁾ Thus in the absence of all evidence to the contrary a Hindu must be considered to be governed by the Mitakshara law where it prevails.⁽⁹⁾ In the United⁽¹⁰⁾ and Central Provinces, in the Southern⁽¹¹⁾ and Western India⁽¹²⁾ the Mitakshara is the leading authority, while Dayabhaga is the leading authority in Bengal. And if the doctrines of the Mitakshara are paramount, as in the

(1) *Entesangji v. Kuvar Harisangji*, I. L. R., 20 Bom., 181.

(2) *Sooruj Koomar v. Mahadeo*, 3 N. W. P. H. C. R., 50; *Collector of Dacca v. Jagab Chunder*, I. L. R., 28 Cal., 608. See on Gossain's generally Steele on the Law and Custom of Hindu Castes, App. B, p. 433. The order follow Hindu law generally, *ib.*, p. 435.

(3) *Gopi Chand v. Sujan Kuar*, I. L. R., 8 All., 616.

(4) *Sham Singh v. Sucha*, (1900) P. R. Cir., No. 79.

(5) *Bai Baiji v. Bai Santok*, I. L. R., 20 Bom., 59.

(6) *Abraham v. Abraham*, 9 M. I. A., 195 (239); *Gajapathi v. Sri Gajapathi*, 14 W. R., 88, P. C.; *Rattigudu v. Konda*, I. L. R., 24

Mad., 271; In re *Nabbi Sahib*, I. L. R., 6 Mad., 247; observed upon *Ghosal v. Ghosal*, 8 Bom. L. R., 770.

(7) *Bhagwan Koer v. Bose*, I. L. R., 31 Cal., 11 (33), P. C.; cf. *Kusum Kumari v. Satya Ranjan*, I. L. R., 30 Cal., 999 (1009); *Ghosal v. Ghosal*, I. L. R., 31 Bom., 25.

(8) *Panundra v. Rajeswar*, I. L. R., 11 Cal., 463, P. C.; *Ram Das v. Chundra Dassia*, I. L. R., 20 Cal., 409.

(9) *Jugo v. Kurun Singh*, 22 W. R., 341.

(10) *Bachebi v. Makhan Lal*, I. L. R., 3 All., 55.

(11) *Login v. Princess Victoria*, 1 I. J. O. S., 109.

(12) *Krishnaji v. Pandurang*, I. L. R., 1 Bom., 65.

Ratnagiri District, though forming part of the Maratha country where the Mayuka has gained the eminent position, it is still a secondary authority.⁽¹⁾ Indeed in the Maratha country the Mitakshara is the principal authority upon Hindu law; but since usage has sanctioned reference to the Mayuka, the former may, in doubtful cases, be construed in the light of the latter.⁽²⁾

Hindu law in so far as it differs from the provisions of the ensuing sections, will be found set out under the appropriate sections.

42. Mahomedan Law.—Although Mahomedan law, pure and simple, is a part of the Mahomedan religion, it does not necessarily bind only those who belong to that creed.⁽³⁾ The intimate connection between law and religion in the Mahomedan faith no doubt justifies the presumption that converts to that faith, apart from any evidence of custom which the community may, since their conversion, have voluntarily imposed upon themselves, would be governed by Mahomedan law.⁽⁴⁾ But it is by no means true that all Mahomedans must needs be bound by it. For in the case of a convert it has been laid down that "it must be gathered from the course of conduct by what law he intends to be governed."⁽⁵⁾ And in the case of Cutchi Memons⁽⁶⁾ and Khojas⁽⁷⁾ it is settled law that, in the absence of evidence to the contrary, the Hindu and not the Mahomedan law is applicable to them in matters relating to property, inheritance and succession.

Similarly Mahomedan Rajputs, known as *Bandas* in Ludhiana and Malaka in the Punjab, are governed by Customary law. For example, a person of this tribe can, on the one hand, transfer his self-acquired immoveable property by gift to his daughter, which would not be permitted by the Mahomedan law, while, on the other hand, the rule that accretions from ancestral property are themselves ancestral is one of Hindu law and cannot be applied to them.⁽⁸⁾

43. Mahomedan law derives its authority from the Koran and the sayings of the Prophet handed down by his descendants and disciples. But all Mahomedans do not follow and do not profess to be bound by the same Code. For out of the two great sects, the Shiah and Sunnis, which divide the Mahomedan world, have sprung up two distinct systems of law both professing to follow the Koran but diverging upon the supplementary principles handed down by tradition. The two sects again are sub-divided into several schools, the doctrinal and legal differences among whom are so great as to form extremely complex systems which have no binding force beyond the clans to which they appeal. Though the Mahomedan law purports to be founded essentially on the Koran, most of the rules and principles which now regulate the lives of Moslems are not to be found there. It undoubtedly contains the germ of the fundamental principles which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of

(1) *Balkrishna v. Lakshman*, I. L. R., 14 Bom., 605; *Janki Bai v. Sundra*, I. L. R., 14 Bom., 612.

(2) *Vinayak v. Lakshmbai*, I. L. R., 1 Bom., 118; *Bhagiratheba v. Kahnijirar*, I. L. R., 11 Bom., 285.

(3) *Mahomed v. Haji Ahmed*, I. L. R., 10 Bom., 1 (11).

(4) *Abraham v. Abraham*, 9 M. I. A., 195 (243); *Jowal v. Buksh v. Dharum Singh*, 10 M. I. A., 511 (537); *Mahomed v. Haji Ahmed*, I. L. R., 10 Bom., 1 (10).

(5) *Abraham v. Abraham*, 9 M. I. A., 195 (243); *Soorendronath v. Mt. Heeramoonnee*, 12 M. I. A., 81; *Neelkisto v. Beer Chunder*, 12 M. I. A., 523.

(6) *Ashrafi v. Tyeb Haji*, I. L. R., 9 Bom., 115; *Mahomed v. Haji Ahmed*, I. L. R., 10 Bom., 1 (12).

(7) *Shuji v. Datu*, 12 B. H. O. R. (A.C.), 281; *Rishid v. Sherhanoo*, 6 Bom. L. R., 874.

(8) *Nawab-ud din v. Mt. Kani*, (1900) P. R., 12.

the body politic; and even of political rules and social economy. The absence of a systematic arrangement, which has frequently been considered as its greatest defect, is explained by the circumstance that it was gradually built up during the lifetime of the Prophet. The moral principles and the legal rules, which make up the work, were enunciated, not simultaneously as a completed code of law but in accordance with the exigencies of the moment and the passing requirements of each special case in the midst of a simple and primitive society."⁽¹⁾ The Shi'ahs and Sunnis then have their own separate codes of law, and a Shi'ah, adopting the Sunni persuasion, would subject himself to the Sunni law. So a Hanafi becoming a Shafeite or an Akbhari becoming an Usuli would be governed by the Shafeite or Usuli principles, as the case may be.⁽²⁾ Where by writers of the highest authority on the law of a particular sect, a point of law is admitted to be doubtful, it is to be decided in accordance with the practice of the courts.⁽³⁾

44. Parsis.—Parsis are neither Hindus nor Mahomedans but form a sect by themselves, and in the absence of any specific law applicable to them in the mofussil, the rule of justice equity and good conscience is the rule to be observed,⁽⁴⁾ which has been interpreted to mean the practice of the Courts of Equity in England with necessary modifications.⁽⁵⁾ The Statute of Frauds (6) was accordingly held to apply to Parsis in India,⁽⁷⁾ but not the rule against perpetuities, which being a law of property or tenure based on feudal considerations was not a rule of equity which could extend beyond its territorial operation.⁽⁸⁾

45. Buddhist Law.—Buddhism at one time the paramount religion of British India, is now confined only to its outskirts, Burmah and Ceylon. The Act has not been yet extended to the whole of British Burmah. Ceylon is out of British India, and as such outside the operation of the Act. Buddhist law is contained in the *Dhammathats* of Menu Kyay, *Manoo Woonum* which, while recognizing the authority of *Menu*, differs from the great Hindu lawgiver on many points. Of the Buddhist law-books *Menu Kyay* is considered in Burmah to be a book of paramount authority.⁽⁹⁾ Thus a purchaser of a debt sold in execution was held not to be affected by section 135 of the Act before its amendment.⁽¹⁰⁾

46. Principle of Saving Personal Laws.—The policy of preserving the personal laws of the people of the country has always been recognized by the British Government, and which was definitely assured to them by an Act of Parliament passed to declare the powers of the Supreme Court at Calcutta which provided that "inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentus by the laws and usages of Gentus, and when only one of the

(1) Ameer Ali, *Mahomedan Law*, I. 8.

(2) *Ib.*, I. 31.

(3) *Dann v. Asooka Bebee*, 2 N. W. P. H. C. R., 360. For difference amongst the juriconsults, see *Abdul Kadir v. Salma*, I. L. R., 8 All., 149.

(4) *Mithibai v. Limji*, I. L. R., 5 Bom., 506; *Jehangir v. Perozbai*, I. L. R., 11 Bom., 1 (4); *Shipurji v. Dossabhoj*, I. L. R., 30 Bom., 359.

(5) *Mancharsha v. Kamrunisa*, 5 B. H. C.

R., 109; *Nooraji v. Rogers*, 4 B. H. C. R., 1.

(6) 29 Car. 11, c. 3.

(7) *Bai Maneckbai v. Bai Merbai*, I L. R., 6 Bom., 363.

(8) *Mithubai v. Limji* I L. R., 5 Bom., 506, c. 3., I. L. R., 6 Bom., 151; *Fardunji v. Banaji*, I. L. R., 22 Bom., 855.

(9) *Woung Tso v. Mah Htabh*, I. L. R., 19 Cal., 425 (477).

(10) *Krishnan v. Perachan*, I. L. R., 15 Mad., 383.

parties shall be a Mahomedan or Gentu, by the laws and usages of the defendants.”⁽¹⁾ The Courts at Bombay and Madras were similarly enjoined by a statute subsequently enacted.⁽²⁾ The provisions of these statutes have been repeatedly re-enunciated in later enactments passed both in England and this country, and now underlie all Acts relating to dispositions of property.⁽³⁾ But these provisions, making as they do exceptions to the general law, must be strictly confined in their extent to the subjects in respect of which the personal law of the parties is to be applicable. As has been aptly observed by Peacock, C.J. “The Mahomedan law is not the law of British India. It is only the law so far as the laws of India have directed it to be observed.”⁽⁴⁾ The same view was taken by Holloway, C. J., who said: “The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our sources of law in the matter to which it applies; where, however, not so received, it can only be prevailing law because consistent, with equity and good conscience.”⁽⁵⁾

47. Hindu and Mahomedan laws then do not of their own force govern the relations between parties, and an Act which does not save them would inevitably repeal any rule contained therein and inconsistent therewith.⁽⁶⁾ The Law Commissioners seem to have taken a different view, for they observe: “Hindu and Mahomedan law derive their authority respectively from the Hindu and Mahomedan religion. It follows that, as a British Legislature cannot make Mahomedan or Hindu religion, so neither can it make Mahomedan or Hindu law. A code of Mahomedan law, or a digest of any part of that law, if it were enacted as such by the Legislative Council of India, would not be entitled to be regarded by Mahomedans as the very law itself, but merely as an expression of law, which possibly might be incorrect.”⁽⁷⁾ Further on they observe:—“The Privy Council has already ruled that estates cannot be created by Hindus in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugnancy. The rules contained in sections 10 to 35 impugn, as far as our experience goes, no rule or practice of Hindus or Mahomedans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among the Mahomedans of devoting property to the family of a particular saint. But to avoid any disturbance of rights enjoyed under personal laws sufficient provision is made by the Bill.”⁽⁸⁾ This clause in the Bill was inserted at the instance of Maharaja Jotindra Mohan Tagore, and the effect of the insertion of this clause in the Act is to leave the decision in the Tagore case intact.⁽⁹⁾ The rule laid down in the Tagore case, however, in no wise differs from the provisions of the Act, and the exception was made out of

(1) 21 Geo. III, c. 71, the preamble of which stated “that the inhabitants should be maintained and protected in the enjoyments of all their ancient laws, usages, rights and privileges.”

(2) 37 Geo. III, c. 149.

(3) *Zohorooddeen v. Bahiroollah*, W. R. (9 ap.), 187; *Muzhar Ali v. Budh Singh*, I.L.R., 7 All. 297 (304), F. B.; *Yusuf Ali v. Collector of Tipperah*, I. L. R., 9 Cal., 138 (141).

(4) *Shakh Kudratulla v. Mahini Mohan*, 4 B. L. R., 134 (169), F. B.

(5) *Ibrahim v. Muni*, 6 M.H.C.R., 26 (31); followed in *Alabi Koya v. Mussa*, I. L. R.,

24 Mad., 513 (520). To the same effect *Gobind Dayal v. Inayatullah*, I. L. R., 7 All., 775 (815), F. B.

(6) *Per* Law Commissioners' Report, 1879, p. 28.

(7) First Report, p. 60. This view has been cited with approval by Holland in his “Jurisprudence,” but is hardly consistent with his definition of law, which he defines to be the will of the Sovereign.

(8) *Ibid.*

(9) *Jotindra Mohan Tagore v. Ganesendra Mohan Tagore*, and *vice versa*, 9 B. L. R., 377, P. C.

deference to the wishes of the Indian members, who contended that the decisions of the Privy Council "were not only based upon erroneous constructions of their law, but were also opposed to the rulings of equally high authorities of an anterior period." It was suggested that by giving sanction by a legislative Act to an interpretation which may be subsequently upset by later decisions, the Hindu community would be greatly prejudiced.⁽¹⁾ It may be remarked that the rule as laid down originally by the Privy Council has not yet in any way been overruled or modified. A full discussion on the effect of the Tagore case will be found in the ensuing commentary.

48. Crown Grants Exempted.—By the Crown Grants Act, 1895,⁽²⁾ all grants and gifts made by or on behalf of the Crown are exempted from the provisions of this Act, and "all provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."⁽³⁾ The Act is enacted so as to be operative retrospectively, and would therefore apply to transfers made equally before or after the Act.⁽⁴⁾ Its provisions are given below:—

ACT NO. XV OF 1895.

An Act to explain the Transfer of Property Act, 1882, so far as relates to grants from the Crown, and to remove certain doubts as to the Powers of the Crown in relation to such grants.

WHEREAS doubts have arisen as to the extent and operation of the Transfer of Property Act (IV of 1882), and as to the power of the Crown to impose limitations and restrictions upon grants and other transfers of land made by

(1) See speech of Maharaja Jotindra Mohan Tagore at the time of the passing of the Act. (See Appendix.)

(2) Act XV of 1895.

(3) *Ib.*, s. 2.

(4) The object and scope of this Act was explained by Sir Alexander Miller in his speech before the Legislative Council on the 10th October 1895, in the following words:—

"As I have just explained, I have one or two small amendments to make. The first is an addition to the title of the Bill. It was pointed out in one of the papers that whereas the title only referred to the Transfer of Property Act, the substantive provisions of the Bill went further and dealt with Crown grants generally, and got rid of a possible restriction on the part of the common law on the power of the Crown to create new estates. Accordingly I wish to propose to add to the title the words 'and to remove certain doubts as to the power of the Crown in relation to such grants.' That will show that the Bill is not confined to the Transfer of Property Act, but relates to all Crown grants, and deals with certain limitations supposed to be imposed otherwise than by that Act. Then, as incidental to that, in the preamble to the Bill it is desirable after '1882,' that the following words be added:—'and as to the power of the Crown, to impose limitations and restrictions upon grants and other transfers

of land made by it or under its authority. That is merely a similar amendment to carry out the proposed alteration to the title. Then I thought it better, on consideration, for the purpose of emphasising that this is a general Bill and not merely confined to the Transfer of Property Act, that s. 2 should be altered into ss. 2 and 3, the subsection numbers being omitted. By this arrangement what is now subsection (2) will become s. 3 as a general provision and not limited by reference to the previous subsection. Then in s. 2, as it will then stand, it has been suggested that the words 'grant or transfer of land' in the fourth and fifth lines would look as if a grant was not a transfer, and that a conceivable difficulty might arise in the case of the grant of leases, and therefore, I propose to add after the words 'grant or' the word 'other' to show that every grant or instrument whereby land is conveyed from one person to another is a transfer. Finally in the fourth line of what will now become s. 3 if these amendments are passed, I have to move that after the word 'law' the word 'statute' be inserted. One of the Judicial Commissioners suggested that the expression 'enactment of the legislature' might be considered so as not to apply to English statutes—such as the Statutes of Uses and Wills which presumably affect all British land in the hands of European British

it or under its authority, and it is expedient to remove such doubts; it is hereby enacted as follows:—

1. (1) This Act may be called the Crown Grants Act, 1895.
 (2) It extends to the whole of British India; and
 (3) It shall come into force at once.

Title, extent and commencement.

2. Nothing in the Transfer of Property Act (IV of 1882) contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen-Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed.

Transfer of Property Act, 1882, not to apply to Crown grants.

3. All provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.⁽¹⁾

Crown grants to take effect according to their tenor.

49. Principle of the Crown Grants Act.—The object of this Act is to provide for the interpretation of contracts of transfer according to their natural tenor. The Act is enacted to have retrospective operation, and it was therefore held to control a grant made in 1861, the Privy Council having held that by force of section 3 of that Act the Government must be deemed to possess power to divert the regular line of succession by an executive Act making succession follow the rule of primogeniture.⁽²⁾ In another case it has been held that section 2 of the Crown Grants Act does not render all the provisions of this Act inapplicable to lands held under grants from the Crown, but the meaning of the section is that when the Court is called upon to construe an instrument granting land by the Crown, it shall construe such grants irrespective of the provisions of this Act. For example, a provision in the instrument restraining alienation by the grantee or his representatives would be valid under section 3 of the Crown Grants Act, notwithstanding the provisions of the Transfer of Property Act.⁽³⁾ But it is competent to a decree-holder in execution of his decree upon a mortgage to sell property affected by such grant.⁽⁴⁾ In construing however, these contracts "upon a question of the meaning of words, the same rules of Common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject."⁽⁵⁾ In construing a Crown grant it is therefore "always a question of intention to be collected from the language used with reference to the surrounding circumstances."⁽⁶⁾ Nor does the fact that the grant emanates from the Government exempt it from

subjects, and that it would be better to insert the word 'statute,' which would clearly accord with our established nomenclature and would leave the expression 'an enactment of the legislature' to apply to the Indian Acts, and I propose to insert it accordingly."

(1) For the meaning of this clause, see *Sheo Singh v. Raghubans Karmar*, I. L. R., 27 All., 634 (653), P. C.

(2) *Sheo Singh v. Raghubans Karmar*, I. L. R., 27 All., 634 (653), P. C.

(3) *Dost Mohammad v. Bank of Upper India*, 3 A. L. J. R., 129

(4) *Dost Mohammad v. Bank of Upper India*, 3 A. L. J. R., 129, s. c., on motion for leave to appeal to P. C., 3 A. L. J. R., 698

(5) *Per Westropp, C.J.*, in *Conservator v. Nagardas*, B. P. J. (1875), 230; followed in *re Antaji*, I. L. R., 18 Bom., 676; *Dudoba v. Collector*, 3 Bom. L. R., 603 (620).

(6) *Conservator v. Nagardas*, B. P. J. (1875), 230.

being subject to the ordinary rules applicable to contracts.⁽¹⁾ Thus the Government has been held to be as much bound by the equitable rules of estoppel as would be any other person.⁽²⁾ For instance, where it sells a plot of land stipulating that it "will be assessed at the rate of nine pies per square yard per annum," it could not thereafter raise the assessment on the ground that the enhancement was justified by an Act, the terms of which must have been well known to the purchaser.⁽³⁾ (§ 59).

50. Crown Grants Act v. Transfer of Property.—It will be seen from the Preamble that the object of the Crown Grants Act was to make it clear that the Crown had power "to impose limitations and restrictions upon grants and other transfers of land made by it or under its authority," and not to confer any new power upon it. If the latter had been the object, or were in effect the case, it would have required an Act of Parliament, since the Indian Legislature being subordinate to Parliament, it could not alter the powers of the Crown and thus alter the English constitution, and if its language have that effect it would be *ultra vires* into which the Municipal Courts have jurisdiction to inquire. As was observed by Sir Lawrence Jenkins, C.J. "It is a legitimate subject of discussion in this Court, for the Governor of this Presidency in Council is a subordinate Legislature, whose authority in the way of law-making is subject to and dependent upon the Acts of Parliament, from which their legislative powers are derived, so that we have the right, and are charged with the duty, of deciding judicially, whether the impugned legislation is within the scope of its authority" ⁽⁴⁾ The Act must then be understood as enacted merely "to remove certain doubts as to the powers of the Crown in relation to such grants." Such doubts existed as to power of the Crown to create a perpetuity, or an estate both impartible and inalienable, or subject to the rule of primogeniture, and the present Act consequently removes these uncertainties validating all "provisions, restrictions, conditions and limitations ever contained in any such grant or transfer," "any rule of law, statute or enactment of the Legislature to the contrary notwithstanding." And so it has been held that under this section, the Government had the power to create an estate unknown to Hindu ⁽⁵⁾ or Mahomedan law.⁽⁶⁾ So where an estate in Oudh was settled with a taluqdar in 1859 and a sanad granted to him under which the estate descended to the grantee and his heirs without indication of the line of inheritance, but to his heir who succeeded him in 1861 another sanad was granted limiting the succession to his estate by the rule of primogeniture, and upon the latter's death childless, his widow claimed to succeed to the property under Hindu law; and with reference to this Act it was contended for her that it was *ultra vires* in the Government to create an estate descending by any rule of inheritance other than that laid down by the law, which in the case was Hindu law, but their Lordships revelled that contention by referring to section 3 of this Act.⁽⁷⁾ And on the same ground the Court upheld a grant for the maintenance of a tomb overruling the contention that it created an estate unknown to Mahomedan law.⁽⁸⁾ It will be seen that

(1) *Per* Sargant, C. J., in *The Secretary of State v. Sheth Jeshingbhai*, 1 L. R., 17 Bom., 407; *Dadoba v. Collector*, 3 Bom. L. R., 603 (619).

(2) *Ahmad Yar Khan v. Secretary of State*, 1 L. R., 28 Cal., 693 P. C.; *Dadoba v. Collector*, 3 Bom. L. R., 603 (619); *Municipal Corporation v. Secretary of State*, 1 L. R., 29 Bom., 580 (607); *Plummer v. Mayor, &c., of Wellington*, 9 App. Cas., 699.

(3) *Dadoba v. Collector*, 3 Bom. L. R., 603

(616).

(4) *Hari v. Secretary of State*, 1 L. R., 27 Bom., 421 (439).

(5) *Sheo Singh v. Raghubans Kunwar*, 1 L. R., 25 All., 634, P. C.

(6) *Haji Mahomed v. Egambara*, (1907) 2 M. L. T., 55.

(7) *Sheo Singh v. Raghubans Kunwar*, 1 L. R., 27 All., 634 (653), P. C.

(8) *Haji Mahomed v. Egambara*, (1907) 2 M. L. T., 55.

this section is a good authority not only for upholding "limitations and restrictions" but also other "provisions" of a grant though their enforcement may be otherwise illegal, or opposed to the general law.

51. Prerogative of the Crown.—It was held in *Bombay* that the rule of construction according to which the Crown is not affected by a statute, unless specially named in it, applies to India.⁽¹⁾ But it was laid down in *Madras* that the exemption of Government from statutory duties and taxes is not really a prerogative of the Crown, but depends solely upon the right construction of the statute. And, indeed, according to the uniform course of Indian legislation, statutes imposing duties or taxes bind Government as much as its subject except in two cases:—

(i) when the very nature of the duty or tax is such as to be inapplicable to Government, and

(ii) when the Government is specially exempted.⁽²⁾ It is moreover provided by the Indian Councils Act⁽³⁾ that "no law or regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as heretofore provided) shall be deemed invalid by reason only that it affects the prerogatives of the Crown."⁽⁴⁾ It was then to remove any doubt that may have been entertained as to the applicability of the Act to the Crown, that the Crown Grants Act was passed. But Crown grants are still subject to the equitable rules which in some measure slacken the rigour with which, technically construed grants from the Crown are presumably fettered.

52. Grants by Crown Agents.—Originally, all lands and hereditaments and other real and personal estate of the East India Company, including such as may thereafter be acquired, vested in the Crown, to be applied and disposed of for the purposes of the Government of India and empowered the Secretary of State in Council to sell and dispose of the same, as he may think fit, the necessary conveyance and assurances being required to be made by the authority of the Secretary of State in Council under the hands and seals of three members of the Council.⁽⁵⁾ This provision which restricted the authority to sell and dispose of all real and personal estate vested for the time being in the Crown, to the Secretary of State in Council alone, was found to be in practice extremely inconvenient, and a statute was accordingly passed which enacted that the Governor-General of India in Council, the Governors in Council of Fort St. George and Bombay respectively, and the Lieutenant-Governor of the United Provinces or any officer for the time being entrusted with the Government, charge or care of any Presidency, Province or District in India, may, subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting shall, from time to time, prescribe, sell and dispose of all real and personal estate whatsoever in India for the time being vested in the Crown, within the limits of their respective Governments, provinces or districts, and to enter into any contract whatsoever within the said respective limits for the purpose of the Government of India.⁽⁶⁾ The same statute also lays down the form of any contract, deed or other instrument, which they may enter into and the mode of executing the

(1) *The Secretary of State v. Mathurabai*, I. L. R., 14 Bom., 218; following *Ganpat v. The Collector*, I. L. R., 1 Bom., 7 (9); *Ex parte Postmaster-General*; *In re Bonham*, L. R., 10 Ch. D., 595 (601); *Venubai v. The Collector*, I. L. R., 7 Bom., 552, note.

(2) *Major C. Bell v. The Municipal Commissioners*, 12 M. L. J. R., 208; *Indian Councils Act*, 1861 (24 & 25 Vict., c. 67), s. 24.

(3) Ss. 21 & 25 Vict., c. 67.

(4) *Id.*, s. 24.

(5) 21 & 22 Vict., c. 106, ss. 39, 40.

(6) 22 & 23 Vict., c. 41, s. 1.

same.⁽¹⁾ It should be noted that although the statute confers upon certain Governments and their officers the power to sell and dispose of all real and personal estate whatsoever in India, for the time being vested in the Crown, yet the exercise of such power is subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting shall, from time to time, prescribe. The provisions or restrictions which may be so prescribed are really in the nature of *statutory bye-laws*, which, if intruded by the Government of India or any local Government, will invalidate, as against the Crown, the disposal of such real or personal estate.⁽²⁾ Such rules should, however, be distinguished from those which are in the nature of instructions issued, by the Government to the various officers concerned, as to the principles which should *guide them* in entertaining or rejecting applications for grant of various descriptions of land and determining to which of several competing applicants the grant should if at all be made, and the *procedure* to be adopted by them, which do not concern the civil Courts.⁽³⁾ The disposal of waste lands, whether assessed or otherwise, would naturally fall within the statutes. Inam title deeds, releasing the reversionary rights of Government in the Inam lands, are also comprised therein.

53. Officers duly empowered to dispose of Crown lands are for that purpose agents of the Government. But being public agents, the extent to which their acts and declarations bind the Government is limited. As pointed out by Story in his "Law of Agency":—"In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter, the principals are, in many cases, bound where they have not authorized the declarations and representations to be made. But in case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held as having authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake or rashness and indiscretion of their agents."⁽⁴⁾ The same view has been laid down by the Privy Council who said: "Again the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, if he exceeded that authority, when the Government in fact or in law directly or by implication ratified the excess."⁽⁵⁾ A grant of land made by a revenue-officer authorized under the rules to make the grant, cannot be cancelled, and if it is cancelled in violation of a distinct provision in the rules, the Civil Court will decree the claim.⁽⁶⁾

(1) 22 & 23 Vict., c. 41, s. 2; 32 & 33 Vict., c. 29, validated the form adopted by the Inam Commissioner in the Madras Presidency.

(2) It appears that such provisions or restrictions have been prescribed by the Secretary of State in Council, though authentic copies of the same are not available, and they do not seem to have been published in the Official Gazette nor in the two Volumes of a "Local Rules and Orders."—*Secretary of State v. Kasturi*, 1 L. R., 26 Mad., 268.

(3) *Periya v. Royala*, 1 L. R., 18 Mad., 434; *Secretary of State v. Kasturi*, 1 L. R.,

26 Mad., 268; *Muthu Veera v. Secretary of State*, 1 L. R., 29 Mad., 461.

(4) Story's "Law of Agency" (9th Ed.), § 307 (a).

(5) *Collector v. Cavalry*, 8 M. L. A., 529 (555), *Beer Kishore v. The Government*, 17 W. R., 497; *Secretary v. Sulemanji*, 1 L. R., 26 Bom., 801 (807); *Sappani v. Collector*, 12 M. L. J. R., 417.

(6) *Kullappa v. Ramanujachariar*, 4 M. H. C. R., 429; *Collector v. Rangappa*, 1 L. R., 12 Mad., 404; followed in *Secretary of State v. Kasturi*, 12 M. L. J. R., 453 (470).

54. Incidents of Crown Grants.—A grant of land in perpetuity does not *per se* imply fixity of rent in perpetuity. "A grant in perpetuity is a grant which in itself has no definite legal meaning in this country and must be understood with reference to the meaning attached to it by the terms of the grant or by surrounding circumstances. Standing by themselves the words may mean either that the grant is permanent as regards hereditary descent or that it is permanent both as regards descent and also rent. In the case of the former, the grantee is entitled to hold the land permanently by himself, his heirs and assigns so long as he conforms to the conditions expressly or impliedly annexed to the grant. Now when a person acquires land from the Crown, he acquires it subject to the paramount right of the Crown to assess it for the purposes of revenue from time to time according to the exigencies of administration, unless by the grant the Crown has exempted the land from that liability. If it is not so exempted, the liability remains, but though it continues, it is still a grant of the land in perpetuity, *i.e.*, it is an estate of inheritance, because, as long as the grantee and after him, his heirs or assigns pay the land revenue demanded from them, they cannot be ousted."⁽¹⁾ Relinquishment of property by the Government by ordering annulment of the entry in the Nazul Register "as the occupiers appear to have all along exercised proprietary rights without question of their power to do so" adding "it is now too late to disturb their status" was contended to be a release in favour of the Zemindar, whilst the occupiers relied upon the words quoted in their favour. But it was finally decided that the words implied no intention to benefit one party more than the other, but merely annulled the entry and restored the rights to the *status quo ante*.⁽²⁾ The enjoyment of property by the Crown by which rival claimants are prevented from enforcing their claims against one another would not serve to extinguish their rights *inter se*, and limitation against them would only begin from the date of relinquishment of the property by the Crown.⁽³⁾

Prior to the advent of the British rule in Bengal persons had acquired monopoly of the right of ferries by prescription, or otherwise than by a grant from the Crown. Such monopolies were recognized by the Mahomedan Emperors.⁽⁴⁾ But at the time of the permanent settlement the British Government refused to recognize them or to treat their profit as an asset for the purpose of settlement, and it was held that if the ferry was in continuation of the highway the monopoly, if any, ceased to exist.⁽⁵⁾ But if the profits of the ferry formed a part of the revenue assessed at the time of the permanent settlement, a monopoly therein must be deemed to have been recognized.⁽⁶⁾ No right of exclusive ferry could be acquired by twenty years' user.⁽⁷⁾ But where the right of a private ferry is violated by an opposition ferry, then unless the latter can show a Crown grant, or give evidence from which a Crown grant is presumed, an action for disturbance will lie as for a continuing wrong.⁽⁸⁾

(1) *Vinayale v. Collector*, 3 Bom. L. R., 910 (1915).

(2) *Maqbul v. Lalla Prasad*, 1 L. R., 24 All., 1 (12), P. C.

(3) *Maqbul v. Lalla Prasad*, 1 L. R., 24 All., 1 (12), P. C.

(4) Vide Ain Akbari (Gladwin, Part II, p. 284).

(5) *Shushtee v. Shib Kushen*, S.D.A. (1852), 402.

(6) *Luchmessur v. Leelanund*, 1 L. R., 4 Cal., 599; followed in *Nityahari v. Dunne*, 1.

L. R., 18 Cal., 652 (663).

(7) *Nityahari v. Dunne*, 1 L. R., 18 Cal., 652 (663); following *Parmeshri v. Mahomed*, 1 L. R., 6 Cal., 608; dissenting from *Rajib Lochun v. Kumri Bebee*, S.D.A. (1854), 153; *Kishoree Lall Roy v. Gokool Monee*, 16 W. R., 281.

(8) S. 23, Act XV of 1877; *Rameshwar Pershad v. Koonj Behari*, L. R., 2 I. A., 33; *Yard v. Ford*, 2 Saund., 172; *Nityahari v. Dunne*, 1 L. R., 18 Cal., 652 (664).

55. Construction of Crown Grants.—In making a grant the Government has wider discretion in burdening it with conditions the non-fulfilment of which would determine the estate. At the same time a covenant which would have this effect must be explicit and would be strictly construed. Evidence of the intention of the Government may be gathered from not only the deed of grant but also the proceedings and correspondence which may have preceded it.⁽¹⁾ The question whether a grant is permanent or personal must in a great measure depend upon its terms, in the construction of which the Court may seek for aid "in the surrounding circumstances and the object for which the grant was made."⁽²⁾ Sometimes the incidents of the grant may be ascertained from use of a single word such as a *jagir* which is presumed to be only for the life of the grantee.⁽³⁾ But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest.⁽⁴⁾ And in this respect there is no distinction between a Crown grant and a grant made by any other grantor. So where the grant was resumable if required for any Government purpose, and the Government had reserved their ownership therein the Court held that the propriety of the resumption could not be questioned as it fell within the terms of the grant.⁽⁵⁾ By a sanad of 1862 Government granted to one A in consideration of his personal military services a village revenue free "to remain in the family of the grantee on his demise subject to assessment," and the question turned upon what was intended to be conveyed by the term "family," and the Court held that it must be taken to be employed in its restricted sense, as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man.⁽⁶⁾ A restriction or limitation if clearly intended to be for a special purpose would nevertheless be enforceable by Government, though it could not be availed of by a third party. So where the Government had granted a village in Inam to A providing that it would not recognize any status created by adoption, and thereafter A adopted B and the Government recognized B as a joint Inamdar whereupon A's other relations sued B for a declaration that he was not entitled to a share of the Inam, Westropp, C J., *inter alia*, held that it was not open to the plaintiffs to rely upon a provision of which Government only is entitled to take advantage.⁽⁷⁾ But here the provision was made only for a fiscal purpose, and consequently the Court rightly held that the provision was controlled by the purpose which originated it. If, however, the restriction had been more unqualified then other considerations would have probably prevailed. Ordinarily, a crown grant to a member of the joint Hindu family conveys the property to him and his co-parceners as joint tenants but much must depend upon the terms and character of the grant and the intention of the grantor as disclosed in its terms.⁽⁸⁾ The effect of the enfranchisement of a service Inam, in Madras, is that the title rests where it was before.⁽⁹⁾ It is a cardinal rule of construction

(1) *Baboo Beer Pertab v. Maharajah Rajender*, 12 M. I. A., 1 (34); *Gulab Das v. The Collector of Surat*, I. L. R., 3 Cal., 186 (189). P. C.

(2) *Krishnarav v. Ramrav*, 4 B. H. C. R. (A. C.), 1 (24).

(3) *Dosi Bai v. Ishwardas*, I. L. R., 15 Bom., 222 (227), P. C.; *o. a.* from I. L. R., 9 Bom., 561. See *Ramchandra v. Venkata Rau*, I. L. R., 6 Bom., 598 (604).

(4) *Dosi Bai v. Ishwardas*, I. L. R., 15 Bom. 222 (227, 228).

(5) *Sapurlo v. Secretary of State*, I. L. R., 36 Bom., 439.

(6) *Jamal Singh v. Gurnukh Singh*, (1910 P. R., No. 20, 5 I. C. 898.

(7) *Vasudev v. Ramkrishna*, I. L. R., 2 Bom. 529 (531).

(8) *Gobind Prasad v. Inayat Khan*, I. L. R., 27 All., 310; *Natham Venkataratnam v. Ramaiya*, 2 M. H. O. R., 470 (471).

(9) *Seshagiri v. Tirumalai*, 17 I. C. 481 (485).

that if general descriptive terms are used in a grant and they are acted upon with a particular construction by both the parties, it lies upon those who impugn that construction to show that it is erroneous.⁽¹⁾

In the case of a grant of land adjoining a highway or river, the presumption is that it includes half of the road or half of the river, even though they are in excess of the area stated to be granted.⁽²⁾ If the channels in the village grant have no connection with the Government source of irrigation, the property in the channels is vested in the grantee.⁽³⁾ Government cannot any more than a private person without the consent of the grantee revoke a grant actually made.⁽⁴⁾

56. Operation of a Crown Grant.—In construing Crown grants the rule is that if words are employed therein which expressly, or by necessary implication, indicate that Government intends that, so far as it may have any ownership in the soil, ownership shall pass to the grantee, neither Government nor any person subsequently to the grant deriving under Government, can be permitted to say that the ownership did not so pass, unless there are in the grant such detailed provisions as show that such words are limited in their operation.⁽⁵⁾ A *sanad* by the State purporting to grant a village in *inam* "including the waters, the trees, the stones, and quarries, the mines, and the hidden treasures, but excluding the *hakdars* and *inamdars*" is a grant by the State of such proprietary rights as it had in the soil or the village to the grantee, and it is not open to the grantor to say that such words mean nothing but land revenue. Even the saving of the rights of the *hakdars* and *inamdars* does not prevent the property in the soil, so far as it can be regarded as vested in the Government, from passing to the grantee.⁽⁶⁾ But where the grant contained only the words "the village of Manabali has been conferred on you as *inam*, to be enjoyed by you, your son, and grand-son. The Government dues of the village, *viz.*, the *koolbub koolkanoo* (*i.e.*, all taxes and assessments), present and future, together with the house-tax, but exclusive of *haks* due to *hakdars*, shall continue to be debited from year to year, from the year next succeeding," it was held that the grant was confined only to the revenues and did not convey the soil of the village or the timber growing upon it, over which the grantee could not acquire any right by even thirty years' user.⁽⁷⁾ Such a construction was justified on the rule of English law that in case of ambiguity "a grant from the Crown is construed most strictly against the grantee, and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words."⁽⁸⁾ In the *sanad* last quoted, the later words were read to be descriptive of the mode of enjoyment and as defining the extent and meaning of the preceding words.⁽⁹⁾ Similarly it has

(1) *Zuhoorudeen v. Collector of Gorukhpur*, 13 W. R. 31, 34, 35, P.C.

(2) *Micklethwaite v. Newlay Bridge Co.*, 33 Ch. D. 133 (145); *Baltur Singh v. Secretary of State*, 24 All. 96; *Secretary of State v. Ambalavari*, 18 I.C. 294.

(3) *Secretary of State v. Kankapalli*, 15 I. C., 594 (601).

(4) *Collector v. Vyankat Rao*, 8 B. H. C. R., 151 A.C.

(5) *Ravji Narayan v. Dadaji*, I. L. R., 1 Bom. 528; *Ganpat Rao v. Anand Rao*, I. L. R., 28 All. 104 (108). See for words of limitation, *Ruttuji v. The Collector of Thana*, 11 M. I. A., 295.

(6) *Ravji Narayan v. Dadaji*, I. L. R., 1 Bom. 523; following *Vaman v. The Collector of Thana*, 6 B. H. C. R., 191; *Shahzadee v. The Collector of Burdwan*, 23 W. R., 378.

(7) *Vaman v. The Collector of Thana*, 6 B. H. C. R., 191.

(8) *Stanhope's case*, Hob., 243; Bro. Abr. Patent Pt., 62; *Duke of Beaufort v. Major of Swansea*, 3 Ex. R., 413; *Attorney-General v. Parsons*, 2 C. & J., 279; *Lindus v. Melrose*, 27 L. J. Ex., 329; *Jewison v. Dyson*, 9 M. & W., 540; *Doe d. Devine v. Wilson*, 10 Moo. P. C., 502.

(9) *Vaman v. The Collector of Thana*, B. H. C. R., 191 (202).

been laid down that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass.⁽¹⁾ The rule against perpetuities is inapplicable to the Colony of New South Wales,⁽²⁾ and a grant there to a minor is not null and void to all intents and purposes.⁽³⁾

The grant of a village by Government, whether Native or British, is subject to all existing rights against Government, whether or not the deed of grant contains an exception or reservation of such rights. Government cannot, by alienating its own rights in a village, albeit that the *sanad* purports to grant the village as a whole, extinguish or affect any substantive right therein appertaining to third persons, or convey to the grantee any larger or better estate or interest than was vested in Government.⁽⁴⁾

57. *Sanads, nam title deeds, and other documents purporting to be, or*

Form.

to evidence grants, or assignments by Government of land or of any interest in land are exempted both from stamp duty⁽⁵⁾ and registration.⁽⁶⁾ And as no form is prescribed, a grant may be made in any way, even by a letter, as where the Agent to the Governor-General in a letter to the grantee announced the intention of the Government as to his position and income, and informed him that he was to have possession of the State lands and jewels.⁽⁷⁾ "Upon a question of the meaning of words the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject; it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances."⁽⁸⁾ So where the *sanad* was of a general and informal character and admittedly capable of a variety of constructions, it was held to be legitimate to consider what was the footing upon which the grantors, *viz*, the Government and its successors and officials from the date of the grant and for a long period of time proceeded.⁽⁹⁾ In England all Crown grants must be in writing: "The king cannot grant or take any thing but by matter of record. It hath this sovereign privilege that it is proved by no other but by itself."⁽¹⁰⁾ There is no similar provision applicable to this country, and though grants are usually now made in writing, instances occur of their having been made by parol. In England Royal franchises never pass by assignment without special words in the Crown's grant.⁽¹¹⁾ But an Act which is arbitrary ought to be construed strictly, and the Courts should not extend its operation further than the language of the Legislature requires.⁽¹²⁾ A saving clause in an Act in

(1) *Wooley v. Attorney-General of Victoria*, 2 App. Cas., 163 (166); cf. *Mullar v. Wildish*, 2 Wyatt and Webb (Eq.), 37; *Attorney-General, ib.* 122; 2 Stephen's Comm., 549.

(2) *Cooper v. Stuart*, 14 App. Cas., 286.
(3) *O'Shanassy v. Joachim*, 1 App. Cas., 82.

(4) *Desai v. Bhavabhai*, 1 L. R., 4 Bom., 643.

(5) S. 3 (1), Indian Stamp Act (II of 1899)

(6) Ss. 17 (j), 90 (d), Registration Act (III of 1877); *Hasan Ali v. Chutterput*, 1 L. R., 19 Cal., 742.

(7) *Hasan Ali v. Chutterput*, 1 L. R., 19 Cal., 742.

(8) *Lord v. Commissioners of Sydney*, 12 Mad. P. C. 497

(9) *Raghaji Rao v. Lakshman Rao*, 1 L. R., 36 Bom., 639, P. C.

(10) 3 Inst., 71.

(11) Year Book, 30 Ed. I.

(12) *Ranji Narayan v. Dadaji*, 1 L. R., 1 Bom., 543; *Sussex Peerage*, 11 Cl. & F., 35, 8 Jur., 793 "If the words of the Statute are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do, in such case, best declare the intention of the Legislature."

favour of the Crown refers to rights of property or rights in the nature of property which belong to the Crown as Crown property.⁽¹⁾

58. Effect of Regrant on Resumption.—The Government sometimes declares certain zemindaries to be impartible, succession to which is also sometimes made subject to the approval of a specified officer. The question whether such an order is legal or illegal must be determined by the nature of the tenure. Thus, where a zemindari was held by a family in which descent was governed by the rule of primogeniture subject to the burthen of making a suitable maintenance allowance to the junior members and in 1767 F the estate was confiscated by the British Government who held its possession for over twenty years till in 1790 it was granted to a junior member of the family, upon whom some years afterwards the family title of *Raja* was also conferred, on a question having arisen as to the nature of the estate which the grantee took, the Privy Council held that although the zemindari was to be treated as the self-acquired property of the grantee⁽²⁾ yet the grant being from the ruling power, in the absence of evidence of the intention of the grantors to the contrary, it carried the incidents of the family tenure as a *Raj*, as the intention of the Government must be taken to have been to regrant the estate as it existed before its confiscation with no change other than that as affected the de throne d *Raja* and his descendants. There was in effect no creation of a new tenure, but simply a change of tenant, by the exercise of a *vis major*.⁽³⁾ No intention to vary the tenure can be inferred from the grant of a *Sanad i-milkiyat-i-istimrari*, in accordance with which the grantee acquires a permanent property at a fixed assessment in the zemindari lands before held by the right of primogeniture as an impartible estate. The estate would continue to be entire and heritable as before.⁽⁴⁾ But in a similar case where the grant concluded with the words "continuing to perform the above stipulations, and to perform the duties of obedience to the British Government, its laws and regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named, the zemindari of Merangi"—it was held that having regard to the terms of the grant and such dealing with the estate as clearly showed no intention to create an impartible estate, the estate could not be regarded as impartible.⁽⁵⁾ "In the present instance," their Lordships said "the grant followed on a purchase of the property by the Government. It was given, on the solicitation of persons who had a claim against the Government, to one who, though no doubt the son of the former zemindar, might have had no such grant, but for the intervention of those persons who were attached to him: and there is nothing in the terms of the grant to support the contention of the appellant."⁽⁶⁾

59. Equitable Relief.—In spite of the special Act exempting Crown grants from the operation of the Act generally governing the transfer of

(1) *Corporation of Yarmouth v. Simmons*, 10 Ch. D., 518 (527, 528).

(2) *Baboo Beer Pertab v. Maharaja Rajender Pertab*, 12 M. I. A., 1 (34); following *Shivagunja's case*, 9 M. I. A., 606.

(3) *Baboo Beer Pertab v. Maharaja Rajender*, 12 M. I. A., 1 (36); followed in *Srinantu Raja Yarlagaaddu v. Srimantu Raja Yarlagaaddu*, 1. L. R., 13 Mad., 406. P. C.; *Nundun Singh v. Janaki Koer*, 1 L. R., 24 Cal., 828; *Ram Nundun v. Janaki*, 1. L. R., 29 Cal., 828, P. C.; *Narpat Singh v. Kashi Ram*, 11 C. W. N., 655; *Goura Chandra v. Secretary of*

State, 1 L. R., 28 Mad., 130. P. C.

(4) *Srinantu Raja Yarlagaaddu v. Srimantu Raja Yarlagaaddu*, 1. L. R., 13 Mad., 406. P. C.

(5) *Sri Raja Satrucharla v. Sri Raja Satrucharla*, 1. L. R., 14 Mad., 237, P. C.; distinguishing *Baboo Beer Pertab v. Maharaja Rajender*, 12 M. I. A., 1.

(6) *Sri Raja Satrucharla v. Sri Raja Satrucharla*, 1. L. R., 14 Mad., 237 (246), P. C.; affirming *Jaganath v. Rambhadra*, 1. L. R., 11 Mad., 380.

property, the equitable principles therein contained would still apply to them when there is nothing in the Act or the grant made thereunder to the contrary. Thus, where a man spends money on the improvement of land under an expectation of an interest therein created or encouraged by the grantors, he would be no worse off than if his grantors had not been the Government.⁽¹⁾ So again in the absence of any procedure prescribed by law for the resumption of Crown grants it is manifestly proper and convenient that a notice should be given, even though it be not strictly necessary.⁽²⁾ In England the Crown is not bound by the statutes of limitation, unless named,⁽³⁾ but in India a different rule prevails.⁽⁴⁾ But even in England the Courts may, independently of the statute, presume a grant from the Crown upon an uninterrupted enjoyment of twenty years,⁽⁵⁾ and such a presumption would be made in this country against the Government in the same way as against a private individual.⁽⁶⁾

**Interpretation
clause.**

3. In this Act, unless there is something repugnant in the subject or context :

**"Immoveable
property."**

"Immoveable property" does not include standing timber, growing crops or grass :

"Instrument" means a non-testamentary instrument :

"Registered."

"Registered" means registered in British India under the law for the time being in force regulating the registration of documents.

**"Attached to the
earth."**

"Attached to the earth" means--

- (a) rooted in the earth, as in the case of trees and shrubs,
- (b) imbedded in the earth, as in the case of walls or buildings, or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

"Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property, or by

(1) *Municipal Corporation v. Secretary of State*, 7 Bom. L. R., 27; *Secretary of State v. Dattatraya*, I. L. R., 26 Bom., 271; following *Plimmer v. Mayor*, [1884] L. R., 9 A.C., 699; *Ramsden v. Dyson* L. R., 1 H. L., 129; *Plimmer v. Mayor of Wellington* 9 App. Cas., 699; *Almad Yar Khan v. Secretary of State*, I. L. R., 28 Cal., 693, P. C.; see s. 51 post, and the commentary thereon.

(2) *Thomas v. Sherwood*, 9 P. C., 142 (148).

(3) Wilberforce, p. 38. The Common Law maxim "nullum tempus occurrit regi" (no time affects the Crown) is now embodied in the Nullum Tempus Act (IX Geo. is now Geo. III. C 16); *Reg v. Bayley*, 1 Dr. and War., 213.

(4) *Secretary of State v. Vira*, I. L. R., 9 Mad., 175; *Appaya v. Collector of Vizagapatam*, I. L. R., 4 Mad., 155; *Secretary of State v. Mathura*, I. L. R., 14 Bom., 213; see Art. 149, Limitation Act (XV of 1877).

(5) *Goodtitle v. Baldwin*, 11 East, 488; *Goodman v. Mayor of Saltash*, 7 App. Cas., 633; *Wheaton v. Maple*, [1893] 3 Ch., 48 (561); *Turner v. Walsh*, 6 App. Cas., 636.

(6) *Ponnuswamy v. The Collector of Madura*, 5 M. H. C. R., 6; *Arzin v. Rakkhal*, I. L. R., 10 Cal., 214 (219); *Ganpat v. The Collector*, I. L. R., 1 Bom., 7 (3); *Secretary of State v. Mathura*, I. L. R., 14 Bom., 213; *Viresa v. Tatayya*, I. L. R., 8 Mad., 647.

hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent :⁽¹⁾

and a person is said to have "notice" of a fact when he actually knows that fact; or when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to, or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

60. Analogous Law.—"Immoveable property" is thus defined in the General Clauses Act:—"Immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."⁽²⁾ It has been however used in varying senses in the different Acts of the Legislature. In the Indian Trustee Act it is defined thus:—"Immoveable property" shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest herein."⁽³⁾ The same sense is more explicitly preserved in the Registration Act.⁽⁴⁾ "Immoveable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, nor grass."⁽⁵⁾ Similar definitions occur in the Succession and other Acts,⁽⁶⁾ where, however, the term has been given more or less different meanings. Thus within the meaning of the Limitation Act standing crops are immoveable property;⁽⁷⁾ growing crops and trees are held not to be moveable property⁽⁸⁾ within the meaning also of the Small Cause Court Act,⁽⁹⁾ and they are likewise treated as immoveable property within the meaning of the Civil Procedure Code and the Provincial Small Cause Court Act.⁽¹⁰⁾ All these are, however, expressly declared to be *moveable* property by this clause.⁽¹¹⁾ "Instrument" must, so far as this Act is concerned, necessarily mean non-testamentary instrument. "Registered" here means registered in accordance with the Indian Law of Registration for the time being in force.⁽¹²⁾ A similar definition is to be found in section 3 (45) of the General Clauses Act.⁽¹³⁾ The definition of "notice" was inserted by the

(1) Added by s. 2 of the Transfer of Property Amendment Act (II of 1900)

(2) S. 3 (25), Act X of 1897. The same definition occurs in s. 2, Act I of 1865.

(3) S. 2, Act XXVII of 1866.

(4) Act III of 1877.

(5) S. 3. The term 'includes' implies that the definition is inexhaustive. *Ful ehsangji v. Desai Kullinaraji*, 13 B. L. R., 254, P. C.

(6) Registration Act (Act XVI of 1903), s. 2 (6); Indian Succession Act (Act X of 1865), s. 3.

(7) *Pandah Gazi v. Jennuddi*, 1 L. R., 4 Cal., 665; *Nattu Miah v. Nandranvi*, 8 B. L.

R., 509; *Tafail Ahmad v. Banee Madhub Mukerji*, 24 W. R., 491.

(8) *Gopal Chandra v. Ramjan*, 5 B. L. R., 194; *In re Hormasji Irani*, 1 L. R., 13 Bom., 87.

(9) X of 1865.

(10) IX of 1887. *Madaya v. Venkata*, 1 L. R., 11 Mad., 193; *Cheda Lal v. Mulchand*, 1 L. R., 14 All., 30; *Ganga Prasad v. Narain*, 1 L. R., 1 All., 394.

(11) *Raj Chandra Bose v. Dharma Chandra Bose*, 8 B. L. R., 510.

(12) At present Act III of 1877.

(13) Act X of 1897.

Law Commissioners of 1879⁽¹⁾ from the Indian Trusts Act, 1882, section 3, but in the Act as subsequently passed, the words "or search" were added after the words "from an enquiry," at the instance of the Select Committee⁽²⁾ in order to make the definition apply expressly to a case where a person wilfully abstains from a search in a register which he ought to have made. The Indian Contract Act, section 229, runs as follows:—

229. Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to, or obtained by, the principal.

Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set off a debt owing to him from *C* against the price of goods.

(b) *A* is employed by *B* to buy from *C* goods, of which *C* is the apparent owner. *A* was before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set off against the price of the goods a debt owing to him from *C*.

61. "Immoveable Property."—This section does not define "immoveable property" the other terms which it only *interprets* and limits by excluding from the definition occurring in the General Clauses Act "standing timber, growing crops or grass" which would otherwise be included in the category. The term immoveable property does not occur in the English law where such property is designated real property as distinguished from moveable property or personal property, but the two terms are by no means synonymous. Indeed, the English term "real property" is based upon no juristic conception of property, but is associated with early form of action, called *actio realis*, which was the term employed by early English writers for *actio in rem* of the Roman law. The terms "real" and "personal" were thus originally applied to actions, in which a decree for restitution might or might not issue against the thing in suit (*in rem*). A successful party in a real action obtained the King's writ commanding the Sheriff to put him in possession of the identical holding in respect of which the action had been brought, whilst personal actions were brought to enforce an obligation imposed on a man personally to make satisfaction for a breach of contract or a wrong, or in short, damages.⁽³⁾ And since specific recovery could only be obtained in respect of immoveable property, the other suits being only relieved in damages, the distinction between real property and personal property began to be made according to the appropriate reliefs granted in each case. Now as freeholds were the only things specially recoverable at common law, the term *realty* came to be used as denoting the freehold. Thus a lease for years, however long, was not regarded as real property at all; and even now it is classed as a chattel real.

62. This classification between real and personal property owes its origin to the feudal tenure introduced into the country after the Norman conquest, when land, then the main source of public wealth, was made subject to the law of feudal

"Realty" relic of feudalism.

(1) Report, dated 15th Nov. 1879, s. 29.

s. 3.

(2) Third Report, dated 11th March 1881.

(3) Will. R. P. (18th Ed.), pp. 24, 25.

tenure, which was not applied to moveable things known as goods or chattels.⁽¹⁾ The first principle of feudalism is that all the land in the realm primarily belongs to the Crown.⁽²⁾ Subjects can at most hold under the King or some mesne lord, an estate *freely* or in fee simple,⁽³⁾—in early times without any right of alienation.⁽⁴⁾ Another difference between fees and chattels was that, while on death of the tenant the former passed at common law to the heir, the latter passed to his executors or administrators. In England a further confusion in the use of the term has been engendered by division of real property formerly spoken of as “lands, tenements, and hereditaments” as contrasted with “goods and chattels,” into corporeal and incorporeal,⁽⁵⁾ as meaning the land in the freeholder's possession, as distinguished from mere rights to or over land, which is in another's possession. It will thus be seen that the distinction between real and personal property does by no means coincide with the term “immoveable” and “moveable property.” Thus while a term for years is regarded as a personal property in England,⁽⁶⁾ it is immoveable property in this country.

63. Incorporeal Rights.—But it may be generally premised that the term includes all that would be real property according to English law, and possibly more; ⁷ *toda giras hak*,⁽⁸⁾ being a right to receive an annual payment, and which attaches to the inamdar into whose hands the village may pass, is an “interest in immoveable property” and would fall into that category.⁽⁹⁾ Similarly *haq-i-chnaharum* or liability to pay customary dues is an incident attaching to land and may be enforced against the vendee, unless it is limited to a right available only as against the vendor.⁽¹⁰⁾ *Varshasans* or annual allowance charged on immoveable property are included within the definition of immoveable property.⁽¹¹⁾ Hindu law regards hereditary offices as immoveable property.⁽¹²⁾ A grant made by the Peishwa, by a sanad, dated 1790, of an annual cash allowance and three khandies of rice to be levied from certain mahals and forts therein mentioned was similarly construed.⁽¹³⁾ So was also a cess levied on all imports and exports and which the plaintiff claimed as an allowance granted by the Peishwas in permanency. Such an allowance whether secured on land

(1) Poll. & Mat. History, Eng. Law, ii, 148 et seq.; Will. R. P. (19th Ed.), 9, 15.

(2) In England “Feudalism” appears to have existed in some form before the Norman conquest (A. D. 1066). “Feudalism, in fact, was superseding the older freedom in England even before the reign of William, as it had already superseded it in Germany and France. But the tendency was quickened and intensified by the conquest.” Green's *History of the English People*, p. 80.

(3) Will. R. P. (18th Ed.), 6, 7, 19, 32; Will. P. P. (15th Ed.), 5.

(4) Will. P. P. (15th Ed.), 2.

(5) In Roman Law and sometimes even in English Law all things are said to be so classified (e. g., in Bracton to 10b). Austin justly criticizes this cross division on the ground that it opposes things considered as the objects of rights, to the rights themselves (*Jurisprudence*, 4th Ed., 371, 804).

(6) *Davis v. Gibbs*, 3 P. W., 26 (28); *Whitaker v. Ambler*, 1 Eden, 151 (152); *Turner v. Turner*, 21 L. J. Ch., 843; *Butler v. Butler*, 28 Ch. D., 66.

(7) *Futteshsangji v. Desai*, 13 B. L. R., 254.

P. C.; overruling *Hatesangji v. Desai*, 4 B. H. C. R., 189.

(8) “A right of levying a cash composition in lieu of other claims, or of plunder.” *The Collector v. Pestonjee*, (1855), 13 S. D. A., 291; *Sumbhoollall v. The Collector*, 8 M. I. A., 1.

(9) *Dhundas Bibi v. Abdur Rahman*, I. L. R., 23 All., 201 (210); following *Heera Ram v. Raja Deo Narain Singh*, Agr., P. B., 63; 2nd Ed., 1874, 48.

(10) *Futteshsangji v. Desai*, 13 B. L. R., 254, P. C.; overruling *Futteshsangji v. Desai*, 4 B. H. C. R., 189.

(11) *Keshun v. Vinayak*, I. L. R., 23 Bom., 22.

(12) *Balwantran v. Purshotam*, 9 B. H. C. R., 99; approved in *Futteshsangji v. Desai*, 13 B. L. R., 254 (263, 264), P. C.; *Beema v. Janasjee*, 2 M. I. A., 23; *Sinde v. Sinde*, 4 B. H. C. R., 51.

(13) *Collector v. Hari Sitaram*, I. L. R., 6 Bom., 516, 1st B., overruling *Collector v. Krishnanath*, I. L. R., 5 Bom., 322 (in which the annuity was not regarded “immoveable” because it was not made a charge upon land).

or not is what is known as *nibandha* in Hindu law and is immoveable property.⁽¹⁾ The life-interest of a Hindu widow in the income of her husband's immoveable estate would appear to be immoveable.⁽²⁾ Rights of common, rights of way, an easement of light and air⁽³⁾ as distinguished from a chance of acquiring a right to it⁽⁴⁾ and other profits *in alieno solo*, rents, pensions, and annuities secured upon land would all fall within the term. So the grant of a right to levy a toll on wood and other specified jungle produce such as catechu and cocoon has been held to be the grant of an interest in land.⁽⁵⁾ A claim to an easement,⁽⁶⁾ a right of ferry,⁽⁷⁾ or fishery,⁽⁸⁾ to open a watercourse,⁽⁹⁾ or to hold land rent free,⁽¹⁰⁾ or a right to realize rent⁽¹¹⁾ or for *mulikana*⁽¹²⁾ or a right to possession and management of *saranjam*⁽¹³⁾ belong to the same class. So the mortgage of "the superstructure of a house, exclusive of the land beneath," is mortgage of immoveable property, the apparent intention being to mortgage the existing house and not merely the materials.⁽¹⁴⁾ A right to customary dues of an hereditary office⁽¹⁵⁾ or a right of a purchaser to have lands registered in his name⁽¹⁶⁾ is, however, not within the category. A *hat* is a benefit arising out of land, and it is therefore within the term, and lease of a *hat* must be made as provided in section 107.⁽¹⁷⁾ But being an intangible right it does not fall within the narrower scope of the term as used in section 9 of the Specific Relief Act.⁽¹⁸⁾ The duties which owners of *gunjs*, bazaars, *hats*, &c., levied on commodities there sold, and called *sayer* collections, are not immoveables.⁽¹⁹⁾ But a right to collect dues upon a piece of land being a benefit to arise out of land has been, in Allahabad, held to be immoveable property.⁽²⁰⁾ A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property;⁽²¹⁾ Varshans are immoveables.⁽²²⁾ But an allowance payable periodically, which is not incidental to an hereditary office, is not, unless it is a charge on such property;⁽²³⁾ but a hereditary office is regarded as by

(1) *Kristodhone Nandaram*, I. L. R., 35 Cal. 889 (1894).

(2) *Natha v. Dhunbaji*, I. L. R., 23 Bom., 1.

(3) *Krishnaji v. Gajanan*, 11 Bom. L. R., 352.

(4) *Sultan Nawaz Jung v. Rustomji*, I. L. R., 20 Bom. 704.

(5) *Christian v. Tekantri*, 13 C. W. N., 611.

(6) *Deosuran v. Mahomed*, 24 W. R., 300.

(7) *Krishna v. Akilanda*, I. L. R., 13 Mal., 54.

(8) *Farbutty v. Mudho Pawe*, I. L. R., 3 Cal. 276; *Ramgopal v. Nurumuddin*, I. L. R., 20 Cal. 446; *Shibu Haldar v. Gopi Sundari*, I. L. R., 24 Cal. 449; distinguishing *Padu v. Gour Mohan*, I. L. R., 19 Cal., 544, F. B.; a case under s. 9 of the Specific Relief Act (per Banerjee, J., in *Shibu Haldar v. Gopi Sundari*, I. L. R., 24 Cal., at p. 451).

(9) *Oodoyessurree v. Hurokishore*, 4 W. R., 107.

(10) *Bhujang v. Collector*, 11 B. H. C. R., 1; *Debi v. Jafer Ali*, I. L. R. 3 All., 40. *Contra* in *Legge v. Rambaran*, I. L. R., 20 All., 35.

(11) *Babulal v. Bhowani*, 9 A. L. J. R., 776.

(12) *Harmuji v. Hirdaynarayan*, I. L. R., 5 Cal., 921; *Churaman v. Bulli*, I. L. R., 9 All., 591.

(13) *Nawajun v. Vasudeb*, I. L. R., 15 Bom., 247.

(14) *Narayana v. Ramaswamy*, I. L. R., 8 Mad., 100.

(15) *Rathna v. Tiruvankata*, I. L. R., 22 Mad., 351.

(16) *Bhikaji v. Pandu*, I. L. R., 19 Bom., 43.

(17) *Surendra Narain v. Bhai Lal*, I. L. R., 22 Cal., 752.

(18) *Fuzlur v. Krishna*, I. L. R., 29 Cal., 614; following *Padu v. Gour Mohan*, I. L. R., 19 Cal., 544, F. B.

(19) *Surendro v. Kedari Nath*, I. L. R., 19 Cal., 8.

(20) *Sikandar v. Bahadur*, I. L. R., 27 All., 462.

(21) *Krishnabhat v. Kapabhat*, 6 B. H. C. R., 137; *Balwantrav v. Purshotam*, 9 B. H. C. R., 99; *The Collector of Thanav. Krishnanath*, I. L. R., 5 Bom., 322; *Appna v. Nagia*, I. L. R., 6 Bom., 542; *Fullehsangji v. Desai*, 13 B. L. R., 251. P. C.; *Rigghoo v. Kassy*, I. L. R., 10 Cal., 73.

(22) *Keshav v. Vinayak*, I. L. R., 23 Bom., 22.

(23) *Beer Ghunder v. Nobodeep*, I. L. R., 9 Cal., 535.

itself immoveable property,⁽¹⁾ and so is a right to worship an idol.⁽²⁾ A claim to maintenance is a familiar example of this species of property.⁽³⁾ A *nibandha* or corody involves generally the idea of a connection with immoveable property and ranks with it.⁽⁴⁾ The chance of acquiring a right to light and air is both incapable of valuation and is wholly outside the term.⁽⁵⁾ A share in a registered company is by law declared to be moveable property.⁽⁶⁾ And so under Hindu law, Government Promissory Notes are classed as moveable property.⁽⁷⁾

64. But there has been considerable diversity of opinion as to the nature of the property which a debt secured by a mortgage of immoveable property constitutes. In Bombay, in cases decided under the Code,⁽⁸⁾ such a debt has been regarded as moveable property, as being "a debt not secured by a negotiable instrument" within the meaning of section 263 of the Code.⁽⁹⁾ In Calcutta, however, the rulings are by no means consistent, for in one case it was laid down that such a debt fell into the category of immoveable property. "A mortgage" they said "is not a mere debt, it represents a substantial interest in the mortgage-property, viz., the right of selling it under certain conditions, in realisation of the debt."⁽¹⁰⁾ But a contrary view was propounded in later cases,⁽¹¹⁾ in which, however, no reasons were given for the change of opinion. In Madras the question was at one time decided on the lines of the earlier Calcutta view. "Regarded as a debt, it is undoubtedly moveable property, but seeing that a debt is made a charge on land, we cannot say that it is not a 'benefit to arise out of land' (within the meaning of the General Clauses Act), and we are constrained to hold that it is immoveable property."⁽¹²⁾ But later cases have struck a discordant note, and in their view it should be treated as merely moveable property.⁽¹³⁾ The Allahabad Court has, on the other hand, held with the later Calcutta cases⁽¹⁴⁾ In the Punjab it has been held that since the mortgage-debt is a charge on immoveable property it is itself immoveable property,⁽¹⁵⁾ but there are cases in

(1) *The Government of Bombay v. Goswami*, 9 B. H. C. R., 222 (225); following *Bharat-sangji v. Nirmalchandraji*, 1 B. H. C. R., 186; *Fatesangji v. Desai*, 4 B. H. C. R., 189; *Raja v. Desai*, 4 B. H. C. R., 56; *Government of Bombay v. Desai*, 9 B. H. C. R., 228, P. C.; *Vishnu v. Yeshwantrao* [1895] B. P. J., 453.

(2) *Eshwari Chander v. Monmohini*, 1 L. R. 4 Cal., 643; followed in *Jotikar v. Mukunda Basta* 1 L. R., 39 Cal., 227 (230).

(3) *Sangapji v. Sangankasapa*, 1 L. R. 21 Bom., 387.

(4) *The Government of Bombay v. Goswami*, 9 B. H. C. R., 222 (226); *Krishnaji v. Gajanan*, 11 Bom. L. R. 352; *The Government of Bombay v. Kallanji*, 14 M. L. A., 551.

(5) *Sultan Nawaz Jung v. Rustonji*, 1 L. R., 20 Bom., 704; *Munappa v. Subramaniam*, 1 L. R., 18 Mad., 437.

(6) S. 44, Indian Companies Act (VI of 1882).

(7) *Doorga v. Pooreen*, 5 W. R., 111.

(8) S. 263 of the Code of Civil Procedure (Act XIV of 1857).

(9) *Niger v. Bhasker*, 1 L. R., 10 Bom., 444; *Baldev v. Ramchandra*, 1 L. R., 19 Bom., 121; *Parashram v. Govind*, 1 L. R., 21 Bom., 226; *Bholanath v. Ba Kashi*, 4

Bom. L. R., 18 S. C., *Tilvadi v. Ba Kashi*, 1 L. R., 26 Bom., 305; but see *Hari v. Ramchandra*, 1 L. R., 9 Bom., 54.

(10) *Srinath v. Gopal*, 1 L. R., 9 Cal., 511.

(11) *Debendra v. Rup Lall*, 1 L. R., 12 Cal., 546; *Kishnath v. Sadashiv*, 1 L. R., 20 Cal., 805 (809); *Gous Mahomed v. Khawas Ali*, 1 L. R., 23 Cal., 450; *Basinath v. Binoyendra Nath*, 5 C. W. N., cxxiii, 6 C. W. N., 5.

(12) *Appasami v. Scott*, 1 L. R., 9 Mad., 5; following *Srinath v. Gopee*, 1 L. R., 9 Cal., 511; *Buddoo v. Maharoop*, 6 N. W. P. H. C. R., 129; *Mt. Bhawanji v. Gulab Rai*, 1 L. R., 1 All., 348; *Hari v. Ram Chandra*, 9 B. H. C. R., 64; *Sami v. Krishnasami*, 1 L. R., 10 Mad., 169; but contra in *Muniappa v. Subramaniam*, 1 L. R., 18 Mad., 437.

(13) *Muniappa v. Subramaniam*, 1 L. R., 18 Mad., 437; *Nitaraji v. South India Bank*, 22 M. L. J. R. 105; *Subramanya v. Subba Iyer*, (1912) 16 I. C., 816.

(14) *Abdul Majid v. Muhammad*, 1 L. R., 19 All., 89; *Karim-un-nissa v. Phul Chand*, 1 L. R., 15 All., 134; distinguishing *Bhawanji v. Gulab Rai*, 1 L. R., 1 All., 348.

(15) *Sewa Ram v. Dharan Shah*, (1913) P. W. R., No. 79.

which the contrary was laid down.⁽¹⁾ Thus then judging from the decided cases, but for the solitary exception of the Punjab, the current view is in favour of holding mortgage-debt to be moveable property.

65. The same want of harmony, did not, however, pervade the question of a mortgage decree when it had to be attached and sold in execution under section 273 of the last Code of Civil Procedure, under which it was agreed that though such a decree was not merely a money decree⁽²⁾ still, at the same time, it was also not immoveable property, as that term is defined in the General Clauses Act,⁽³⁾ or within the meaning of the Indian Registration Act, in as much as it does not of itself "purport or operate to create" an interest in immoveable property within the meaning of section 17, and consequently its transfer though in writing did not require to be registered under that section.⁽⁴⁾ So far as regards the Code of Civil Procedure the matter has been further cleared up by amendment of section 273, now order XXI, rule 53 of the Code of Civil Procedure, but since the amended definition of an "actionable claim" excludes a secured debt, it is no longer assignable as provided in section 130, and since the debt though moveable carries with it the security which is inseparably annexed to it, and which would follow it on attachment⁽⁵⁾ or assignment,⁽⁶⁾ it would probably be treated as falling under the term "immoveable property" under the Act, though in a case decided under the Registration Act it was held that since such a decree does not "purport or operate to create," which means does not of itself purport or operate to create any right, title or interest in immoveable property, its assignment need not be registered.⁽⁷⁾

66. The equity of redemption in mortgaged property is undoubtedly immoveable property.⁽⁸⁾ "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entails and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."⁽⁹⁾ An opposite view may be said to have been taken in certain cases in the

(1) *Bmtu v. Gaudli Singh*, 1 I. C., 450.

(2) S. 273 of the last Code of Civil Procedure. *Macnaghten v. Surja Prosad*, 4 C. W. N., xxxv; *Bajjnath v. Benoyendra*, 6 C. W. N., 5.

(3) *Brijnath v. Benoyendra*, 6 C. W. N., 5; *Gous Mohamed v. Khawas Ali*, I. L. R., 23 Cal., 450 (451).

(4) *Gous Mohamed v. Khawas Ali*, I. L. R., 23 Cal., 450 (453); *Abdul Majid v. Mahomed Frizullah*, I. L. R., 13 All., 89; *Subrain v. Puran Singh*, 8 A. L. J. R., 1327.

(5) *Balkrishna v. Msumar*, I. L. R., 5 All., 142 (157), P. C.; *Sami Ayyar v. Krishnasami*, I. L. R., 10 Mad., 169; *Buldev v. Ramchandrar*, I. L. R., 19 Bom., 121.

(6) *Exp. Smith*, 2 D. & L., 271; 2 Robbin's Mortgage 826.

(7) *Jwan Ali v. Basa Mal*, I. L. R., 9 All., 108, F. B.; *Abdul Majid v. Muhammed*, I. L. R., 18 All., 89; *Mumtaz Ahmed v. Sri Ram*,

I. L. R., 35 All., 521; *Brijnath v. Benoyendra*, 6 C. W. N., 5; *Ram Ratan v. Jogesh Chandra*, 12 C. W. N., 625 (627); *Gous Mahomed v. Khawas Ali*, I. L. R., 23 Cal., 450, dissenting from *Gopal Narayan v. Trimbak*, I. L. R., 1 Bom., 267 (s. 231 of the C. P. C. distinctly implies that a decree may be transferred by assignment).

(8) *Jairam v. Balkrishna*, 3 N. L. R. 72 (74).

(9) *Per Hardwick*, L. C., in *Cusborne v. Scarfe*, 1 Atk., 603; cited in *Heath v. Pugh*, 6 Q. B. D., 360; *Mahalavi v. Kusaji*, I. L. R., 18 Bom., 730 (745); *Parashram v. Gobind*, I. L. R., 21 Bom., 226 (228); *Kanti Ram v. Kutubudin*, I. L. R., 22 Cal., 33; *Umesh Chander v. Zakur Fatima*, I. L. R., 18 Cal., 164, P. C.; *Khubchand v. Kahan Das*, I. L. R., 1 All., 240; *Raghunath v. Juravan*, I. L. R., 8 All., 705; *Kandian v. Ranjima*, I. L. R., 4 Mad., 218; *Gangadhar v. Swaram*, I. L. R., 8 Mad., 246.

Allahabad and Bombay High Courts.⁽¹⁾ "But it will be found upon an examination of the facts of those cases that the first mortgagee had, subsequent to the second mortgage, purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage. In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor; it has already passed into the hands of the first mortgagee."⁽²⁾

67. Standing Timber.—By "timber" is generally meant such trees only as are fit to be used in building and repairing houses.⁽³⁾ Thus in England oak, ash and elm trees are considered timber provided at least they have attained a certain age and size, that is, they are at least twenty years' old, provided also they are not so old as not to yield a reasonable quantity of usable wood in them, sufficient to make a good post.⁽⁴⁾ Timber may be varied by local custom. "There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country, beech in some counties, hornbeam in others and even white-thorn and black-thorn, and many other trees are considered timber in particular localities in addition to the ordinary timber trees."⁽⁵⁾ In certain cases even age is not a sure test, and the tree is said to become timber on attaining a certain girth. Trees fit for firewood only, or not sufficiently grown to produce useful wood, clearly could not be ranked as timber. The term "standing timber" would appear to have been used in contradistinction to trees. Certain trees, being almost invariably used as timber, are commonly spoken of as "timber trees." But probably most trees would admit of being used both as timber and for other purposes. Thus, properly speaking, almost every tree being potentially "timber," and no tree actually timber, the question whether a tree is for the purpose of any transaction, to be deemed to be "timber" must depend upon the way it is regarded and treated in that transaction. If, for example, trees are sold with a view to their being cut down and removed, the sale is one of "standing timber."⁽⁶⁾ But if, on the other hand, trees are sold with a view to the purchaser keeping them permanently standing and enjoying them by taking their fruit or otherwise, the sale could hardly be regarded as one of "standing timber," but it would be no doubt a sale of immoveable property. Thus a mango tree, which is primarily a fruit tree, might not always come within the term "standing timber," but it may be classed as a timber tree where, according to the custom of a locality, its wood is used in building houses.⁽⁷⁾ Similarly in England timber may include by local custom beech and various other trees, even trees which are primarily fruit trees, such as, cherry, chestnut and walnut.⁽⁸⁾

68. Though standing timber is declared to be moveable property, still parties entering into a contract with reference to such timber may expressly or

(1) *Gaya Prasad v. Solik Prasad*, I.L.R., 3 All., 682; *Hor Prasad v. Bhogwan Das*, I.L.R., 4 All., 196; *Mulchand Kuber v. Lallu Trikam*, I.L.R., 6 Bom., 404; *Parsi v. Girand Singh*, (1885) A.W.N., 155.

(2) *Kanti Ram v. Kutubuddin Mahomed*, I.L.R., 22 Cal., 45.

(3) *Krishna Rao v. Babaji*, I.L.R., 24 Bom., 21.

(4) *Per Sir G. Jessel, M.R., Honeywood v. Honeywood*, L.R., 18 Eq., 303; citing Gib-

bons on Dilapidations, p. 215, Countess of Cumberland's case, Moo., 812; *Herlakenden's case*, 4 Rep., 636.

(5) *Per Sir G. Jessel, M.R., Honeywood v. Honeywood*, L.R., 18 Eq., 306 (309).

(6) *Ali Saheb v. Mohidin*, 13 Bom. L.R., 874 (877).

(7) *Krishnarao v. Babaji*, I.L.R., 24 Bom., 31; *Katwar v. Ramadhin*, 10 A.L.J.R., 516.

(8) *Chandoo v. Talbat*, 2 P.Wms., 608.

by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise out of the land on which the timber grows. In such a case, the contract would undoubtedly be not in respect of mere moveables, but would operate as a transfer of an interest in immoveable property.⁽¹⁾ Trees before their severance from the ground are reckoned as forming part of it, and are therefore immoveable property,⁽²⁾ but on severance, of course, they become moveable property. But a lease of a forest granted for two years in order that the lessee might cut and remove all kinds of trees growing therein, being a sale of standing timber, which is both here and in the Indian Registration Act classed as moveable property, requires no registration.⁽³⁾ But if added to the right to cut and fell trees the lessee is given the right to take the forest produce, the lease would then be a lease of immoveable property.⁽⁴⁾ "The principle of these decisions appears to be this, that whenever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over; or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industrials, etc.*, the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods."⁽⁵⁾

69. Standing Timber under other Acts:—Of course, this definition is professedly not one of general application, but is limited only to this Act, and from which it follows that the term "standing timber" is not to be classed as moveable property for all purposes, though it is so regarded under the Provincial Small Causes Court⁽⁶⁾ and the Indian Registration Act,⁽⁷⁾ but it is treated as immoveable property for the purpose of limitation⁽⁸⁾ and of the Code of Civil Procedure, and would be so regarded under the comprehensive definition of "immoveable property" as given in the General Clauses Act.⁽⁹⁾

70. Growing Crops.—Indian law makes no distinction between what are known as *emblements* in English law, i.e., crops which are the annual results

(1) *Serni Chettiar v. Santhanathan*, I. L. R., 20 M.d., 58 (65, 66), F. B.; *Abdullah v. Ashraf Ali*, 7 C. L. J., 154.

(2) *Ghufoo un v. Mustuk deh*, 2 Agra, 300; *Bapu v. Dhondi*, I. L. R., 16 Bom., 353; *Sakharam v. Vshram*, I. L. R., 19 Bom., 207.

(3) S. 2 (9), Indian Registration Act (Act XVI of 1904); *Abdullah v. Ashraf Ali*, 7 C. L. J., 152 (166); *Muthra Das v. Jidubir*, I. L. R., 28 All., 277; *Mangal Sen v. Naoli*, 9 I.C., 478.

(4) *Sukry v. Gomdakull*, 6 M. H. C. R., 71; *Serni Chettiar v. Santhanathan*, I. L. R., 20 M.d., 58 (60, 63, 65).

(5) Sir Vaughan Williams in *Duppa v. Mayo*, (Notes); cited per Lord Coleridge, C.J.,

in *Marshall v. Green*, L. R., 1 C. P. D., 35 (39).

(6) *Umed Ram v. Dualat Ram*, I. L. R., 5 All., 564 (566), F. B.

(7) *Ram Ghulam v. Mamohar Das*, (1887) A. W. N., 59; *Mangal Sen v. Naoli*, 9 I.C., 478.

(8) *Abdullah v. Ashraf Ali*, 7 C. L. J., 152 (166); *Ram Gulam v. Marohar*, 7 A. W. N., 59; *Sakha Ram v. Vishram*, I. L. R., 19 Bom., 207; *Madayi v. Venkata*, I. L. R., 11 Mad., 19; *Jamal Singh v. Ladha*, (1884) P.R. No. 112.

(9) S. 3 (25), General Clauses Act (Act X of 1897); *Jamal Singh v. Ladha*, (1884) P. R. No. 112; *Abdullah v. Ashraf Ali*, 7 C. L. J., 152 (166).

of agricultural labour, and other crops, i.e., grass and clover which do not repay within the year the labour by which they are produced. Consequently, "growing crops" would here include not only the seeds or products of the harvest in corn, but all vegetable growths whether in the form of fruit, leaf, bark or roots, which have no existence apart from their produce as distinguished from trees and shrubs which have a recognized existence apart from any produce which they may bear. As such *pan* creepers would be included in the term, though the creepers are uprooted not annually but at the end of the third year.⁽¹⁾ But plantain trees which, when once planted, yield fruit for several years, fall into a different category.⁽²⁾ and so does also *lac* which is the excretion of insects reared upon certain trees.⁽³⁾ But growing crops must be distinguished from future crops⁽⁴⁾ which are ordinarily classed as immoveable property;⁽⁵⁾ and have been therefore classed as immoveable property.⁽⁶⁾ Under section 87 of the Contract Act sale of such crops is the sale of goods not yet in existence, and the ownership of such goods may be transferred by acts done after the goods are produced in pursuance of the contract by the seller, or by the buyer with the seller's assent.⁽⁷⁾ The term "crops and produce of land," as used in the Code of Criminal Procedure, means crops and produce attached to the land, and which is then regarded as immoveable property.⁽⁸⁾

71. Grass.—Grass means also growing grass or herbage; "and a right to depasture or to cut grass for an indefinite time would be regarded as right in immoveable property."⁽⁹⁾

72. Maintenance.—A sum of money payable for maintenance, even though out of immoveable property at Government revenue does not thereby cease to be moveable property unless it is made a charge upon land in which case it would be treated as immoveable property.⁽¹⁰⁾

73. Property.—In the Bill as revised by the Law Commission property was thus defined: "The 'ownership' of a thing is the right of one or more persons to possess and use it to the exclusion of others. Such ownership is either absolute or qualified. The thing of which there may be ownership is called 'property.'"⁽¹¹⁾ A clear notion of property is a pre-requisite for properly understanding the law thereof, and the subject will be therefore found fully discussed under section 5. Here, however, it may be stated that the term "property" is throughout the Act used in its most generic sense, as meaning not only the actual physical object, but also all interest comprised therein and may be the subject of ownership. According to Lord Langdale "property is the most comprehensive of all terms which can be used in as much as it is indicative and

(1) *Atmaram v. Doma*, 11 C.P.L.R., 87.

(2) *Gopala v. Choppoo*, 11 C. P. L. R., 89.

(3) *Parmanand v. Birkhu*, 5 N. L. R., 21.

(4) *Kalka Prasad v. Chandan Singh*, I. L. R., 10 All., 20.

(5) *Kalka Prasad v. Chandan Singh*, I. L. R., 10 All., 20; *Misri Lal v. Mozhar*, I. L. R., 13 Cal., 262.

(6) *Seeni v. Santhanathan*, I.L.R., 30 Mad., 58; *Mammukutty v. Puzhakkal*, I. L. R., 29 Mad., 353; *Kuthuva v. Thoppar*, 15 I.C., 234 (239); *Raja Bije Bahadur v. Gurnolal*, 5 C. P. L. R., 6; *Parmanand v. Birkhu*, 5 N. L. R., 21; *Kotagiri v. Patibanda*, 14 M. L. T., 225.

(7) S. 87, ill. (c), Indian Contract Act (IX

of 1872); *Misri Lal v. Mozhar*, I.L.R., 13 Cal., 262.

(8) *Shah Romzan v. Janardhan*, 6 C. W. N., 881.

(9) Shep., 12.

(10) *Government of Bombay v. Desai Kulhanrai*, 14 M.L.A., 551 (563, 564); *Asghar Ali v. Khurshed Ali*, I.L.R., 24 All., 27 (49), P. C.; *Ram Singh v. Hargobind*, (1891) P.R. No. 83.

(11) To this definition is appended the following marginal references: Bill III, s. 3, Report s. 2, N. Y. Code, para. 159, showing the source from which the definition has been extracted.

descriptive of every possible interest which the party can have."⁽¹⁾ It therefore includes the right known as an "equity of redemption,"⁽²⁾ and a debt secured by charges.⁽³⁾ An actionable claim is therefore also 'property.'⁽⁴⁾ The "common of turbary," or a right of cutting turf in another person's land and "common of pasture," or the right of depasturing cattle on the land of another, are appendant incorporeal hereditaments which are regarded in England as falling into the category of real property,⁽⁵⁾ and there can be no doubt but that they will be so regarded in this country.

74. Instrument.—In the Bill the term used was assurance and which was thus defined:—" 'Assurance' means any non-testamentary instrument, which purports or operates to create, transfer, or otherwise dispose of, whether in present or in future, any right, title or interest to or in immoveable property."⁽⁶⁾ This definition having been subsequently abandoned, the present definition may be regarded as only in a measure supplementary to that given in the Indian Registration Act, but the term has been given special and restricted connotation for the purpose of this Act. From the nature of the Act testamentary instruments are excluded from its consideration. In the Registration Act ⁽⁷⁾ the term was said to have been used on the understanding that the writing is not merely evidence of the transaction, but is the transaction itself."⁽⁸⁾

75. "Registered."—"Registered" means "registered" in accordance with the provisions of the Indian Registration Act or other law regulating the registration of documents in British India. Accordingly, a document registered out of British India, *e. g.*, in a Feudatory State, is not registered within the meaning of this Act. A document compulsorily registered, and though denied by the executant at the time of presentation for registration, is to be regarded as duly registered, but where a hypothecation bond was registered without the minor being represented, it was held not to be registered so far as the minor was concerned. Registration must be *in accordance* with the law, otherwise the document is not treated as registered;⁽⁹⁾ but registration by an officer of property situated partly outside his jurisdiction is not invalid.⁽¹⁰⁾ But where the *whole* of the property is situate outside the jurisdiction of the Registering officer its registration is of no effect,⁽¹¹⁾ and the Civil Court can refuse to receive it in evidence.⁽¹²⁾ The Court is entitled to go behind a certificate of Registration and where it finds that a document has been registered by an officer who had no jurisdiction to register it, the Court will refuse to receive it in evidence on the ground that it is not duly registered.⁽¹³⁾ So where the registration of a

(1) *Jones v. Skinner*, (1835) 5 L. J. Ch., 90.

(2) *Matadin v. Kazim Husein*, I. L. R., 13 All., 493, F. B.

(3) *Rudra v. Krishna*, I. L. R., 14 Cal., 241; *Matadin v. Kazim Husein* I. L. R., 13 All., 493, F. B.; *Mushram v. Ishen Chunder*, I. L. R., 21 Cal., 563, F. B.

(4) *Muchiram v. Ishen Chunder*, I. L. R., 21 Cal., 563, F. B.; *Rudra Prakash v. Krishna Mohun*, I. L. R., 14 Cal., 241.

(5) Will, R. P. (18th Ed.), 395.

(6) The draft definition bore the following marginal note showing the source from which it was adopted—Act III of 1877, s. 17, ol. (b) (Indian Registration Act).

(7) Act XX of 1866.

(8) *Somu Gorukhal v. Rangammal*, 7 M. H. C. R., 19.

(9) *Mohammed v. Raja Pertab*, 5 N. W. P. H. C. R., 91; *Shanker v. Jograj Singh*,

I. L. R., 5 All., 599.

(10) *Mohammed v. Raja Pertab*, 5 N. W. P. H. C. R., 91.

(11) *Ram Coomar v. Khuda Newaz*, 7 C. L. R., 223; *Har Sahai v. Chummi Kuar*, I. L. R., 4 All., 14; *Sheo Shanker v. Hirdey Narain*, I. L. R., 6 Cal., 29; *Bishunath v. Kalluni Bai*, W. N. [1882], 175, but contra *Beni Madhub v. Khatir Mondul*, I. L. R., 14 Cal., 449; *Baijnath v. Sheo Sahay*, I. L. R., 18 Cal., 556, F. B.

(12) *Baijnath v. Sheo Sahay*, I. L. R., 18 Cal., 556, F. B.

(13) *Beni Madhab v. Khatir Mondul*, I. L. R., 14 Cal., 449.

(13) *Beni Madhab v. Khatir Mondul*, I. L. R., 14 Cal., 449; *Joginee v. Bhoot Nath*, I. L. R., 29 Cal., 654; *Daji v. Moreshwar* N. L. R., 112.

document has been compassed by fraud as by giving false or incorrect description of the property in respect of matters which from their nature it lies upon the party registering the document to state, being especially within his knowledge, registration would be invalidated, if the misdescription affects the jurisdiction or identification of the property.⁽¹⁾

76. Registration Acts.—The first Registration Act or rather two Acts for India were passed in 1843,⁽²⁾ which, however, provided only for optional registration.⁽³⁾ They were both repealed, in 1864,⁽⁴⁾ by a subsequent Act called the Registration of Assurances Act, and which in its turn was superseded by an Act enacted two years later.⁽⁵⁾ Another Act passed in 1868⁽⁶⁾ repealed the one previously in force. Again, in 1871, still another Act⁽⁷⁾ was brought into existence repealing the Acts before then in force and sweeping away a part⁽⁸⁾ of the Registration Act of 1866, which described the procedure relating to the registration of memoranda of decrees and orders affecting immoveable property. It effected a still greater change in doing away with the provisions, contained in sections 52—55 of the said Act, enjoining special registration of obligations of payment of money, and their summary enforcement; and which had marked a peculiar feature in the then Registration Law. The Act passed in 1877 merely consolidated the previous Act. And though amended from time to time,⁽⁹⁾ it has been substantially re-enacted as the present law.⁽¹⁰⁾

77. "Attached to the Earth."—The expression "attached to the earth" occurs twice again in the Act,—in the last part of paragraph 2, section 8, and in cl. (h) of (B), section 108. "Fixtures" under section 8 pass with the property, and under section 108 the lessee is entitled to remove all fixtures made by him provided he leaves the property *in the state in which he received it*. "You shall not destroy the principal thing by taking away the accessory to it."⁽¹¹⁾ Attached includes the doors and window shutters of a building.⁽¹²⁾

78. This clause defines what terms may be deemed to be "attached to the earth" and as such would be included in the category of immoveable property.⁽¹³⁾ Really speaking, the clause is a proviso explanatory of the terms as used in the definition of immoveable property. As a rule, whatever is affixed to the soil, becomes, in the contemplation of law, a part of it and is subjected to the same rights of property as the soil itself. The clause divides "attached" things into three classes, namely, (a) those that are *rooted* in the earth (§§ 79—82); (b) things that are *imbedded* (§§ 83—85); or (c) things that are *attached* to what is so

(1) *Bairnath v. Sheo Sahay*, I. L. R., 18 Cal., 556.

(2) Acts I and XIX of 1843.

(3) S. 3, Act XIX of 1843, provided:—
"And it is hereby declared and enacted, that no conveyance or other instrument affecting title to land, or any interest in the same, whether made before or after the said first day of May last past, other than such deeds or certificates as aforesaid are or shall be in any respect void for want of registration, any Act, Regulation or law to the contrary notwithstanding."

(4) Act XVI of 1864.

(5) Act XX of 1866.

(6) Act XXVII of 1868.

(7) Act VIII of 1871.

(8) Part VIII of Act XX of 1866.

(9) Amended by Acts XII of 1879, XIX of 1883 (Land Improvement Loans), VII of 1886, VII of 1888, XIII of 1889 (Cantonments), XII of 1891 and Act XVII of 1899.

(10) Act XVI of 1908.

(11) 3 Atk., 13 (*per* Lord Hardwicke).

(12) *Peru Bepari v. Ronun*, I L.R., 11 Cal., 164; *Queen-Empress v. Sheikh Ibrahim*, I.L.R., 13 Mad., 518; *Purshotama v. Municipal Council of Bellary*, I.L.R., 14 Mad., 467.

(13) S. 3 (45), General Clauses Act (X of 1897).

imbedded such as trade-fixtures and machinery permanently fixed to the land whether for the purpose of trade or the better enjoyment of the land itself.⁽¹⁾ (§§ 86—91.)

79. Trees and shrubs being rooted in the earth are deemed to be attached thereto, and so long as they are so attached they are immoveable property, and form part of the soil to which they are affixed,⁽²⁾ but they lose their character immediately on severance.⁽³⁾ Hence so long as they are not cut they are *prima facie* to be taken as passing with the land on which they grow. The sale of a house and compound would then clearly comprise the trees thereon unless they were expressly excepted.⁽⁴⁾ Where the *mutwali* of a shrine planted fruit trees on land admittedly belonging to the tribe and the judgment-creditor of the *mutwali* sought to attach the tree under a money-decree against the *mutwali*, it was held, that although the judgment-debtor's predecessor planted the trees while acting as *mutwali*, apart from the land he could acquire no property in the trees by so doing, nor could any benefit which the *mutwali* who originally planted the grove, or his successors might have derived by taking the fruit of the tree, enable them to acquire any right of ownership in the trees as against the shrine, and which, until the contrary is established, belonged to the shrine to which the land belonged.⁽⁵⁾ Similarly a tenant planting trees on his holding acquires no right to sell or otherwise dispose of them at any rate beyond the term of his own tenancy⁽⁶⁾ unless by custom or contract he has acquired a greater right therein. Hence where a tenant hypothecates trees standing on the land he holds for a term, the hypothecation is only valid for the term of his tenancy, and would cease to be enforceable with the cessation of his tenancy and his ejection.⁽⁷⁾ Trees and shrubs being attached to the soil pass by a conveyance without express mention.⁽⁸⁾ But should they be reserved and excepted out of the conveyance, they will be deemed to have been severed in contemplation of law from the soil, and would then cease to be immoveable property.⁽⁹⁾ Similarly where trees alone are transferred they are deemed to have been detached from the earth and are moveable property.⁽¹⁰⁾ But a *yaddast* entitling the grantee to "cut and enjoy the trees, &c., and the grass, korai, green nuts, &c., from this day till the close of Fasli 1304" is not a mere lease to *existing things*, but also to what might grow on the ground within the period named, that is, to an interest in immoveable property which would require registration⁽¹¹⁾ in as much as it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from

(1) *Macleod v. Kikabhoy*, 3 Bom. L. R., 426 (430); citing *Hallen v. Runder*, 1 O. M. and R., 266; *Lee v. Gaskell*, L. R., 1 Q. B. D., 700 (in the case misquoted); see *Elves v. Maw*, 3 East., 53; *Wike v. Hall*, 8 App. Cas., 195 (210); *Ex parte Astbury*, L. R., 4 Ch., 630.

(2) *Muhammad v. Lante Ram*, I. L. R., 23 All., 291, F. B.; *Harbins Lal v. The Maharaja of Benares*, I. L. R., 23 All., 126 (127); *Ramalinga v. Samiappa*, I. L. R., 13 Mad., 15.

(3) S. 3 (25). General Clauses Act (X of 1897); *Re Anslie*, 80 Ch. D., 485; *Re Llewellyn*, 87 Ch. D., 344.

(4) *Faqeer Sonir v. Mt. Khuderun*, 2 N. W. P., H. O. R., 251; *Iqbal Husen v. Nand Kishore*, I. L. R., 21 All., 294. See s. 108 (h), *Comm. post*.

(5) *Nurbibi v. Maginal*, I. L. R., 16 Bom.,

517.

(6) *Imdad Khan v. Bhanirath*, I. L. R., 10 All., 159; *Kaun-alia v. Gulab Kuar*, I. L. R., 21 All., 297; *Janki v. Sheo Adhar*, I. L. R., 23 All., 211; *Nafarchandra v. Ram Lal*, I. L. R., 22 Cal., 742.

(7) *Ajudhia Nath v. Sital*, I. L. R., 3 All., 567; *Ram Baran v. Salig Ram*, I. L. R., 2 All., 896; *Mt. Pearun v. Ram Narain*, 1 N. W. P., H. O. R., 213.

(8) *Wills*, P. P. (15th Ed.), 133.

(9) *Harlakenden's case*, 4 Rep., 63 (b).

(10) *Marshall v. Green*, 1 O. P. D., 35; *Rambhat v. Vasuleo*, [1886] B. P. J., 130; *Chowdhry v. Dhandoo*, 3 Agra, 157.

(11) *Seeni Chettiar v. Santhanathan*, I. L. R., 20 Mad., 68, F. B.; following *Sukry Kurdeppa v. Goondakull*, 6 M. H. O. R., 71; *Marshall v. Green*, 1 O. P. D., 35.

further vegetation and from the nutriment to be afforded by the land.”(1) On a similar principle a document creating a right of use over growing trees for a term of years creates an interest in land and not only in the “forest produce” which it purports to lease.(2) But the hypothecation of an existing sugarcane crop, though the property was described as “khet-naishakar” (“a field of sugarcane”), was held to be a mortgage of moveables, the word “khet-naishkar” being only descriptive of the extent of the interest conveyed.(3) Such mortgages must, however, be distinguished from those which relate to future property, as future indigo crops that may be grown upon the mortgagor’s land, which is in effect no more than an agreement to mortgage moveable property that may come into existence in future, for which there is at present no legislative recognition although the Courts have always enforced such agreements if not otherwise invalid.(4)

80. A distinction must be drawn between trees and shrubs and emble-

Emblements. ments or vegetable products as are the annual results of agricultural labour. Emblements or the annual crops comprise not only corn and gram sown, but also roots planted and other annual artificial products of the land, but they do not comprise fruit trees, such as panmala and figs which pass with the land.(5) These products are never considered as part of immoveable property. But on the other hand, they belong to the tenant who has grown them, and which he is allowed to gather and take away even on ejection.(6)

81. The term tree appears to contemplate trees of mature growth, and

Shrubs. so does the word “shrubs” as used in ordinary parlance. But does the clause comprehend immature and growing trees and shrubs, or plants however small, as for example seedling in a nursery. The law on the subject was explained by Sir Vaughan Williams in a case to which reference has already been made elsewhere (§ 68) and the test there laid down should furnish a fair working rule for distinguishing the two classes of property.

82. It would thus appear that in a sale of crops, or trees or other matters existing in a growing state in the land, the question whether the interest conveyed is or is not an interest in land depends upon the nature of the agreement between the parties and the rights which such an agreement may give.(7) The sole test in such cases is that of intention.(8) Where the purchaser is to derive no benefit from the soil but is only to remove, as soon as possible, so much timber which happened to be affixed to the land at the time, it cannot be said that any interest in the land was intended to be conveyed. On the other hand, if the contract be for the sale of, say, a young plantation of some rapidly-growing timber, which was not to be cut down until it had become substantially changed and derived benefit from the land, the case would obviously be otherwise.(9)

(1) *Marshall v. Green*, 1 C. P. D., 35.

(2) Reference under s. 30 of *Madras Forest Act*, I. L. R., 12 Mad., 203, F. B.

(3) *Kalka Prasad v. Chandan Singh*, I. L. R., 10 All., 20.

(4) *Misri Lal v. Mozhar Hossain*, I. L. R., 13 Cal., 262; *Lala Tilokdhari v. Furlong*, 2 B. L. R., 230.

(5) *Dowlatram v. Gulabchand*, [1885] B. P.

J., 151.

(6) S. 108 (i) *post*; *Graves v. Weld*, 5 B. & Ad., 105; 39 R. R., 418; *Murtaza Khan v. Gajraj Singh*, 14 C. P. L. R., 89; following *Evans v. Roberts*, 29 R. R., 421.

(7) *Smith v. Surman*, 9 B. & O., 561.

(8) Cf. per Grove, J., in *Marshall v. Green*, I. L. R., 1 C. P. D., 35 (44).

(9) *Ibid*.

- 83.** The next clause is the authoritative rendering of the legal maxim
(2) *Imbedded.* *omne quod solo inædificatur solo cedit*,⁽¹⁾ which is however a specific variation of the general maxim before discussed.

In discussing the questions falling within the ambit of the maxim several points call for discussion, but of which it takes no note. A building or erection may be put up by a person who may be, as regards the land, a mere trespasser, or a tenant. A trespasser may again build innocently or believing that the owner would compensate him for it, or he may knowingly erect it in the hope of remaining undisturbed in possession, or perhaps to make it costly for the owner to secure eviction. In the case of a trespasser there can be no doubt but that his erection would be regarded as an accretion to the land. But should the trespasser have acted innocently it is possible to conceive of a case when he may have to be placed upon terms.⁽²⁾

84. Taking now the other case, namely, where the building has been made by a tenant lawfully in possession of the premises, the question is one the answer to which must depend upon at least the following considerations :—

(i) the nature of the erection made, whether it is permanently fixed to the soil or not; (ii) whether its removal can be effected without prejudice to the soil; in other words, would the injury caused by its removal be much greater to the landlord than the benefit from the materials when removed is to the tenant; and (iii) whether the building was subservient to some purposes of trade. Then again, it is conceivable that the question may arise between three classes of persons : (i) between different representatives of the same owner of inheritance, *viz.*, between his heir and executor; (ii) between the executors and the remainderman or reversioner;⁽³⁾ (iii) between landlord and tenant. In the first case, *i.e.*, as between heir and executor the rule obtains with the most rigour in favour of the inheritance, and against right to disannex therefrom, and to consider as a permanent chattel anything which has been affixed thereto. In the second case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. In the third case, however, the greatest latitude and indulgence has always been allowed in favour of the claim to having any particular articles considered as personal chattels as against the claim of the landlord.⁽⁴⁾

85. This clause only defines what erections are to be regarded as forming part of the property to which they have been affixed. The question as to what things must be regarded as sufficiently imbedded in the soil so as to become a part thereof is one which is not free from difficulty. As Blackburn, J., observed : "it is a question which must depend upon the circumstances of each case and mainly on two circumstances, as indicating the intention, *viz.*, the degree of annexation and the object of annexation."⁽⁵⁾ But the second consideration is obviously subservient to the first, for if the fixture be sufficiently annexed to the freehold it would pass with it with whatever object it may have been annexed. A spinning mill, a part of which had been fixed by means of

(1) "All that is built on the soil follows (or belongs to) the soil." The General rule is explained in notes to *Elwes v. Mawe*, 2 Sm. L. C., (7th Ed.), 185; 3 East, 98. But this maxim has but a limited application in this country—*Chaturbhuj v. Bennett*, 1. L. R., 29 Bom., 323.

(2) See s. 51 and the commentary thereon.

(3) In England this may be in the case of

a tenant for life or in tail.

(4) *Hervlakenden's case*, 4 Co. Rep., 64; *Cooke v. Humphrey*, Moore, 177; *Lord Darby v. Asquith*, Hole, 234; cited in *Elwes v. Mawe*, 3 East, 51, 6 R. R., 523 (534); *D'Eyncourt v. Gregory*, L. R., 3 Eq., 382.

(5) *Holland v. Hodgson*, L. R., 7 C. P., 328 (394).

screws and the rest being sunk into the stone flooring and secured by molten lead was thus held to be at law distrainable for rent.⁽¹⁾ But the purpose of annexation may rebut the presumption to be drawn from the degree of annexation.

86. Besides the erections imbedded in the earth the clause would not exclude other fixtures such as machinery and the building accessory thereto, being erected to cover and protect it.⁽²⁾

Incidental Fixtures. With regard to buildings and trade-fixtures the general rule is that, whatever has been annexed to the land for the purpose of its better enjoyment, the intention must clearly be presumed to be to annex the erection to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex it only temporarily, in which case it may be detached and removed from the *corpus*.⁽³⁾ The question, again, is a question of intention,⁽⁴⁾ but the degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land. Of course, no such presumption is possible where the value of the fixture is far in excess of the land upon which it was erected or where by custom or contract a different intention is indicated.

The question whether a trade-fixture is severable or not depends not only upon its nature, degree and the mode of attachment, but also the circumstances under which it was attached, the purpose to be served, and last but not least, the position of the rival claimants to the things in dispute.⁽⁵⁾ The question of chattel or fixture would appear to be a question of law.⁽⁶⁾

87. With regard to permanent fixtures the law appears clearly to be that they must be deemed to be added to the principal from which they may not be removed.⁽⁷⁾ But this rule receives a liberal construction in the case of trade-fixtures, the increasing cost and importance of which is forcing a number of exceptions to the rule so as almost to circumvent it. Thus, it has been held, that if a lessee for years make a furnace fixed with mortar for his advantage, or a dyer make his vats or vessels, he may remove them, but if he suffer them to be fixed to the earth after the term, they then belong to the lessor.⁽⁸⁾ So where a fire-engine was erected to work a colliery,⁽⁹⁾ or a cyder mill to make cyder,⁽¹⁰⁾ the machineries were regarded as accessories to the carrying on of the trade. A colliery is not only an enjoyment of the estate, but in part carrying on a trade.

(1) *Hellawell v. Eastwood*, L. R., 6 Ex., 295.

(2) See per Lord Fitzgerald in *Wake v. Hall*, 8 App. Cas., 195 (216); o. a. from *Wake v. Hall*, 7 Q. B. D., 295.

(3) Per Lord Blackburn in *Wake v. Hall*, 8 App. Cas., 195 (204); o. a. from *Wake v. Hall*, 7 Q. B. D., 295.

(4) *Lancaster v. Eve*, L. R., 3 Ex., 257 (260). The intention may be rebutted by circumstances pointing to the contrary—*ib.*, p. 260.

(5) *Reynolds v. Ashby & Son*, [1904] A. C.,

466 (474).

(6) Per Lord James in *Reynolds v. Ashby & Son*, [1904] A. C., 466 (471).

(7) *Buckland v. Butterfield*, 2 Brod. & Bing., 54; *Wake v. Hall*, L. R., 8 App. Cas., 195 (209).

(8) Year Book, 20 Hen. VII, 13, a & b, Poole's case Salk., 368.

(9) *Lawton v. Lawton*, 3 Atk., 13; *Lord Dudley v. Lord Ward Ambler*, 113; *Lawton v. Salmon*, 1 H. Black, 259, 2 R. R., 764.

(10) Per Lord Hardwicke in *Lord Dudley v. Lord Ward Ambler*, 113.

88. On a somewhat similar principle matters of ornament, as ornamental marble chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like have been allowed to be carried away by the outgoing tenant as chattels of a personal nature.⁽¹⁾ But where the mortgagor of a house, subsequently to the mortgage, removed the ordinary fixed grates from various rooms in the house and substituted for them "dog grates," which were of considerable weight, but were not physically attached to the structure of the house in any way, it was held that under the circumstances the true inference was that the mortgagor placed the dog-grates in the house with the object of improving the inheritance, and that they were therefore fixtures which passed to the mortgagee.⁽²⁾ On the other hand, tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them are, as against the remainderman, removable by the tenant, or by his executor after his death, even though they may have been fixed never so permanently to the freeholds. ⁽³⁾ Gardeners and nurserymen erecting green-houses or hot-houses and planting trees are entitled to disannex the structures made and even the trees planted by them.⁽⁴⁾ In one case machines were supplied by the owner of them to the lessee of a factory upon the hire-purchase system, on condition that they were to remain the property of the owner till they had been wholly paid for, and that upon default in payment the owner was to have power to determine the hiring and remove the machines. They were affixed, as the owner knew, to concrete beds in the floor of the factory by bolts or nuts, and could have been removed without injury to the building or the beds. The lessee made default in payment, and the owner brought an action to recover the machines or their value from a mortgagee of the premises who had taken possession. It was held that the machines had been so affixed as to pass by the mortgage to the mortgagee.⁽⁵⁾

89. Trade-fixtures, and fixtures for ornament and convenience may then be regarded as the two exceptions to the general rule as to annexations. In England a third exception is admitted under certain restrictions by the statute relating to landlord and tenant.⁽⁶⁾ But to these must be added two other exceptions, namely, (i) cases of express stipulation or necessary implication, and (ii) custom. All these will have to be considered when discussing the law of landlord and tenant.⁽⁷⁾

90. The third clause seems immediately to exclude things attached to houses and walls, such as window blinds,⁽⁸⁾ window sashes,⁽⁹⁾ shutters, fastenings, hangings, tapestry and pier glasses, whether nailed or not,⁽¹⁰⁾ beds fastened to the walls or ceilings, ⁽¹¹⁾ fixed tables, water tubes, cupboards, book cases screwed to the walls, ⁽¹²⁾ clock-cases, iron ovens, grates, ranges, and stoves, although fixed in brick work, iron back to chimneys,⁽¹³⁾ pumps and all articles of domestic utility

(1) *Beck v. Rebow*, 1 P. Wms., 94; Ex parte *Quincey*, 1 Atk., 477; *Lawton v. Lawton*, 3 Atk., 13.

(2) *Mont v. Barnes*, L. R. [1901], 1 Q. B., 205.

(3) *In re De Falbe*, [1901] 1 Ch., 523. *Leigh v. Taylor*, [1904] A. C., 157.

(4) *Penton v. Robert*, 2 East., 88; *Dean v. Allalley*, Esprin. N. P. O., 11.

(5) *Reynolds v. Ashby & Son*, [1903] 1 K. B., 87 O. A., [1904] A. C., 466.

(6) Landlord and Tenant Act, 1851 (14 and 15 Vict., c. 25, s. 3); Agricultural Holdings Act, 1883 (46 and 47 Vict., c. 61, s. 34).

(7) S. 108, *post*.

(8) *Amos & F.*, 110, 326, 371, Wood, L. & T. (16th Ed.), 670.

(9) *Rex v. Hedges*, 2 East. P. C., 590n.

(10) *Buckland v. Butterfield*, 22 R. R., 649.

(11) Ex parte *Quincey*, 1 Atk., 477.

(12) *Rex v. St. Dunstan*, 4 B. & C., 686.

(13) *Harvey v. Harvey*, 2 Stra., 1141.

or convenience, which, *being not annexed* for the *permanent* beneficial enjoyment of that to which they are attached, are considered as forming no part of the house or building to which they may have been annexed. The clause here closely follows the modern English rule which makes a similar exception in favour of things not permanently annexed to the freehold, which the outgoing tenant is allowed to take away. But a *verandah*, the lower part of which is supported on posts fixed to the ground falls into a different category.⁽¹⁾ Similarly, doors and windows being permanently attached to houses and being necessary for their permanent beneficial enjoyment could not be detached from the houses of which they form a part.⁽²⁾ Indeed anything that is affixed to walls or buildings for their permanent beneficial enjoyment, such as doors and windows, bars and locks, are things "attached." Mere juxtaposition, however, is not within the term, *e.g.*, a granary erected on straddles is not for the present purpose attached to the land.⁽³⁾ So a shed which was not attached, but which simply rested by its own weight on the foundation prepared for it, and the roof of which was connected with the wall of the main building by a dammed canvas was held not to be a fixture.⁽⁴⁾ So Lord Blackburn observed:—"Whenever the chattels have been annexed to the land for the purpose of better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily;⁽⁵⁾ and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land, are removable by the executor as between him and the heir.....The degree and nature of the annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land; and as Lord Hardwicke said in *Lawton v. Lawton*,⁽⁶⁾ 'you shall not destroy the principal thing by taking away the accessory to it,' and therefore I think, even if the property in the chattel was not intended to be attached to the property in the land, the amount of damage that would be done to the land by removing it, may be so great as to prevent the removal. But in the case now before the House, it is, I think, impossible to hold that the amount of this disturbance is so great as to amount to a destruction of the land, or to shew that the property in the materials must have been intended to be irrevocably annexed to the soil."⁽⁷⁾ The maxim is regarded in England as one of universal application.⁽⁸⁾ No doubt it is expressed in general terms and without qualifications; but it must be taken with reference to what one would have said if the only cases were those in which there could be a fixing to the freehold, *viz.*, by a trespasser or by a tenant.⁽⁹⁾

91. The result of these rulings seems to be that fixtures are a part of the immoveable property if (i) they are for permanent enjoyment, (ii) are accessory thereto, and (iii) are for the beneficial enjoyment of that to which the fixture is attached. Machines and other trade-fixtures, therefore, do not come within the scope of this clause.

(1) *Penry v. Brown*, 2 Stark, 403, 20 R. R., 705.

(2) See s. 8, *Comm.*

(3) *Wiltshear v. Cottrell*, 1 E. & B., 674.

(4) *Chaturbhuj v. Bennett*, 1 L. R., 29 Bom., 323, 331, 343.

(5) *Per* Lord Blackburn in *Wake v. Hall*, 8 P. O., A. C., 195 (204); see also *Elwes v.*

Mawe, 2 Sm., L. C., 7th Ed., 185.

(6) 3 Atk., 15.

(7) *Wake v. Hall*, 8 App. Cas., at pp. 204 and 205 (*per* Blackburn, L.).

(8) *Wake v. Hall*, 8 App. Cas., at pp. 204 and 205 (*per* Lord Watson).

(9) *Ibid.* (*per* Lord Bramwell, p. 209).

92. Actionable claim.—There can be no doubt but that this clause has been misplaced here, and its transposition to this section has destroyed the symmetry of Chapter VIII, to which it legitimately belongs.⁽¹⁾

93. The definition of the term as now given was substituted⁽²⁾ for the following which was section 130:—"A claim which the Civil Courts recognize as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary." The difficulties which this definition had given rise to have been set out at length in the Introduction to Chapter VIII. In part they have now been cleared up by the amended definition which *excludes* from its comprehension (1) a mortgage-debt, and (2) an equitable interest in immoveable property. A large number of cases had clustered round these points, which the meagre definition originally inserted in the Act did not help to reconcile. It was accordingly held in some cases that the interests now covered by the exceptions constituted an actionable claim⁽³⁾ whereas it was laid down in other cases that that could not have been the intention of the Legislature.⁽⁴⁾ The present definition excludes all secured debts from the category of a mere "actionable claim." The original definition had left another point vague, for, if goods were stolen or taken by a trespasser, there can be no doubt but that the party aggrieved had a claim against the wrong-doer, which he could make good in the Civil Court; but would that be a suit on an actionable claim?⁽⁵⁾ In this respect also the amended definition is a distinct improvement, for it enacts that the claim must be a claim to any *debt*, as distinguished from damages.

In English law all personal property may be either (i) in possession called *choses in possession* or (ii) in action, or *choses in action*. Choses in possession are things of which the owner has the present possession and enjoyment, and which he can deliver over to another. But things of which he had no actual possession or enjoyment, but only a right enforceable by suit were designated choses in action, since they could only be recovered or realised by an action.⁽⁶⁾ Now such things might be (i) a debt, (ii) the benefit of a contract, or (iii) damages for a wrong. All these rights would, according to the English law, fall within the term. But under the present definition cases (i) must be, and cases (ii) may be classed under the term, but those falling in class (iii) are clearly excluded.

94. The term then must not be regarded as a synonym for the corresponding English phrase, even the definition of which is by no means yet settled. Thus while Blackstone defines it to be a "bare right without any occupation or enjoyment,"⁽⁷⁾ and

(1) See *Intro.*, § 51.

(2) S. 2, Transfer of Property (Amendment) Act (II of 1900).

(3) *Jugdeo v. Brij Behari*, I.L.R., 12 Cal., 505; *Motun Mohun v. Fullarunissa*, I.L.R., 13 Cal., 297; *Muchiram v. Ishin*, I.L.R., 21 Cal., 568; *Sabbimall v. Venkatarama*, I.L.R., 10 Mad., 289; *Rathnasami v. Subramany*, 11 Mad., 56; *Hakim-un-nissa v. Deonarain*, I.L.R., 13 All., 102.

(4) *Siblal v. Azam-tullah*, I.L.R., 18 All., 265; *Moti Ram v. Jethmal*, I.L.R., 16 All., 319. For other cases see *Intro.*, Chap. VIII, *post*.

(5) *Palmer's Case*, 5 Rep., 24b; *Franklin*

v. Neate, 13 M. & W., 481; *Duncan v. Garrett*, 1 C. & P., 169, 26 R. R., 649; *Balis v. Thick*, 9 Jur., 304; *Rogers v. Kennay*, 9 Q. B., 592.

(6) *Termes de la Ley*, *choses in action*, 2 Black Comm., 389, 396; *Colonial Bank v. Whinney*, 30 Ch. D., 261 (1855), 11 App. Cas., 426.

(7) "Property in chattels personal may be either in possession, where a man hath not only the right to enjoyment of the thing, or else it is in action, where a man hath a bare right without any occupation," 2 Black, Comm., 389, 396, Wills. P. P. (15th Ed.), 28.

thereby excludes both benefit of a contract as well as the right to sue for a tort, (1) in another place it is thus defined: "A thing in action is when a man hath cause or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity or rent, action of covenant or ward, trespass of goods taken away, beating or such like; and because they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action," (2) and which would include not only the benefit of a contract and a right to sue for a wrong, but also patents and copyrights.

Now property of which the owner is *out* of possession may be divided into three classes, *viz.*:—1. Where it is a specific thing, including goods purchased but not delivered. 2. Where it is a contract, not being a contract for the sale of goods, or money payable otherwise than under a contract. 3. Patent, copyrights and trade-marks.

Property comprised in the first class should be distinguished from that included in the two remaining classes, because it is possible for the owner to obtain actual possession of it, which is not possible in the two other cases. Indeed, the right which the owner has in property of the first kind can scarcely be called an actionable claim, and the amended definition distinctly excludes such property from its category, although it would fall within the term as defined by Blackstone. In modern English law, however, Blackstone's conception of the term is seldom found in practice, and indeed it may be said to have become obsolete. But the term, as now used, distinctly implies rights which the owner has against a person under a contract, or for the payment of money other than under a contract. Such a definition would, however, be still too wide to coincide with that adopted in the Act.⁽³⁾ From the present state of law on the

(1) But *cf.* 2 Black. Comm., 396.

(2) *Termes de la Ley*, S. V. *Chose in action*.

(3) In his article on "chose in action," Sir Howard Elphinstone examines the various meanings and concludes that "chose in action," according to modern usage, includes only money due, whether under a contract or not, and contracts of every nature except contracts for the sale of goods where the word 'contract' is used in its widest meaning so as to include shares in the companies. The phrase is never at the present day used in the meaning of a right of action in respect of a tort; and it is perhaps doubtful whether it includes patents, copyrights and trade-marks" (9 L.Q.R., 311). This view was concurred in by Charles Sweet in 10 L.Q.R., 303 (317):—"The Chief result of this investigation is to confirm Sir Howard Elphinstone's conclusion that 'chose in action' is used in at least two meanings. *Prima facie*, it means a debt, or sum of money repayable under a contract. It is so used in the Judicature Act, and also in ordinary parlance. We should never think of describing a transfer of stock as an assignment of a chose in action. In a more extended and technical sense, however, it includes shares and stocks; it is so used in the Bankruptcy Act, and in the old law of husband and wife. In a still wider sense it includes many rights which the old books treated as choses in ac-

tion or 'things of that nature' such as rights of action for torts, rights of entry, annuities, rights of presentation, &c., and also (it is submitted) some rights of more modern origin, such as patents, copyrights and trade-marks. But the view which this article seconded was strenuously controverted by Mr. T. Cyprrian Williams in 10 L.Q.R., 143, who thinks that the term "chose in action" is elliptical and is equivalent to a "thing *lying in action*." "And a thing lying in action may, I think, be explained as a thing which it requires an action to recover or realize, if wrongfully withheld" (10 L.Q.R., 143). This view no doubt finds support in the language used in some statutes and decisions. Thus such rights (i.e., rights of action in tort) are regarded as property and are so treated in the Bankruptcy Act of 1845 (6 Geo. IV, c. 16, s. 63) *Per Parke, B., Blickham v. Drake*, (1819) 2 H.L.C., 579 (625, 626). They have been spoken of as choses in action in *argument* in *Rogers v. Spence*, (1946) 12 O. & Fin., 700 (705), and in *Re Park Gita Wiggon Works Co.*, 17 Ch. D., 234, the right of any liquidator, creditor or contributory of a Company being wound up to proceed against any director of the Company for a *misfeasance* was expressly held by the Court of Appeal to be a thing in action of the Company. In America the term was similarly used in *The People v. Tipton*, 19 Wm., 73 (75); *Grocer's Bank v. Clark*, (1866) 48 Barb. 28.

subject in England one is not sure of a certain guide in interpreting the term as used in the Act. One thing is certain that the terms of the definition definitely exclude the right of action for tort from its scope.

95. What is a "Debt."—A great deal, however, still depends upon what may be understood to be comprehended in the term "debt," a claim to which is an "actionable claim." In its primary sense a debt is a liquidated money obligation, which is usually recoverable by suit.⁽¹⁾ An action for debt is generally founded on some contract alleged to have taken place between the parties, or some matter of fact from which the law would imply a contract between them.⁽²⁾ It is an essential feature of an action for debt that it should be for a liquidated or certain sum of money. "In general," says Blackstone, "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth), a *debt* is then said to exist between these parties; while, on the other hand, if the demand be of uncertain amount, as when an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a *debt*, but as a claim for damages."

96. Origin of Debt.—A debt may arise from any of the three species of contract:—(i) As in the case of a sale where the vendee has not paid the price agreed upon, in which case the vendor has a property in the price as a chose in action, by means of this contract of debt. (ii) In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor for the same amount, upon his implied contract that he shall execute the trust reposed in him, or repay the money to the bailor. (iii) Upon hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing let, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, or the hire of the animal hired.⁽³⁾

In short, any contract whereby a determinate sum of money becomes due to any person, and is not paid but remains in action merely, is a contract of debt. Debts are of two kinds, (i) payable at present, and (ii) payable in future,⁽⁴⁾ or debts (i) owing and (ii) accruing,⁽⁵⁾ or as they are sometimes also described as " (i) now due owing or (ii) payable."⁽⁶⁾ A debt of the latter kind is, however, an actually existing debt and not merely a debt which might or might not become due.⁽⁷⁾ A debt which might or might not become due is not conditional or contingent but is uncertain, and is therefore no more than a mere expectancy or a mere right of suit which is not within the term. Thus, speaking of attachable debts, the Privy Council observed that "the attachment must operate at the time of the attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result. Thus, if the land of A be held by A subject to an option in B to take it at a definite price or sum the

(1) *Webster v. Webster*, 31 Beav., 393; *Sabju v. Noordin*, I.L.R., 24 Mad., 139 (144).

(2) 1 Ch. Pl., 109.

(3) 2 Black. Comm., 464.

(4) "*D-bita in presenti, solvenda in futuro.*" Per Blackburn, J., in *Tapp v. Jones*, L.R., 10 Q.B., 591 (592).

(5) S. 61, Common Law Procedure Act,

1854; *Tapp v. Jones*, L.R., 10 Q.B., 591. The words "existing, accruing, conditional or contingent" are intended to draw a similar distinction.

(6) *Subramaniam v. Arunachalam*, I.L.R., 25 Mad., 603 (612), P.C.

(7) *Harid s. v. Baroda Kishore*, I.L.R., 27 Cal., 38 (42).

attachment must be of the land and not of the price. An existing debt, though payable at a future day, may be attached, whilst a salary, wages, or money claim accruing due may not."⁽¹⁾ It is a general rule that a debt which the debtor cannot sue for cannot be attached,⁽²⁾ and hence it is clear that the term "debt" as used here bears the same meaning as in the Code.⁽³⁾ Similarly, it was held that a sum of money sanctioned as a gratuity by a Railway Company to one of its servants and made over to the paymaster for payment to him could not be attached, for as the gift was not completed there was no debt due.⁽⁴⁾

97. Thus, a thing incapable of being estimated or valued such as "all the claims of Ramnath against all his debtors"⁽⁵⁾ cannot be assigned. But where there is a balance, though unascertained, in the hands of the agent or vendee payable to the principal or vendor, it is both attachable and assignable. "Such balance is a sum of money which the agent is bound on principles of justice and equity to pay over on demand to his principal, although there may have been no actual but only an implied agreement to repay such balance."⁽⁶⁾ The right to claim the benefit of a contract for the purchase of goods being a "beneficial interest in moveable property" is assignable as an actionable claim.⁽⁷⁾ Servants' wages when they become due are a debt and so is money, due for goods sold.⁽⁸⁾

98. What are not Debts.—And where A is bound under a deed to pay to B a monthly maintenance allowance during the lifetime of the latter, there can be no transfer of the allowance before it is actually due.⁽⁹⁾ So where S for a valuable consideration promised K to satisfy a decree outstanding against him, and instead of carrying out his agreement, purchased the decree, applied for its execution, and brought K's property to sale, it was held that the execution-purchaser had no right of suit for breach of the agreement abovementioned.⁽¹⁰⁾ The right or interest of the vendor of the immoveable property in the purchase-money payable on a future day, as on the execution of the conveyance is not, so long as the condition has not been fulfilled, a debt, and cannot be assigned.⁽¹¹⁾ Debts which the civil court, by which is intended the civil court in British India, does not recognize as affording grounds for relief, must also be eliminated from the definition. In a case decided with reference to section 266 of the Code it was held that debts due to a British subject by a foreign Government or by its subject are not debts which are liable to attachment in execution of a decree.⁽¹²⁾ The policy of the rule, that claims over which no court in British India has jurisdiction are not debts liable to be attached, is based upon the impossibility of effecting attachments,

(1) *Tuffuzul Hossein v. Raghunath*, 14 M. I. A., 40; *Haridas v. Baroda Kishore*, I. L. R., 27 Cal., 38 (42). It may be here noted that salaries, &c., payable in future may now be attached. See s. 266 (h) (j), Civil Procedure Code (Act XIV of 1882). *Bhoyrub Chunder v. Madhub Chunder*, 6 C. L. R., 19; *Beard v. Egerton*, I. L. R., 6 Mad., 179.

(2) *Per Spankie and Oldfield, JJ.*, in *Bangi Lal v. Col. Mercer*, 7 N.W.P.H.C.R., 331 (333).

(3) S. 266, Civil Procedure Code (Act XIV of 1882).

(4) *Jankidas v. East Indian Ry. Co.*, I. L. R., 6 All., 634; citing s. 123, *post*, and s. 90, Contract Act; *Muhammed v. Carter*, I. L. R., 5 Mad., 272.

(5) *Tuffuzul Hossein v. Raghunath*, 14 M. I. A., 40.

(6) *Madho Das v. Rumi*, I. L. R., 16 All., 286 (293).

(7) *Jaffer Mehar Ali v. Budge Budge Jute Mills Co.*, I. L. R., 33 Cal., 702.

(8) *Nobin v. Kenny*, 5 W. R., S.C.C. Ref., 3.

(9) *Haridas v. Baroda Kishore*, I. L. R., 37 Cal., 38.

(10) *Syed Mahomed v. Sheo Seerek*, 6 N.W. P., H. C. R., 95; following *Tuffuzul Hossein v. Raghunath*, 14 M. I. A., 40.

(11) *Ahmeduddin v. Majlis Rai*, I. L. R., 4 All., 12; *Fleming v. Loe*, [1901] 2 Ch., 359.

(12) *Ghamshamlal v. Bhansali*, I. L. R., Bom., 249.

and the necessary limitations placed on the extent of jurisdiction of British Courts. But should the comity of courts of justice be by express agreement exchanged with any particular foreign State, there is no reason why the debt should not then be attached.⁽¹⁾ At any rate such a debt does not cease to be an actionable claim, for the civil courts would recognize it as affording grounds for relief, though they may be powerless to give it.

99. Uncertain sum.—An uncertain right in unascertained property cannot be the subject of assignment.⁽²⁾ Thus the assets of a judgment-debtor as yet unascertained, in a partnership business, which were in the hands of a receiver, cannot be assigned, since, until the dissolution of the partnership and the ascertainment of the share in the assets of the partners, such share could not be treated as a debt.⁽³⁾ The assignment to a person, after contract, of the right to recover damages will not be enforced.⁽⁴⁾ No opinion was ventured as to whether arrears of interest due on a Government promissory note, blank endorsed and payable to bearer under the terms of the instrument is a debt which could be attached,⁽⁵⁾ but apparently there could be no objection to its assignment. The remuneration paid to the *shebait* of a temple,⁽⁶⁾ or a priest at funeral ceremonies⁽⁷⁾ cannot be classed as property capable of transfer. A *vrutti* may not be sold except to a member in the line of succession or to a possible heir, unless there be any express direction of the founder, or a rule of usage to the contrary.⁽⁸⁾ Indeed, in such cases alienation is always a matter of custom, which is allowed to override the prohibition of the Hindu texts.⁽⁹⁾ Private pensions,⁽¹⁰⁾ maintenance-allowances,⁽¹¹⁾ wages of a private servant before they become due are not attachable and presumably not assignable,⁽¹²⁾ but the prospective pay of a public servant may presumably be assigned.⁽¹³⁾

100. Exceptions.—A secured debt is now no longer regarded as an actionable claim. It is immaterial whether the debt is secured by the mortgage of immoveable property, or hypothecation or pledge of moveable property—but so long as it is secured, it is not an actionable claim. So a beneficial interest in moveable property in possession (actual or constructive) of the owner is not an actionable claim—it is ownership. But beneficial interest in moveable property *not* in the actual or constructive possession of the claimant is an

(1) *Ghamshamlal v. Bhansali*, I. L. R., 5 Bom., 249 (252).

(2) *Bebee Tokai v. Davod Mullick*, 6 M.I.A., 510; explained in *Madho Das v. Ramji*, I.L.R., 16 All., 286 (293).

(3) *Abbott v. Abbott*, 5 B.L.R., 382.

(4) *Forkengton v. Uagee*, [1902] 2 K. B., 427; see s. 6, *post*.

(5) *Bysack v. Battye*, 1 Tay. & Bell., 313.

(6) *Dubo Misser v. Srinibas*, 5 B. L. R., 617; *Kali Churn v. Bungshee*, 15 W.R., 339; *Mancharam v. Pranshankar*, I.L.R., 6 Bom., 300; *Trimbak v. Narayn*, I.L.R., 7 Bom., 188; *Narasimma v. Anantha*, I. L. R., 4 Mad., 391; *Kuppa v. Dorasami*, I. L. R., 6 Mad., 76.

(7) *Jhumum v. Dinonath*, 16 W.R., 171.

(8) *Sitarambhat v. Sitaram*, 6 B.H.C.R., 250; *Mancharam v. Pranshankar*, I. L. R., 6 Bom., 298.

(9) *Rajah Muttu Ramalinga v. Perianayagum*, (1874) 1 I. A., 209; *Greedharee v. Nundo*, 11 M. I. A., 405; *Durga Bibi v.*

Chanchal, I. L. R., 16 Mad., 490; *Khetter v. Hari Das*, I. L. R., 17 Cal., 557; *Doorganath v. Ram Chunder*, I.L.R., 2 Cal., 341; *Kuppa v. Dorasami*, I. L. R., 6 Mad., 76; *Narasimma v. Anantha*, I. L. R., 4 Mad., 391; *Sadashiv v. Jayantibai*, I.L.R., 8 Bom., 185; *Rajaram v. Ganesh*, I. L. R., 23 Bom., 131, and the cases therein cited.

(10) *Tuffuzul Hossein v. Raghunath*, 14 M. I. A., 40; *Bhojrub Chunder v. Madhub Chunder*, 6 C.L.R., 19; *Dent v. Dent*, L. R., 1 P. & M., 366; *Willcock v. Terrell*, L. R., 3 Ex. D., 323.

(11) *Hari Das v. Baroda Kishore*, 4 C. W. N., 87; but see *Monessur v. Beer Protal*, 15 W. R., 188; see s. 6, *post*.

(12) *Ayyavayyar v. Vrasami*, I. L. R., 21 Mad., 393.

(13) *Cf. Bhojrub Chunder v. Madhub Chunder*, 6 C. L. R., 19; *Beard v. Egerton*, I. L. R., 6 Mad., 179; but see for old law, *Tejram v. Kusaji*, 7 B. H. C. R., 110, *contra* in England, 1 W. & T., L. C. (7th Ed.), 141.

actionable claim, since it is a right to property which may be asserted by a suit. Such beneficial interest may be acquired by a policy of insurance, stocks and shares in companies, debentures and the like. All such investments are actionable claims and therefore subject to the provisions of this Act, unless they are held subject to other special Acts. So in England the Bank of England refuses to recognise trusts (1) or to keep more than one account for the same person, and the legal title to stock thus belongs to the person in whose name it is for the time being entered.(2) The National Debts Act now prescribes its own procedure for the transfer of stock. And elaborate provisions are similarly made for the transfer of Indian and Colonial stock to which it must conform.

101. Equitable choses in action.—Regarded as a source of emolument, a share (*e.g.*, in a trading Company) is a mere right to receive a certain share of the profits made by the Company. It is not an interest in land though the Company may own land (3) The nature and incidents of shares in the joint stock and incorporated companies are generally determined by their charters and Acts of incorporation. Similarly, shares in the companies registered under the Indian Companies Act are capable of being transferred in the manner provided by the regulations of the Company.(4) Transfers are sometimes made by deed, sometimes by writing only; and they are not generally complete until registered at the office of the Company.(5) Where equitable interests in moveables are allowed, as they still are in England, they are generally of the same nature as equitable estates in land. "Thus if chattels personal be delivered or assigned to one, on trust for another simply, the former, who is the trustee, has the legal ownership. But the latter, who is called the *cestui que trust*, has the right in equity to compel the trustee to allow him to have the beneficial enjoyment. And in consequence of this right he is regarded in equity as enjoying as against all persons bound by the trust, an interest equivalent to ownership in the chattels in question. This equitable interest of the *cestui que trust* is analogous to the legal ownership of the chattels, and would pass to his executor or administrator, on his death, as personal estate. But if the trustee should manage to dispose of the chattels to a *bona fide* purchaser for value, who had no notice of the trust, the latter would not be bound by the trust. And the *cestui que trust* would have no *equity* to recover the chattels from the purchaser so acquiring the legal ownership of them; and would have no remedy but to sue the trustee, under the equitable jurisdiction of the court, for damages for the breach of trust."(6)

102. Judgment-debt.—Judgment-debts, or, as they are called, debts of record, are debts which are due by the judgment of a Court of Record. In England, all judgment-debts can be sued upon as creating a debt between the parties,

(1) National Debts Act, 1870 (33 & 34 Vict., c. 71, s. 30).

(2) *Ib.*

(3) S. 44, Indian Companies Act (VI of 1882), *Sprirling v. Parker*, 9 Beav., 450; *Walker v. Milne*, 4 Beav., 507; *Eulwistle v. Davis*, L. R., 4 Eq., 272; *Nanney v. Morgan*, 37 Ch. D., 346 (352).

(4) S. 44, Indian Companies Act (VI of 1882). Similar provision is made in s. 22 of the English Companies Act, 1862 (25 &

26 Vict., c. 89).

(5) First Schedule, ss. 8—11, Indian Companies Act (VI of 1882); First Schedule, ss. 8—10, English Companies Act (25 & 26 Vict., c. 89); *Roots v. Williamson*, 38 Ch. D., 485; *Moore v. North-Western Bank*, [1891] 2 Ch., 599.

(6) Will. R. P. (19th Ed.), 176, 178, 179; Will. P. P. (15th Ed.), 26; *Lewin on Trusts* (10th Ed.), 835; *Davey v. Williamson*, [1898] 2 Q. B., 194.

whether or no the Court be a Court of Record.⁽¹⁾ In this country such debts merge into the decree ⁽²⁾ and are only recoverable as provided in the Code of Civil Procedure.⁽³⁾ A judgment-debt may be classed under the term "debt" for the purpose of limitation.⁽⁴⁾ But it is not an actionable claim, though it may be validly assigned,⁽⁵⁾ and its assignment is governed by similar rules.⁽⁶⁾

103. Notice.—The comprehensive ⁽⁷⁾ definition of "notice" in this section **Analogous Law.** is reproduced from its definition in section 3 of the Indian Trust Act ⁽⁸⁾ with a few verbal variations which will be noticed by comparing with the latter definition.

3. A person is said to have notice of (a) fact (either) when he actually knows that fact, or when, but for wilful abstention from (an) inquiry (or search which he ought to have made), or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Contract Act, 1872, section 229.⁽⁹⁾

The words within brackets mark the difference. Section 229 of the Contract Act referred to in the definition runs thus:—

Consequences of notice given to agent.	229. Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of his business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to, or obtained by, the principal.
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Illustrations.

(a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

(b) *A* is employed by *B* to buy from *C* goods, of which *C* is the apparent owner. *A* was, before he was so employed, a servant of *C*, and then learnt that the goods really belonged to *D*, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from *C*.

104. This clause divides "notice" into three separate sub-divisions—**(a)** actual notice called in the English law express notice; **(b)** constructive or implied "notice" when but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence he would have known; **(c)** or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, section 229. The definition of the word "notice" here correctly codifies the law which existed prior to the passing of the Act.⁽¹⁰⁾ Thus it was held in a case decided in 1881,⁽¹¹⁾ that when a person is proved to have had knowledge of certain facts, or to have been in a

(1) *Williams v. Jones*, 18 M. & W., 628; Anson, Contracts (9th Ed.), 374; Will. P. P. (15th Ed.), 194.

(2) *Periasami v. Krishna*, I. L. R., 25 Mad., 491 (442), F. B.

(3) For judgment-debtor, see s. 2, and for Execution, Ch. XIX of the Code of Civil Procedure (Act XIV of 1882).

(4) *Rambit v. Satgur*, I. L. R., 3 All., 247, F. B.; *Janki v. Ghulam*, I L.R., 5 All., 201; *Muhammad v. Payag*, I. L. R., 16 All., 228; but see *Kally Prosunno v. Heeralal*, I.L.R., 2 Cal., 468.

(5) S. 232, Code of Civil Procedure (Act XIV of 1882).

(6) The subject will be found fully discussed in Ch. VIII.

(7) *Preonath v. Ashutosh*, I.L.R., 27 Cal., 358 (361); *Dina v. Nathu*, I. L. R., 26 Bom., 358.

(8) Act II of 1882.

(9) S. 3, Indian Trusts Act (II of 1882).

(10) *Churaman v. Balli*, I L.R., 9 All., 591.

(11) *Doorga Narain v. Baney Madhub*, I. L. R., 7 Cal., 199.

position, the reasonable consequence of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice, as may properly be held to have the consequences of notice actually obtained. But if there is not actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied. Constructive notice may apply against third persons from a neglect to call for deeds and documents of title; but not to the same extent where a Registration Act is in operation, as it would where no registration Act prevails.⁽¹⁾

105. The doctrine of notice as affecting priorities is founded upon the rule

Principle of notice.

which discountenances latches and fraud of all kinds. As such its principle is widely applicable, and stated generally, it is an exception to the general maxim, *qui prior est tempore, potior est jure*.⁽²⁾ Correctly understood, it is, however, rather an explanation than an exception to it, for the true meaning of the maxim is that, as between persons having only equitable interests, if such equities are *in all other respects* equal, then only would the rule apply.⁽³⁾ As was stated by Sir T. Plumer, M. R., "If there appears to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate, than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference which, priority of date might otherwise have given, is done away with and counteracted."⁽⁴⁾ The ground of the doctrine was again plainly thus stated by Lord Hardwicke:—"That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser, and not that he is not a purchaser for a valuable consideration in every respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate; and after knowing that, he takes away the right of another person by getting the legal title."⁽⁵⁾ Even a registered conveyance may be postponed to an unregistered conveyance, if the former had been executed after notice of the latter, and the dominant policy of the law in thus overriding the policy of registration is to prevent fraud, although it has been doubted whether the question of notice is wisely allowed to be agitated as against a party who has taken under a duly registered conveyance.⁽⁶⁾ The Law of Notice may then be regarded as involved in the Law of Fraud, and as such it plays an important part in the Law of Transfer where conflicting and inconsistent rights are successively created over the same property; and sometimes when the opposing rights are evenly balanced, the question of notice may alone be resorted to in order to determine the merits of the rival claimants.

(1) *Doorga Narain v. Baney Madhub*, I.L.R., 7 Cal., 199; following *Agra Bank v. Barry*, L.R., 7 H.L., 135; and *Ramcoomar v. McQueen*, 11 B.L.R., 53.

(2) "He who is first in point of time is more powerful in law."

(3) *Rice v. Rice*, 2 Drew., 73; *Gordon v. James*, 30 Ch.D., 249; *National Provincial Bank v. Jackson*, 32 Ch.D., 1; *Farrand v. The Yorkshire Bank*, 40 Ch.D., 182. See s. 48 *post*, under which the maxim will be found exhaustively explained.

(4) *Dearle v. Hall*, 3 Russ., 1 (21) O.A. 3 Russ., 59.

(5) *Le Neve v. Le Neve*, 3 Atk., 646; *Kettlewell v. Watson*, 26 Ch.D., 501.

(6) See s. 48, *post*; *Waman v. Dhondiba*, I.L.R., 4 Bom., 126, F.B.; *Vohora v. Harilal*, (1896) B.P.J., 778; *Chunder Nath v. Bhairab Chunder*, I.L.R., 1 Cal., 250; *Chunder Kant v. Krishna*, I.L.R., 10 Cal., 710; *Selwa v. Gunpot*, (1890) P.R. No. 115; overruling *Nizamuddin v. Akbar*, (1889) P.R. No. 143.

106. With regard to the knowledge of the agent imputed to the principal, the principle is declaratory of a general principle of law which was thus expounded by the Privy Council. "That principle," they said, "is in an especial sense applicable to legal proceedings which are usually conducted through an agent, and it would be impossible to conduct such business as it would lead to grave inconvenience and injustice if it were required to prove afterwards that the client had personal knowledge of the contents of the pleadings, or of some document, in suit, or of the general nature of the claim made against him. It is not a mere question of constructive notice or inference of fact but a rule of law which imputes the knowledge of the agent to the principle, or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."⁽¹⁾

107. The doctrine of constructive notice only applies where a man is guilty of gross or culpable negligence in not obtaining knowledge, which it was in his power to obtain.⁽²⁾ As such it may arise; *first*, where a man has notice of the fact of an incumbrance, but does not make any inquiry as to its nature, and so does not obtain the knowledge which inquiry would have given him; or, *secondly*, where his conduct shows that he had a suspicion of the truth, but he wilfully avoided inquiring into it. The limits of constructive notice must be narrowly watched, for "it is highly inexpedient for courts of Equity to extend the doctrine of constructive notice; that where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the knowledge with which it is sought to affect him; that he would have acquired it but for his gross negligence in the conduct of the business in question."⁽³⁾ Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal. It cannot be applied in support of a charge of direct personal fraud.⁽⁴⁾

108. The law of constructive notice may now be said to have crystallized itself into well defined rules and cases, in which a party is deemed to be affected with notice. It is perhaps not equitable that all men should be measured by the uniform foot-rule of a "prudent" or a "reasonable" man, for these qualities are by no means to be found in the same degree amongst all races. The backward savage who has but recently been placed under the protection of codified law is hardly expected to be as circumspect as the wary banker or a merchant living amidst legal surroundings and cultured associates. But at the same time law does not take note of individual peculiarities and judges all men by the same or at least similar standard. It assumes that men mindful of their interests ought to be acquainted with those canons by which a prudent man transacts his business. *Vigilantibus non dormientibus jura subveniunt.*⁽⁵⁾ But

(1) *Per Lord Davey in Raja Rampal Singh v. Balbhaddur Singh*, 6 C. W. N., 849 (855), P. C.

(2) *Ware v. Lord Egmont*, 4 DeG. M. & G., 460; *Hewitt v. Loosemore*, 9 Hare 449; *Colyer v. Finch*, 5 H. L. C., 905; cited in *Montefiore v. Browne*, 7 H. L. C., 241 (253).

(3) *Per Lord Cranworth in Ware v. Lord Egmont*, 4 DeG. M. & G., 460 (479); followed *Montefiore v. Browne*, 7 H. L. C., 241 (262);

Wyllie v. Pollen, 32 L.J., Ch., 782.

(4) *Wilde v. Gibson*, 1 H. L. C., 605; reversing *Gibson v. D'Este*, 8 Jur., 94.

(5) "Laws come to the assistance of the vigilant, not of the sleepy." But the standard of intelligence should not be fixed too high, 13 L. Q. R., p. 340; *Adams v. Great North, &c., Co.* [1891] A.C., 46; *English, &c., Co. v. Brunton*, [1892] 2 Q. B., 708.

it must not be forgotten that the prudence of an average man is an imaginary abstraction,—a rule of the thumb which should not be regarded as a precise and exact measure or as affording an invariable and inflexible standard for judging human conduct.

109. Actual Notice.—Actual notice may be sub-divided into two classes, namely (1) that required to be attended by some prescribed formality as writing and delivery in a particular way, or to a particular person in a manner usually directed by law, and (2) that in which no formula or mode of delivery is prescribed, but yet the notice has to be an actual notice as contra-distinguished from a constructive notice to be presently considered. The question of actual notice is essentially one of fact which has to be determined on the evidence.

110. An actual notice to constitute a binding notice must be definite information given by a person interested in the property, for it is a settled rule that a person is not bound to attend to vague rumours or to statements by mere strangers, and that a notice to be binding must proceed from some person interested in the property.⁽¹⁾ To hold otherwise, a person would have to attend to every gossip or flying report which may have been misleading or untrue. The notice, again, must be in the same transaction,⁽²⁾ for a person is not bound by notice given in a previous transaction which he may have forgotten.⁽³⁾ Notice is distinct from knowledge which, however, must be conveyed in every notice.⁽⁴⁾ Thus, a mere assertion, that some person claims a title is not sufficient, but, perhaps, a general claim is not sufficient to affect a purchaser with notice of a deed of which he does not appear to have had knowledge.⁽⁵⁾ But, if a person knows that another has or claims an interest in property for which he is dealing, he is bound to inquire what that interest is; and, if he omits to do so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest.⁽⁶⁾ And indeed, where it is so, the person must follow up the inquiry, for an intending purchaser cannot escape from liability by showing that no amount of inquiry on his part would have disclosed the interest if it is proved that it did exist.⁽⁷⁾ And it is not necessary that the notice should name the person who has an interest, but only that there is a person having such an interest.⁽⁸⁾ Thus where the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice.⁽⁹⁾

(1) *Barnhart v. Greenshields*, 9 Moo. P.C., 18 (36); Sugd. V. & P. (14th Ed.), 755, but Dart, V. & P., 967, says that the above statement is too general, for it is one thing to say that mere flying reports are not evidence, and another to affirm that a purchaser cannot in any case be affected by a deliberate and particular statement of an adverse title unless made by a party interested.

(2) *East Grimstead's Case*, Duke, 640; Sugd. V. & P. (14th Ed.), 755.

(3) *Wildgoose v. Weyland*, Goold., 147; *Cornwallis's Case*, Tot., 254; cited in Sugd. V. & P. (14th Ed.), 755; *Warrick v. Warrick*, 8 Atk., 294.

(4) *Mildred v. Maspons*, L.R., 8 App. Cas.,

874 (885), but, O.A., Selborne, L. C., reserved his opinion, *ib.*, p. 888.

(5) *Jolland v. Stainbridge*, 3 Ves., 478; *Fry v. Porter*, 1 Mod., 300; *Butchers v. Stapely*, 1 Ves., 363; *Nursing v. Raghoobur*, 1. L. R., 10 Cal., 609, Sugd.'s V. & P., (14th Ed.), 755.

(6) *Per Couch, C. J.*, in *Gobind Chunder v. Doorgapersaud*, 22 W. R., 248 (252); following *Gibson v. Ingo*, 6 Hare, 124.

(7) *Gobind Chunder v. Doorgapersaud*, 22 W. R., 248 (252).

(8) *Mildred v. Maspons*, L. R., 8 App., Cas., 874 (885).

(9) *Per Wigram, V. C.*, in *Jones v. Smith*, 1 Hare, 55.

Mere inaccuracies as to notice do not exonerate a person from pursuing an inquiry once taken up. Thus where the plaintiff, a purchaser of a legal estate, had express notice that the defendant obtained possession of the land bought under a deed which purported to convey an equitable title thereto, it was held that erroneous recitals in the deed as to the derivation of the equitable title actually transferred did not vitiate the notice or estop the defendant, and that the plaintiff was bound to convey the legal estate to the defendant.⁽¹⁾ Recitals in a deed are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry.⁽²⁾ Hence misdescription of the nature of security in a deed would not discharge an intended mortgagee who had actual notice of the debt and of the trust for its discharge, from inquiring further than ascertaining that there was no judgment of the nature described in the deed.⁽³⁾

111. But where a man buys in the face of hostile claims, he runs the risk of those claims eventually turning out to be well-founded, for although, at the time of the purchase he may have honestly believed that he could ignore them, he cannot afterwards set himself up as an innocent purchaser without notice: he must then stand or fall by the strength of his own right as against that of the opposing claimant.⁽⁴⁾ But a mere casual conversation in which knowledge of an incumbrance is imparted is not notice of it unless the mind of the person has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or any ordinary man of business would act upon the information and would regulate his conduct by it. In other words, the party imputing notice must show that the other party had knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired.⁽⁵⁾ The existence of suspicious circumstances or a general report are not themselves notice of the matter to which they relate.⁽⁶⁾ But where the vendee says he has bought and the vendor is silent, it is good notice to a third person present.⁽⁷⁾ But notice to be binding on him must be given to him in the character in which such notice is intended to affect him, and not in any other character.⁽⁸⁾ And it must appear that the party to be affected with notice had the means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself.⁽⁹⁾

112. A party cannot be affected with notice, unless it is shown that he had knowledge of a prior interest either before the deed was executed,⁽¹⁰⁾ or before the payment of the money,⁽¹¹⁾ or in

(1) *Trinidad Asphalt Co. v. Coryat*, [1896] A. C., 587. There is no distinction in the mofussil courts of this country between a legal right and an equitable right to property. There is but one kind of proprietary right not divisible into parts or aspects. *Sedee Nazeer Ali v. Rajah Ojoodhya*, 8 W. R., 399.

(2) *Trinidad Asphalt Co. v. Coryat*, [1896] A. C., 587.

(3) *Montefiore v. Browne*, 7 H. L. C., 241 (263). This judgment of Lord Chelmsford, L. C., probably carries the doctrine of constructive notice a good deal further than would be justified by the principle of notice. It has indeed been animadverted upon by Sugden in V. & P. (14th Ed.), 779, who observes: "The case shows to what danger a

purchaser or mortgagee is exposed by this doctrine of constructive notice. I fear that if still at the bar, I should have thought that further inquiry on the part of the mortgagee was unnecessary."

(4) *Per Phear, J.*, in *Sedee Nazeer Ali v. Rajah Ojoodhya*, 8 W. R., 399 (408).

(5) *Per Lord Cairns, L. C.*, in *Lloyd v. Banks*, L. R., 3 Ch., 488 (490, 491).

(6) *West v. Reid*, 2 Hare, 249; *Greenlade v. Dare*, 20 Beav., 284.

(7) *Weymouth v. Boyer*, 1 Ves., J., 425.

(8) *Beolay v. Carter*, 17 W. R. (Eng.), 180.

(9) *Broadbent v. Barlow*, 50 L. J., Ch., 569.

(10) *Wigg v. Wigg*, 1 Atk., 384; *Fitzgerald v. Burck*, 2 Atk., 397.

(11) *Story v. Lord Windson*, 2 Atk., 630.

the case of a marriage contract, at the time of the settlement.⁽¹⁾ And in a plea of purchase it is a sufficient denial of notice to say that, at the time of the purchase he had no notice, without saying "or any time before."⁽²⁾ Where a man purchases an estate, pays part, and gives bond to pay the residue of the money, notice of an equitable incumbrance before payment of the money, though after the bond, is sufficient.⁽³⁾ A purchaser for valuable consideration without notice of any prior equity, having accidentally acquired the legal estate under a deed of which he had no notice at the time of the purchase, is not affected with notice of anything contained in such deed.⁽⁴⁾ A sale of the estate of an insolvent debtor, made *bona fide*, at a public auction, is not, after conveyance to the purchaser, necessarily voidable in equity, only because the purchaser, after the sale but before the conveyance, had notice of incumbrances attending the conduct of the sale by the assignees amounting to negligence on their part.⁽⁵⁾

113. A notice is actual which brings the knowledge of a fact directly home to the party. Actual notice does not present any difficulty. An actual notice "must be explicit and positive, but it need not be worded with the accuracy of a plea. Notice should be such as the person bound by it may act upon safely."⁽⁶⁾ Mere vague reports from uninterested persons or suspicion of the existence of any fact are not notices. The service of notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the court that the notice itself must have reached the hands, or come to the knowledge of the person against whom it is proved.⁽⁷⁾ But while this may be regarded as the general rule, it is by no means universal, and various degrees of proof are required according to the object of the notice. Thus, under the several provisions of this Act, *express* notice is imperative,⁽⁸⁾ but in a Calcutta case⁽⁹⁾ decided with reference to the corresponding section before its amendment it was held that the object of such notice being the protection of the assignee, the filing of plaint in court is sufficient notice, since by it the mortgagor becomes aware of the assignment, and the transfer would accordingly come into operation *on the date* when he thus becomes aware of it. This case, it may be noted, was, however, decided upon the authority of an English precedent,⁽¹⁰⁾ wherein it was held that it is not necessary to the validity of the assignment of a debt as between the assignor and assignee that notice should be taken to the debtor.⁽¹¹⁾ This and the Allahabad cases,⁽¹²⁾ however, are cases which turn upon the construction and object of section 131 of the Act, and can no longer be regarded as authoritative. Service of registered notice through post, where the addressee refuses it, is held to be good evidence of the service of its contents.⁽¹³⁾ Indeed, a notice properly addressed and sent by registered post may be presumed to have reach-

(1) *Davies v. Thomas*, 1 L. J. (N. S.) Ex., 21.

(2) *J. nes v. Thomas*, 3 P. W., 243.

(3) *Tourville v. Naish*, 3 P. W., 306.

(4) *Pilcher v. Rawlins*, L.R., 7 C.H., 259.

(5) *Borrell v. Dann*, 2 Hare, 440.

(6) Story on "Contracts," s. 1260.

(7) *Syud Esuf Ali v. Mt. Azumtoonissa*, 1864, W. R., 49 (per Norman, J.); *Norendra Narain v. Dwarka Lal*, 1 L. R., 3 Cal., at p. 407, P. C.

(8) *e. g.*, ss. 69 (c) (1), 83, 102, 103, 106, para. 2, 111 (h) (but cf. s. 118), and 181.

(9) *Jagdeo v. Brij Behari*, 1 L.R., 12 Cal., 505.

(10) *Ryall v. Rowles*, 1 Ves., 848, 1 W. & T. L.C. (7th Ed.), 96.

(11) *Ib.*, p. 115.

(12) *Kalka v. Chandan*, 1 L.R., 10 All., 20 (1887).

(13) *Jogendro v. Dwarkanath*, 1 L.R., 15 Cal., 681; see also s. 82, C.P.C.; *Rutonji Edulji Shet v. The Collector of Tanna*, 1 M. I. A., 295; *Lootf Ali v. Pearee Mohun*, 16 W. R., 223.

ed the addresseee.⁽¹⁾ Where notice has been duly served, and its contents are afterwards sought to be proved against the party in possession of the original, it is incumbent upon him before offering secondary evidence of its contents to previously give notice calling for the original.⁽²⁾ Such notice need not be *express*,⁽³⁾ and there are circumstances under which it may be altogether dispensed with.⁽⁴⁾

114. Constructive Notice.—Constructive notice may be defined to be “knowledge which the court imputes to a person from the circumstances of the case upon a legal presumption so strong that it cannot be allowed to be rebutted, that the knowledge must exist though it may not have been formally communicated.”⁽⁵⁾ Constructive notice is in its nature no more than evidence of notice, the weight of the evidence being such that the court imputes to the purchaser that he had notice.⁽⁶⁾ Constructive notice may be presumed from (1) *wilful abstention from inquiry*, (2) *gross negligence*, (3) *information given to or obtained by agent*. “The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything ‘constructive’ ought to be narrowly watched, because it depends on a fiction. We are, however, bound by the authorities, and I conceive that when a person purchases property where a visible state of things exists, which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists, which is very unlikely to exist without a burden, he is affected with notice. The tenant cannot legally be in possession without having some rights, and his possession is held to give notice to a purchaser what those rights are.”⁽⁷⁾

115. It has been stated before (§ 104) that notice may be either express or actual, or constructive or implied. Express notice is actual knowledge of a particular fact conveyed in writing or by word of mouth. Constructive notice is on the other hand knowledge imputed by inference.⁽⁸⁾ It may be considered to consist in those circumstances under which the court concludes that notice must be imputed on grounds of public policy to an innocent person, or that the party has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which therefore the common interests of society require should, in its consequences, be as equivalent to actual notice.⁽⁹⁾ As was observed by Lord Esher, M. R.:—“The doctrine of constructive notice is wholly equitable; it is not known to the common law. There is an inference of fact known to common lawyers, which comes somewhat near to it. When a man has statements made to him, or has knowledge of facts, which do not expressly tell him of something which is against him, and he abstains from making further enquiry because he knows what the result would be—or, as the phrase is, ‘he wilfully shuts his eyes,’ then judges are in the habit of telling juries that

(1) 1 Tay. Ev., § 179; 1 Wigmore Ev., § 95; s. 16, *ill.* (b) i, s. 114, *ill.* (f), Indian Evidence Act (Act I of 1872); *In re Hickly*, 10 Ir. R. Eq., 117 (127); *Mir Tapurah Hossein v. Gopi Narayan*, 7 C.L.J., 251.

(2) S. 66, Indian Evidence Act (I of 1872); *Hira Lall v. Ganesh*, I.L.R., 4 All., 410, P.O.

(3) *Ib.*

(4) S. 66 (1) to (6), Indian Evidence Act

(I of 1872).

(5) *Hewitt v. Loosemore*, 9 Hare, 449 (455).

(6) Snell's Equity, p. 33.

(7) *Allen v. Leckham*, 11 Ch. D., 790 (795, 796).

(8) 2 Robbin's Mortgage, p. 1305; *Hewitt v. Loosemore*, 9 Hare, 449 (455).

(9) Dart, V. & P. (6th Ed.), 971.

they might infer that he did know what was against him. It is an inference of fact drawn because you cannot look into a man's mind, but you can infer from his conduct whether he is speaking truly or not when he says that he did not know of particular facts. There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred."⁽¹⁾ And another learned judge has very clearly enunciated the principle which underlies the equitable doctrine of notice:—"The whole doctrine of notice proceeds on this—where a man has created a charge affecting his estate, he is not at liberty to enter into any new contract in derogation of the interest which he has created. This court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted to enter knowingly into a contract with a person so situated, which would redound to his benefit at the expense of the prior incumbrance. The conscience of a purchaser is affected through the conscience of the person through whom he buys; that person is precluded by his previous acts from honestly entering into a contract to sell, and, therefore, any one who purchases *with the knowledge that his vendor is precluded from selling*, is subject to the same prohibition as the vendor himself."⁽²⁾

In English law constructive notice is said to be of two kinds, the one being the notice to an agent called "imputed notice;"⁽³⁾ the other, more properly called "constructive notice," being confined only to the notice which the courts have raised against a person from his wilfully abstaining from making inquiries or inspecting documents. In this country one distinguished nomenclature has been sanctioned by the Act, and the term "notice" without qualifying words, includes all species of notice, whether actual or constructive.

116. The doctrine of constructive notice may apply in three cases: (i) where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts and instruments to a knowledge whereof he would have been led by due inquiry after the fact which he actually knows; (ii) where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it; ⁽⁴⁾ (iii) where notice is implied from gross negligence and where the party is affected by notice to agent.⁽⁵⁾

117. The doctrine of constructive notice is of great intricacy and presents endless complications in practice, and for which reason it is not easy to formulate any general rules, inasmuch as the question is one of fact to be determined upon the proved circumstances of individual cases. But the following section of the English Conveyancing Act ⁽⁶⁾ may often afford valuable analogy:—

3. (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or other thing unless—

(i) It is within his own knowledge or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(1) *English, &c., Investment Co. v. Brunton*, [1892] 2 Q. B., 700 (707, 708).

(2) *Per Wood, V. C.*, in *Benham v. Keane*, 1 J. & H. 702, followed in *Fuzldeen v. Fakir Mahomed*, I.L.R., 5 Cal., 336 (348).

(3) *Kettlewell v. Watson*, 21 Ch. D., 704.

(4) *Jones v. Smith*, 11 L. J. (N. S. Ch.), 33, affirmed, 12 L. J. (N. S. Ch.), 381.

(5) *Le Neve v. Le Neve, Amb.*, 436; *Hiern v. Mill*, 13 Ves., 120; *Sheldon v. Cox*, 2 Eden., 224.

(6) 45 & 46 Vict., c. 39.

(ii) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the notice of his counsel, as such, or of his solicitor or agent as such, or would have come to the knowledge of the solicitor or agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived mediately or immediately and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.⁽¹⁾

It may be noted that this section is partial and was enacted only to restrict the tendency of the courts in certain cases to extend the doctrine.⁽²⁾

118. The subject of constructive notice may be generally divided into the following heads : where it is inferred (i) from wilful abstention from inquiry or search for or into title-deeds and the registry ; (ii) from gross negligence, as where an inquiry might have been pursued, but was not ; and (iii) where notice is given to agent.⁽³⁾ The English equitable doctrine of notice was applied to India even before its recognition by the Legislature.⁽⁴⁾

119. A person is deemed to have constructive notice of facts which he had wilfully and designedly abstained from inquiring into, and from which the court may well infer that the abstention from inquiry was for the purpose of avoiding notice.⁽⁵⁾ The term would appear to comprise only such abstention from inquiry or search as would show want of *bona fides*,⁽⁶⁾ a wilful blindness from which fraudulent design is not too remote. But the wilful abstention must be from an inquiry which one ought to have made, or in other words, which one was under law or duty bound to make, that is wilful omission of a duty, which may be evidence of fraudulent omission or gross negligence. "What is *wilful abstention*?" Said Bowen, L.J.,⁽⁷⁾ "*Wilful* is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally as used in courts of law implies nothing blamable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done, arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent. Now, if that is all you can get out of the analysis of these words ('wilful default') it becomes plain that to endeavour to classify every conceivable contingency with a view of defining what will be and what will not be wilful default would be idle. You cannot define the words 'wilful default' more than I have defined them." Illustrative cases may, however, be useful to show in what cases the courts have held *wilful abstention* to have been proved or presumed. A letter forwarded by post duly registered, must be presumed to have been tendered to the addressee,

(1) Clauses (3) and (4) are omitted. Cl. (3) enacts that nothing in this section shall be deemed to affect any party with notice where he would not have been so affected as if the section had not been enacted, and cl. (4) makes the operation of the section retrospective saving only suits pending at the commencement of the Act.

(2) *e. g.* *Hervy v. Smith*, 22 Beav., 299 ; *Miles v. Tobin*, 16 W. R. (Eng.), 425 ; See *Earl of Gainsborough v. Watcombe Co.*, 54 L. J. Ch., 991.

(3) See § 157 onwards.

(4) *Jeewandas v. Framji*, 7 B. H. C. R. (O J.), 45 ; *Dina v. Nathu*, I. L. R., 26 Bom., 538.

(5) *Jones v. Smith*, 1 Hare, 48.

(6) *Joshua v. Alliance Bank*, I. L. R., 22 Cal., 105 (203) ; citing *Agra Bank v. Barry*, L. R., 7 App. Cas., 135 ; followed in *Sukh-nandan v. Sadaram*, 13 C. P. L. R., 48.

(7) *Young and Harston's Contract*, 31 Ch. D., 168 (174).

and a person refusing it cannot afterwards plead ignorance of its contents, because he had wilfully abstained from receiving it and thus acquainting himself with its contents.⁽¹⁾

120. Where a party has notice that the deeds are in possession of a third party, he is bound to ascertain whether he has a charge on them and his failure to do so would affect him with notice of the nature and amount of the charge and claim.⁽²⁾ It is well settled that a purchaser, a mortgagee or a transferee of a mortgage will be deemed to have notice of all facts which he could have learned upon a proper investigation of the title under a contract containing no restriction of his rights in that respect. So a transferee who does not ask to have the title-deeds delivered,⁽³⁾ or, if they also relate to other property to have them produced,⁽⁴⁾ is deemed to have notice if they turn out to be in the possession of a stranger and of that stranger's rights whatever they may be. Hence a purchaser who without requiring delivery or production of the title-deeds takes a title from a mortgagee who has deposited the deeds by way of sub-mortgage is affected with constructive notice of the sub-mortgage, and the legal estate conveyed to the purchaser is in his hands subject to the equitable incumbrance, and this notice will raise a trust to the amount of the sub-mortgage. It is immaterial whether the purchaser employs a solicitor or not, and whether the solicitor, if one is employed, informs the purchaser of the sub-mortgage or not.⁽⁵⁾ Indeed, no evidence will be admitted to prove that a solicitor did not in fact communicate his knowledge to the client.⁽⁶⁾ Similarly if a purchaser or mortgagee, being informed that the title-deeds were with a creditor, failed to inquire as to the purpose for which he held them, he will be postponed in favour of the creditor should he afterwards turn out to have been an equitable mortgagee,⁽⁷⁾ unless he be the party's solicitor with whom deeds are usually deposited for custody.⁽⁸⁾

121. If the mortgagee has made diligent inquiries as to the deeds and has been given a reasonable excuse for their non-production, he is not bound to prosecute his inquiries any further.⁽⁹⁾ And it does not matter that the information given was false, unless he had means of ascertaining the truth from other sources, as where a puisne mortgagee was informed that the prior mortgagee had a warrant of attorney or judgment whereas he had in reality a mortgage.⁽¹⁰⁾ So again where the mortgagor falsely asserted and recited in the deed that the title deeds were held by a third person in whose favour a prior charge had been created, whereas the mortgagor had suppressed the title-deeds which he deposited with a subsequent mortgagee as security for a loan, it was held that the false recital did not operate to give priority to the subsequent mortgagee.⁽¹¹⁾ A company issuing debentures charging all its property, present and future, and covenanting not to create any charge in priority to the debentures, afterwards mortgaged a specific fund to a third party whose solicitor knew of the covenant,

(1) *Loof Ali v. Pearee Mohun*, 16 W R., 223.

(2) *Hiern v. Mill*, 13 Ves., 114; *Maxfield v. Burton*, L. R., 17 Eq., 15.

(3) *Worthington v. Morgan*, 16 Sim., 547; *Maxfield v. Burton*, L. R., 17 Eq., 15; *Lloyds Banking Co. v. Jones*, 29 Ch. D., 221.

(4) *Oliver v. Hinton*, [1899] 2 Ch., 264 (270).

(5) *Berwick & Co. v. Price*, [1905] 1 Ch., 632.

(6) *Bradley v. Riches*, 9 Ch. D., 189; *Kettlewell v. Watson*, 21 Ch. D., 605 (704—

707); *Boursot v. Savage*, L. R., 2 Eq., 134 (142); *Berwick & Co. v. Price*, [1905] 1 Ch., 632 (639).

(7) *Hiern v. Mill*, 13 Ves., 314.

(8) *Bozon v. Williams*, 3 Y. & J., 150.

(9) *Colyer v. Finch*, 5 H. L. C., 905; *Ratcliff v. Bernard*, L. R., 6 Ch., 652; *Agra Bank v. Barry*, L. R., 7 H. L., 135.

(10) *Broadbent v. Barlow*, 3 De G. F. & J., 570; *Ladbroke v. Lee*, 4 De G. & S., 106; *Heathorne v. Darling*, 1 Moo. P.C., 5.

(11) *Frazer v. Jones*, 17 L.J. Ch., 358.

but was misled by the managing director of the company into a belief that the covenant did not affect his mortgage, and whereupon he did not see the form containing the covenant. On a competition between the mortgagee and the debenture-holder, the former was held not to have forfeited his priority inasmuch as he had been misled by the manager.⁽¹⁾ In all these cases it will be noticed, there was an honest desire to arrive at the truth, and although more diligence might have repaid inquiry, its absence would not visit a person with the consequence of constructive notice. But where a life-tenant represented himself to be full owner and conveyed his interest as such for valuable consideration the transferee will be affected with notice of the real interest.⁽²⁾ Similarly a lessee has notice of the lessor, and the sub-lessee of the immediate and original lessor even though the terms of their contract preclude them from calling for the lessor's title.⁽³⁾ A person who has notice of claim or interest ought to inquire what that claim or interest is. Thus where the purchaser of property is informed that there are charges on the property he will be fixed with notice of all charges the existence of which he might have ascertained from inquiry.⁽⁴⁾ Actual knowledge that the rents are paid by the tenants to some persons whose receipt is inconsistent with the title of the vendor is notice of that person's rights.⁽⁵⁾ All these cases, however, assume that the party affected had knowledge of, or his attention drawn to, some specific circumstance which ought to have put him upon an inquiry, that, if prosecuted, would have led to a discovery of the prior interest or the real title.⁽⁶⁾ Hence where a solicitor mortgaged property to his client and handed over to him a bundle of papers which he falsely represented to be the title-deeds, and afterwards sold the property to another to whom he made over the deeds he had fraudulently withheld from the mortgagee, it was held that the latter could not be postponed to the purchaser.⁽⁷⁾ So again the omission of a transferee of a mortgage to give notice to the mortgagor, who has, for want of such notice, dealt with the original mortgagee, does not prejudice the transferee's right of foreclosure.⁽⁸⁾ And generally it may be stated that the mere omission to prosecute inquiries to the extent to which a prudent, cautious, and wary person ordinarily would, is not sufficient to fix a transferee with notice.⁽⁹⁾ But there should not be any fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind. If there is merely want of caution as distinguished from fraudulent and wilful blindness, the doctrine could not be equitably applied.⁽¹⁰⁾ Cases of wilful abstention from inquiry or search, as such, are naturally rare, and are often treated as questions of fraud to which they are allied by a close affinity.

122. It has been observed before (§ 121) that ordinary negligence does

(ii) **Gross negligence.**

not deprive a man of his priority. But both in England and under the Act, a party is bound by the consequences of what is designated in law as gross negligence,⁽¹¹⁾ and

(1) *English, &c., Trust v. Brunton*, [1892] 2 Q B., 700.

(2) *Jackson v. Rowe*, 2 S. & S., 472 (475), explained in *Smith v. Jones*, 1 Ph., 255.

(3) *Steedman v. Poole*, 6 Hare, 193; *Bank of Ireland v. Brookfield Linen Co.*, L.R., 15 Ir., 37.

(4) *Jones v. Williams*, 24 B., 47 (59).

(5) *Hunt v. Luck*, [1902] 1 Ch., 429.

(6) See *per* Montague Smith in *Ramcoomar v. Macqueen*, 13 W.R., 166, P.C.; 11 B.L.R., 46, P.C.; cited and approved in *Mahomed v. Kishori Mohun*, I.L.R., 22 Cal., 909

(919), P.C.

(7) *Hunt v. Elmes*, 2 D. F. & J., 578; *Ratcliffe v. Barnard*, 6 Ch., 652.

(8) *Wilkinson v. Tate*, 4 Ch., 288.

(9) *Dart's V. & P.* (6th Ed.), 986, 987; *Sugd. V. & P.* (14th Ed.), 772, 775; *Jones v. Smith*, 1 Ph., 237; *Agra Bank v. Barry*, L.R., 7 H.L., 135; *Williams v. Williams*, 17 Ch. D., 437.

(10) *Per* Wigram, V. C., in *Jones v. Smith*, 1 Hare, 43 (55).

(11) "*Crassa Negligentia*," *Jones v. Smith*, 1 Hare, 43.

which, if allowed, would be a cloak to fraud.⁽¹⁾ "Negligence," said Wigram, V. C., "as I understand the term, supposes a disregard of some fact known to the purchaser, which, at least, indicated the existence of that fact, notice of which the Court imputes to the purchaser."⁽²⁾ But gross or culpable negligence does not import any breach of legal duty, for a transferee of property is under no legal obligation to investigate his vendor's title. But in dealing with immoveable property, as in other matters of business, regard is had to the usual course of business; and a transferee who wilfully departs from it in order to avoid acquiring a knowledge of his transferor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way.⁽³⁾ Negligence may then be stated to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁽⁴⁾ "Gross negligence"⁽⁵⁾ is nowhere defined, but in section 78 "gross neglect," "fraud" and "misrepresentation" have been used as equivalent in their legal consequences.⁽⁶⁾ In order to affect the legal relation of a person, neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing, to the person who is led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party itself, or even if some duty owing to third persons with whom those seeking to set up the estoppel are not privy.⁽⁷⁾ By "proximate cause" is no doubt meant the *real* cause.⁽⁸⁾ Negligence operates on a party by estoppel, and as such the law of negligence may be said to be a branch of the law of estoppel that whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it.⁽⁹⁾ Loss may be occasioned by some act, conduct, or default⁽¹⁰⁾ of a party, but it must be in the very transaction in question.⁽¹¹⁾ But it is not necessary that it should be designed, and indeed the person charged may be perfectly innocent. In ordinary cases the element of fraud does not exist in the composition of gross negligence, but in extreme cases (*crassa negligentia*) the court might treat it as evidence of fraud, impute a fraudulent motive to it, and visit it with the consequence of fraud, though here too, morally speaking, the party charged might be perfectly innocent.⁽¹²⁾ If a man in the course of business volunteers to make a statement on which it is probable that in the course of

(1) *Jones v. Smith*, 1 Ph., 255

(2) *West v. Reid*, 2 Hare, 257 (259).

(3) *Ware v. Lord Egmont*, 4 DeM. & G., 460 (473); *Bailey v. Barnes*, [1894] 1 Ch., 25 (35).

(4) *Blyth v. Birmingham Waterworks Co.*, 11 Ex., p. 784.

(5) For more particular information see s. 78, *post*.

(6) *Shan Moun Mull v. Madras Building Company*, 1 L. R., 15 Mad., 368.

(7) *Per Blackburn, J.*, in *Swan v. North British Australasian Co.*, 32 L. J. Ex., 277; cited by Lord Coleridge, C. J., in *Arnold v. Cheque Bank*, 1 C. P. D., 578 (587, 588); following *Young v. Grote*, 4 Bing., 253; *Ingham v. Primrose*, 7 C. B. (N. S.), p. 82; distinguishing *Roberts v. Tucker*, 16 Q. B.,

560; *Bank of Ireland v. Trustees of Evan's Charities*, 5 H. L. C., 389; *contra* in *Young v. Grote*, 4 Bing., 254, "the fount of bad argument" was practically overruled in *Scolfield v. Earl of Londesborough*, [1895] 1 Q. B., 543 O.A. [1896], 532; *Morrison v. Verschnyle*, 6 O. W. N., 429 (448); *Svami Naidu v. Subramania*, 2 M. H. C. R., 158.

(8) *Selton v. Lafone*, 19 Q. B. D., 69 (71).

(9) *Likbarrow v. Mason*, 2 T. R., 70.

(10) *Freeman v. Cooke*, 2 Ex., 654.

(11) *Swan v. North British Australasian Co.*, 32 L. J. Ex., 277; *Bank of Ireland v. Evans Charities*, 5 H. L. C., 389, explained; *Arnold v. Cheque Bank*, 1 C. P. D., 578.

(12) *Jones v. Smith*, 1 Hare, 43.

business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and further than that, there is a duty to take reasonable care that the statement shall be correct. It is not necessary that the person making the statement should have *intended* the person to whom he made the statement to act in any particular way upon it.⁽¹⁾ If such a statement was believed in and, as a result of this belief, one did what one might otherwise not have done, then the doctrine of culpable negligence should certainly be applied.

123. Where the drawer of a cheque failed to exercise proper caution in the mode of drawing it, which admitted of easy interpolation, and which misled the banker into paying the forged

Ordinary negligence.

cheque, the drawer, having caused the banker, to pay it by his own neglect in the mode of drawing the cheque itself, could not complain of that payment.⁽²⁾ But where the drawer after preparing and signing a draft and making it payable to a certain person enclosed it in a letter and placed it in a letter-box in his office to be posted in the usual way, and from where it was stolen and the thief forged the payee's endorsement and got it cashed, and the drawer then sued a bank for having received money obtained by theft, and it was pleaded that the plaintiff, being guilty of negligence in the custody and transmission of the drafts, could not recover, but it was held that there was no negligence: "There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief."⁽³⁾ No person can be called grossly negligent if he does not provide against the occurrence of a very extraordinary event. "If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book or, neglect to lock the desk in which it is kept, and a servant or a stranger should take it up, is it impossible to contend that a banker paying his forged cheque would be entitled to charge his customers with that payment?"⁽⁴⁾

An executor has authority to sell or mortgage the property of the testator in due course of administration and give a complete title, free from the charge or trust, to a purchaser or mortgagee. Such a purchaser or mortgagee, therefore, is not bound to inquire whether the legacies charged on his estate by the testator had been paid and he must be presumed to have acquired a free, complete and valid title unless it is clearly proved that he had *express* or constructive notice, that a certain other person had claims against the estate and the executor was acting in breach of the trust.

A purchaser from an executor is neither entitled nor bound to inquire whether debts or legacies charged on the testator's estate have been paid or not, and without such enquiry he can obtain a good title. Similarly a purchaser or mortgagee from an executor who is also devisee is not bound to inquire whether legacies or debts charged on the estate have been paid or not.⁽⁵⁾

(1) Lord Esher, M. R., in *Carr v. L. & N. W. Ry. Co.*, L.R., 10 O.P.D., 307; *Coventry v. The G. E. Ry. Co.*, L.R., 11 Q.B.D., 776.

(2) *Bank of Ireland v. Evans's Charities*, 5 H. L. C., 389; explained in *Arnold v. Cheque Bank*, L. R., 1 O.P.D., 578 (587).

(3) *Arnold v. Cheque Bank*, L. R., 1 O. P. D., 578 (589).

(4) *Bank of Ireland v. Evans Charities*, 5 H.L.C., 389.

(5) *Sioleman v. Rahimtula*, 6 Bom. L. R., 800; *Corser v. Cartwright*, 7 App. Cas., 731; *In re Tanqueray Williams and Landan*, 20 Ch. D., 465; *In re Whistler*, 35 Ch. D., 561; *Greender Chunder v. Mackintosh*, 1 L. R., 4 Cal., 897.

124. So in case of sale ordinary prudence dictates that the intending purchaser should look into the title, and it will be his own folly if he takes without investigation. In a sale of immoveable property governed by the Act, the purchaser may even get some relief against the vendor, but in an execution-sale there is no implied covenant for title and the purchaser who buys without careful inquiry does so at his own peril. And moreover whether the sale be voluntary or involuntary where there are competing equities as where a forged mortgage-bond was sold by the personal representatives of the mortgagee, and the assignment contained only limited covenants, the assignee was not allowed to recover back his money, it being incumbent on him to look into the goodness of his title.⁽¹⁾ But it would appear that in such a case the purchaser would have recovered if the contract had been inchoate as that no assignment had been executed.⁽²⁾ And in a contract for sale the seller is not liable if the abstract is negligently prepared for it is the purchaser's duty to examine it with the deeds, and he can by the exercise of ordinary diligence avert any loss from the seller's negligence.⁽³⁾ And if the purchaser leave the deeds with the seller, it is negligence, and "any subsequent purchaser from the first purchaser may, upon his legal title, recover them in trover, even against a person to whom the original seller has fraudulently conveyed the estate, as if he were still owner of it, and delivered the deeds up to him" ⁽⁴⁾ though on a plausible reason."⁽⁵⁾ The purchaser from a vendee is not deemed to have constructive notice of the vendor's lien for the unpaid purchase-money from his being in possession, if he has acknowledged receipt of the entire consideration and has made over the sale-deed to the purchaser.⁽⁶⁾ It has been held by the Privy Council that persons interested in the maps and surveys made for revenue purposes must be deemed to have had notice of them, and that they may be presumed to be correct until the contrary is established.⁽⁷⁾

125. Negligence, however gross, is however never by itself sufficient to postpone a legal estate to an equitable estate,⁽⁸⁾ unless (a) the owner of the legal estate has wittingly or unwittingly "assisted in or connived at the fraud which has led to the creation of the subsequent equitable estate without notice of the prior legal estate" and evidence of which may be afforded by the absence of ordinary care in inquiring for or keeping title-deeds, and such conduct, if not satisfactorily explained, will be sufficient to postpone the legal estate :⁽⁹⁾ and (b) "where the owner of the legal estate has constituted the mortgagor his agent to raise money, and has

(1) *Bree v. Holbech*, Doug., 654; *Ex parte Swan*, 30 L. J. (N. S.), C. P., 113; *Taylor v. Wadland Ry. Co.*, 28 Beav., 287.

(2) *Sugd. V. & P.* (14th Ed.), 550.

(3) *Walker v. Moore*, 10 Barn. & Cress., 416, cited in *Sugd. V. & P.* (14th Ed.), 432.

(4) *Harrington v. Price*, 3 Bar. & Ad., 170; *Wakefield v. Newton*, 6 Q. B., 276, and cases cited in *Sugd.*, 434; *Madras Hindu Union Bank v. C. Venkatramiah*, 1 L. R., 12 Mad., 424; distinguishing *Northern Counties, &c., Co. v. Whipp*, L. R., 26 Ch. D., 482; following *Perry-Herrick v. Attwood*, 2 DeG. & J., 21; *Briggs v. Jones*, L. R., 10 Eq., 52; *Shan Maun v. Madras Building Co.*, 1 L. R., 15 Mad., 268.

(5) *Shan Maun v. Madras Building Co.*, 1 L. R., 15 Mad., 268.

(6) *White v. Wakefield*, 7 Sim., 401; *Worthington v. Morgan*, 16 Sim., 547.

(7) *Jagadindra v. Secretary of State*, 1 L. R., 30 Cal., 291 (301), P. C. As to maps see *Ghosh v. Secretary of State*, 1 L. R., 22 Cal., 252; *Shyama Sundari v. Jogobundhu*, 1 L. R., 16 Cal., 186; *Sarat Sundari v. Secretary of State*, 1 L. R., 11 Cal., 784; *Dewan Ram Jewan v. Collector*, 14 B. L. R., 221 note; *Ram Jewan v. Collector*, 19 W. R., 127.

(8) *Per Fry, L. J.*, *Northern Insurance Co. v. Whipp*, 26 Ch. D., 482 (494).

(9) *Dart. V. & P.* (6th Ed.), 952; *Worthington v. Morgan*, 16 Sim., 547; *Whitbread v. Jordan*, 1 Y. & C., 303; *Peto v. Hammond*, 30 B., 495; *Maxfield v. Burton*, 17 Eq., 15; *Clarke v. Palmer*, 21 Ch. D., 124; *Lloyd's Banking Co. v. Jones*, 29 Ch. D., 221.

for that purpose either left the deeds in his custody,⁽¹⁾ or returned them to him,⁽²⁾ and the mortgagor has by means of the possession of the deeds created the equitable estate without notice of the prior legal estate, even although the principal had no intention that his agent should commit a fraud, or knowledge that he was doing so."⁽³⁾ Where, however, the prior estates are both equitable the same rule would still apply, although in such a case less negligence would postpone the prior incumbrancer, but the mere possession of title-deeds by the subsequent incumbrancer would not give him priority unless it is coupled with some active omission or negligence on the part of the prior incumbrancer.⁽⁴⁾ So where the mortgagor has given a receipt for a larger amount than that received by him he cannot afterwards be allowed to redeem as against a transferee who has purchased the mortgage on the faith of the receipt except on payment of the amount for which the transferee has purchased, for in the absence of any circumstance to cause suspicion, he was entitled to rely on the acknowledgment in the mortgage-deed and the endorsed receipt and has a better equity than the mortgagor who, by leaving the receipt in the hands of the mortgagee had enabled him to commit fraud.⁽⁵⁾ Marshalling is not prevented by notice of prior mortgage.⁽⁶⁾ Where on a petition of sale presented by the subsequent incumbrancer, a notice was served on the prior equitable mortgagee to produce the deeds, the former was held to have priority over the latter in respect of further advances made after notice.⁽⁷⁾ And in a possessory mortgage the mortgagee is fixed with notice of the instrument, the parties thereto and the conditions thereof under which the tenants of the property mortgaged to him have been paying rents, for it is the duty of the mortgagee to inquire before taking his mortgage.⁽⁸⁾ And if the mortgage be an equitable one, the mortgagee must inquire as to whom the legal estate is vested in, as also the nature and amount of any prior incumbrances.⁽⁹⁾ Then, again, where an equitable mortgage is created by a person holding an official or fiduciary position, the circumstances may be such as to fix the mortgagee with notice that the mortgagor was acting otherwise than in his individual capacity.⁽¹⁰⁾ And it has been held that it is the duty of a person receiving by way of an equitable mortgage of railway stock, the certificates of the shares thereof, to inquire what is the real position of the person professing to mortgage it, for if such person has only the legal title by having the certificates in his possession, but is, in truth, merely the trustee for another, the equitable mortgagee will be unable to enforce his claim in opposition to the original *cestue que trust*.⁽¹¹⁾ A mortgagee employing the mortgagor as his solicitor is generally in a disadvantageous predicament, but he is not affected with notice of an incumbrance known to the mortgagor.⁽¹²⁾

(1) *Perry-Herrick v. Attwood*, 2 De. & J., 21.

(2) *Briggs v. Jones*, L. R., 10 Eq., 92.

(3) *Dart. V. & P.* (6th Ed.), 952.

(4) *Kettlewell v. Watson*, 26 Ch. D., 501.

(5) *Per Bowen, L.J.*, in *Bickerton v. Walker*, 31 Ch. D., 151; following *Goodwin v. Roberts*, 1 App. Cas., 476; *Rice v. Rice*, 2 Drew., 73 [Bowen, L.J., in deciding the case, seems to have thought that for this purpose there is no difference between a mortgage and an absolute conveyance, see p. 159]; *French v. Hope*, 56 L. J. Ch., 363.

(6) *Robb.*, 782, but see s. 81, *post*.

(7) *Re Keogh's Estate*, [1895] 1 Ir. R., 201.

(8) *Knight v. Bowyer*, 2 DeG. & J., 421.

(9) *Robb.*, 1317.

(10) *Mayor v. Murray*, 7 DeG. M. & G., 497.

(11) *Shropshire, &c., Co. v. The Queen*, L. R., 7 E. & I., 1 App., 496; *Re Morgan; Pillgrem v. Pillgrem*, 18 Ch. D., 93.

(12) *Espin v. Pemberton*, 3 DeG. & J., 547.

126. It is a general rule that a purchaser or lessee of a leasehold interest is not only fixed with notice of the contents of the lease under which the property is held but also with the title of the lessor.⁽¹⁾ And since notice of a deed is generally notice of its contents, he will have constructive notice of all the restrictive covenants therein contained, and of the other connected deeds forming part of the chain of the same title. And he is not relieved against the consequences of not making the inquiry, even if the vendor or lessor had made the most express representation that they contained no restrictive covenants, nor anything in any way affecting the title.⁽²⁾ But it would have been otherwise if the notice related to a deed which did not necessarily and directly affect the property,⁽³⁾ e.g., a collateral agreement between the lessor and a third party and not referred to in the deed forming part of the chain of the lessor's title.⁽⁴⁾ But where the deeds relate to the property itself no prudent mortgagee will enter into any agreement affecting it without calling for and inspecting the title-deeds.⁽⁵⁾ And even as regards collateral contracts there are cases to show that where the tenant in possession had entered into a contract for the purchase of the property the subsequent purchaser thereof was held to have notice of the pre-existing contract of which he could have learnt on inquiry from his vendor.⁽⁶⁾

127. And the same rule would appear to apply to even interests subsequently acquired by him,⁽⁷⁾ but the rule is inapplicable as between the vendor and purchaser while the matter rests in contract.⁽⁸⁾ It appears now to be the better opinion and certainly more reasonable that, while the purchaser has implied notice of the tenant's title, he is not fixed with notice of the original and intermediate leases and of their covenants, for "it had never been considered want of due diligence in the purchaser, which was to fix him with implied notice, if he did not pursue his inquiries through every derivative lessee until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant."⁽⁹⁾ Notice of a tenancy does not affect a purchaser with constructive notice of the lessor's title,⁽¹⁰⁾ but the mortgagee or purchaser of property held under a sub-lease has constructive notice of all the covenants in the head-lease, and also of the unusual covenants, if he had an opportunity of examining the title or has taken possession.⁽¹¹⁾ And it follows that if the purchaser or mortgagee finds the tenancy land in the occupation of another he is bound to ascertain the nature and extent of the occupier's interest,⁽¹²⁾ but not if he took vacant possession.⁽¹³⁾ And if several persons are in occupation as tenants in common and carrying on a joint business thereon, he will be deemed to have notice of their partnership.⁽¹⁴⁾

(1) *Taylor v. Stibbert*, 2 Ves. J., 437 (440); *Jones v. Smith*, 1 Hare, 60; *Mumford v. Stohwasser*, 18 Eq., 556.

(2) *Patman v. Harland*, L. R., 17 Ch. D., 358; observing on *Wilson v. Hart*, L. R., 1 Ch., 463.

(3) *Le Neve v. Le Neve*, 1 Amb., 436, 2 W. & T. L. C. (7th Ed.), 175; *Jones v. Smith*, 1 Ph., 244 (253, 254).

(4) *Carter v. Williams*, L. R., 9 Eq., 678.

(5) *English, &c. Investment Co. v. Brunton*, [1892] 2 Q. B., 700.

(6) *Daniels v. Davison*, 16 Ves. J., 249; 10 R. R., 171; 2 W. & T. L. C. (7th Ed.), 225.

(7) *Allen v. Anthony*, 2 W. & T. L. C. (7th Ed.), 226.

(8) *Caballern v. Henty*, 9 Ch., 447.

(9) *Per Lord Cottenham, M. R.*, in *Hanbury v. Litchfield*, 2 M. & K., 693, considering *Daniels v. Davison*, 16 Ves. J., 249; an extreme case beyond which the doctrine should not be extended.

(10) *Jones v. Smith*, 1 Hare, 69.

(11) *Wilbraham v. Livesay*, 18 Beav., 208; *Hyde v. Warden*, 3 Ex. D., 72.

(12) *Jones v. Smith*, 1 Hare, 48 (60).

(13) *Miles v. Langley*, 1 R. & My., 39.

(14) *Cavander v. Bulteel*, L. R., 9 Ch., 79.

128. Registration as Notice.—The question whether the registration of a document is of itself sufficient constructive notice to subsequent purchasers or mortgagees is one which cannot be categorically answered. In England where the system of public registry is still imperfect and is confined only to certain counties,⁽¹⁾ it has been laid down that it is not of itself a sufficient notice.⁽²⁾ And in Ireland where the system of registry is more ancient and universal, the same rule prevails,⁽³⁾ although there by the force of the peculiar wording of the Act,⁽⁴⁾ the prior registered deed, even though a mere agreement or creating only a charge,⁽⁵⁾ has priority over a subsequent deed although it be a conveyance without notice. But the Yorkshire Registries Act distinctly provides against a person gaining priority “merely in consequence of his having been affected by actual or constructive notice, except in case of actual fraud.”⁽⁶⁾

129. But on the question of notice the courts in England are unanimous,⁽⁷⁾ although no doubt dictums are not wanting in which the courts have expressed a doubt whether an intending transferee ought not to search in a public registry which is a known repository for conveyances.⁽⁸⁾ But against this it has been urged that if the registration of a deed should be held constructive notice “it must be taken as notice of everything that is contained in the memorial; and if the memorial contains a recital of another instrument, it is notice of that instrument; if a fact, it is notice of that fact.”⁽⁹⁾ The inconvenience of this cannot but be deemed exceedingly great.⁽¹⁰⁾ It is permissible, however, to question the propriety of this reasoning, although the uniformity of the rule is beyond question.⁽¹¹⁾

130. In America, however, the doctrine is said to have been differently settled, it being there uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable in the same property. The reasoning upon which that doctrine is founded, is the obvious policy of the Registry Acts, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance. The American doctrine certainly has the advantage of certainty and universality of application: and it imposes upon

(1) *E.g.*, Middlesex and Yorkshire (Middlesex Registry Act, 7 Anne, c. 20), amended by the Land Registry Middlesex Deeds Act, 1891 (54 & 55 Vict., c. 64); Yorkshire Registries Act, 1884 (47 & 48 Vict., c. 54), amended by (48 & 49 Vict., c. 26). By s. 15 of the Act of 1884, it was enacted that registration shall be deemed to constitute actual notice, but the enactment was found to be productive of great commercial inconvenience, and the section had to be repealed in the following year (48 & 49 Vict., c. 26).

(2) *Bushell v. Bushell*, 2 Sch. & L. 90; *Ford v. White*, 16 Beav., 120; *Lane v. Jackson*, 120 Beav., 535; *Re Russell Road Purchase*, L. R., 16 Eq., 78.

(3) 6 Anne, c. 2; *Galbraith v. Cooper*, 8 H. L. C., 315 (330).

(4) 6 Anne, c. 2, s. 3.

(5) *Mill v. Hill*, 3 H. L. C., 828.

(6) 47 & 48 Vict., c. 54, s. 14; *Battison v. Hobson*, [1896] 2 Ch., 408.

(7) *Underwood v. Courtown*, 2 Sch. & L., 66; *Wyatt v. Barwell*, 19 Ves., 435.

(8) *Per* Lord Hardwicke, C., in *Morecock v. Dickens*, Amb., 480; *Hine v. Dodd*, 2 Atk., 275; *Wyatt v. Barwell*, 19 Ves., 435.

(9) *Per* Lord Camden in *Morecock v. Dickens*, Amb., 678; *Latouche v. Dunsany*, 1 Sch. & L., 137 (157); *Underwood v. Lord Courtown*, 2 Sch. & L., 41 (64).

(10) *Latouche v. Dunsany*, 1 Sch. & L., 157.

(11) *Bedford v. Backhouse*, 2 Eq. Ca. Ab., 615; *Calor v. Cooley*, 1 Cox, 182; *Wiseman v. Westland*, 1 Y. & J., 117; *Wyatt v. Bartwell*, 19 Ves., 435; *Wrightson v. Hudson*, 2 Eq. Ca. Ab., 609; *Morecock v. Dickens*, Amb., 678; *Bushell v. Bushell*, 1 Sch. & L.,

subsequent purchasers a reasonable degree of diligence in examining the title to estates.⁽¹⁾

131. In this country, all instruments affecting land of and above the value of Rs. 100 must compulsorily be registered,⁽²⁾ but there is no statutory provision in the Act as to whether registration is of itself constructive notice to subsequently created interests, although there are provisions in the Act giving priority to registered over unregistered documents unaccompanied or not followed by the delivery of possession.⁽³⁾ Such preference is in a measure secured by the English and Irish Registry Acts where registered instruments have priority over unregistered instruments, though of an earlier date, if the former had no notice of the latter.⁽⁴⁾

132. In regard to this country, except for passing a dictum of their Lordships of the Privy Council⁽⁵⁾ the Courts are clearly divided upon the question. Thus, while it has been maintained by the Bombay⁽⁶⁾ and Allahabad⁽⁷⁾ Courts that the registration of a document is of itself good notice, the Courts in Calcutta and Madras have laid down the contrary. In Bombay, admittedly the practice of the American Courts has been approved of, but it is at the same time conceded that the mortgagee is not bound by any law to search for incumbrances, but that "in this presidency it has so long been held incumbent on him, as a prudent man, to do so, that we think it may fairly be said that he is guilty of gross negligence if he omits this precaution."⁽⁸⁾ The Allahabad Court similarly follows the same practice, for it observed: "The registry is open to search by any one disposed to make a search. In this particular case Kishen Dutt made no search, and we have to decide whether he must be taken to have notice by reason of the fact that Tika Ram's mortgage was in fact registered in the office where that document was bound under the Act to be registered. It appears to us that every person dealing with immoveable property knows that certain documents, such as mortgages of the value of over Rs. 100, must be registered and that the fact whether such a mortgage has been registered will be disclosed by a search in the registry. It also appears to us that it is the duty

(1) Story Jur. (11th Am. Ed.), p. 420; ib. (2nd Eng. Ed.), §§ 401, 402.

(2) S. 17, Indian Registration Act (III of 1877).

(3) *Ib.*, s. 48.

(4) *Re Wight's Mortgage Trust*, L. R., 16 Eq., 41; explaining *Wright v. Stanfield*, 27 Beav., 8; *Moore v. Culverhouse*, 27 Beav., 693; *Neve v. Pennell*, 2 H. & M., 170; *Rolland v. Hart*, L. R., 6 Ch., 678; *Credland v. Potter*, L. R. 10 Ch., 8.

(5) *Mahomed Ibrahim v. Ambika Pershad*, I. L. R., 39 Cal., 527 (556), P. C.

(6) *Motiram v. Hari*, (1877) B. P. J., 4; *Tukaram v. Ramchandra*, I. L. R., 1 Bom., 314; *Narain v. Kirparam*, (1877) B. P. J., 26; *Icharam v. Raju*, 11 B. H. C. R., 41; *Nonabhat v. Lakshman*, (1877) B. P. J., 83; *Balaji v. Ramchandra*, 11 B. H. C. R., 37; *Dundaya v. Chenbasappa*, I. L. R., 9 Bom., 427; *Shivram v. Genu*, I. L. R., 6 Bom., 515; *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 168, F. B., followed in *Dullabdas v. Lakshmandas*, I. L. R., 10 Bom., 89;

Chintaman v. Dareppa, I. L. R., 14 Bom., 506; *Narayan v. Bapu*, I. L. R., 17 Bom., 741; *Balmukundas v. Moti*, I. L. R., 18 Bom., 444; *Chunilall v. Ramchunder*, I. L. R., 22 Bom., 213; *Dina v. Nathu*, I. L. R., 26 Bom., 538; *Tajudin v. Govind*, 5 Bom. L. R., 144; *Sahadev v. Sheikh Papa*, I. L. R., 29 Bom., 199. (In *Jalubhai v. Bai Amrit*, I. L. R., 2 Bom., 299, the earlier purchase without possession was not registered until after the later purchase so that the effect of registration as giving notice did not arise).

(7) *Matadin v. Kazim Husain*, I. L. R., 13 All., 432 F. B.; *Muhammad v. Samiuddin*, I. L. R., 9 All., 125; *Janki Prosad v. Kishen Dutt*, I. L. R., 16 All., 478, F. B.

(8) *Dina v. Nathu*, I. L. R., 26 Bom., 538 (542). In Bombay registration has been held to be good notice even in cases arising before the Act. *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 168, F. B.; *Dundaya v. Chenbasappa*, I. L. R., 9 Bom., 427; *Narayan v. Bapa*, I. L. R., 17 Bom., 741.

of every person bringing any suit on a mortgage under chap. IV of Act IV of 1882 to ascertain, so far as he reasonably can, that he has impleaded, as parties to the suit which he is about to bring, all persons having an interest in the property comprised in his mortgage. It also appears to us that any reasonably prudent person who was bringing such a suit ought to search in the registry in order to ascertain what were the dealings with the property, the subject of his mortgage, whether these dealings were anterior or subsequent to his mortgage, if he intends to bring a suit on that mortgage. . . . In our opinion Kishen Dutt must be taken to have either wilfully abstained from searching the registry, or, in not making a search in the registry, to have omitted to do an act which a reasonably prudent mortgagee about to bring a suit on his mortgage . . . ought to have done or would have done. In either case, in our opinion, Kishen Dutt must, by reason of Tika Ram's mortgage having been registered, be taken to have had notice of the interest created by that mortgage, and, if he had ascertained that that mortgage had been made, it would have put him on further inquiry, which he was bound to have made, as to who was the person who was at the time of the suit interested in the property. We do not decide that registration is of itself notice to all the world. All we do decide is that where it is the duty of a person to search or where a reasonably prudent man would in his own interest make a search, then the fact that the search, if made, would have disclosed a document affecting the property, affects that man with notice of such document and puts on him the necessity of further inquiry."⁽¹⁾

133. The Allahabad Court then re-echoes the view of Lord Camden, who said that "it becomes a serious point whether a Court of Equity should not say that in all cases of registry, which is the public depository for deeds, and to which any person may resort, a subsequent purchaser ought not to search or be bound by notice of the registry as he would of a decree in equity or judgment at law."⁽²⁾ The High Courts of Calcutta ⁽³⁾ and Madras have not, however, conceded this, and there the prevailing English and Irish doctrine has been followed: "To hold otherwise might have the effect of seriously disturbing titles created upon the understanding that the law here was the law of the English and Irish Courts. . . . The Indian Legislature must have been aware of the conflict between the English and Irish decisions and those of the Bombay High Court upon the subject, and yet in laying down what shall be the effect of registration and non-registration, they have abstained from declaring that notice to subsequent purchasers and mortgagees shall be one of the effects of registration. . . . We are not prepared to lay down as a general principle that non-search of the registry is such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief, for

(1) *Per* Sir John Edge, C. J., in *Janki Prasad v. Kishen Dutt*, I. L. R., 16 All., 478, (482), F. B. The same view has more recently been reiterated by the same learned Judge while delivering a judgment of the Privy Council in *Mahomed Ibrahim v. Ambika Pershad*, 39 Cal., 527 (556).

(2) *Morecock v. Dickens*, Amb., 678.

(3) *Durga Narain v. Baney Madhub*, I. L. R., 7 Cal., 199; *Joshua v. Alliance Bank*, I. L. R., 21 Cal., 185; *Inderdawn v. Gobind*, I. L. R., 23 Cal., 790; *Monindra v. Traylokya-nath*, 2 C. W. N., 750; *Atulkristo v. Muttylal*,

3 C. W. N., 30 (32); *Preo Nath v. Ashutosh*, I. L. R., 27 Cal., 358; following *Le Neve v. Le Neve*, Amb., 436; *Bunwari v. Ramjee*, 7 C. W. N., 11 (18). [In this case it is stated that the American doctrine has now undergone a change and reference is made to Story's Eq. Jur., 2nd Eng., Ed. §§ 401, 402, which however does not refer to American Law; cf. *ib.*, preface.] [In *Joshua v. Alliance Bank*, I. L. R., 22 Cal., 185, Sale, J., appears to have accepted the Bombay view, see p. 204.]

to do so, would be practically to make registration notice, which, for other reasons, we have declined to do."⁽¹⁾ A similar though a somewhat modified view has also been taken by the Calcutta High Court,⁽²⁾ which has laid down that the question whether registration is notice or not, is a question of fact, and as each case arises, it should be determined whether the omission to search the register together with the other facts amounts to such gross negligence as to attract the consequence which results from notice. This view has been adopted in *Burmah*,⁽³⁾ and the Central Provinces.⁽⁴⁾ But the view so taken does not solve the difficulty. As will be shown hereafter, the question is indeed one of fact, and it does not further the discussion by declaring that it is so, but the question, whether the fact that a title was registered sufficiently puts a man upon inquiry, an omission to make which is culpable negligence affecting the party with the same consequences as if he had made the search, still remains, although in the present state of the law, it cannot be satisfactorily answered. Indeed, the addition of the words "or search which he ought to have made" to the definition as originally propounded in the Trusts Act⁽⁵⁾ would appear to show that search in the registry was probably present in the minds of the framers of the Act. If so, the intention of the Legislature might have been, as indeed it could have been expressed in language less open to argument.⁽⁶⁾ Till, however, the Legislature declares its intention, the doctrine should not be extended to embrace cases not clearly within its scope. But both under the English leading cases and the precedents settled in this country, if it is shown that the purchaser or mortgagee has searched the register, notice will be imputed to him of all instruments registered within the period for which he searched, but the presumption does not extend beyond the period covered by his search.⁽⁷⁾ And where registration is notice, it is not confined to only subsequently created interests; but also extends to prior incumbrances, so that the puisne mortgagee enforcing his mortgage is deemed to have notice of his prior incumbrancer whom he should implead in the suit.⁽⁸⁾

134. From the language of the clause, it would appear, that *per se* registration was not intended to amount to notice and having regard to the variable circumstances, the fact was probably left to be determined in each case. The fact that the registry was open to search which could have been, but was not, made would then still be an element varying in importance in accordance with the nature and conduct of the parties' accessibility to the information and other similar facts which must be considered collectively. These considerations are strengthened by the term "ought" in the clause which does not import a duty or obligation, but means ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances.⁽⁹⁾

(1) *Shan Maun v. Madras Building Co.*, 1 L. R., 15 Mad., 268 (274, 275); following *Somasundara v. Sakharai*, 4 M. H. C. R., 869; *Madras Hindu Union Bank v. C. Venkatranjiah*, 1 L. R., 12 Mad., 424; *Damodara v. Somasundara*, *ib.*, 429; see also *Rajaram v. Krishnasami*, 1 L. R., 16 Mad., 301.

(2) *Doorga Narain Sen v. Baney Madhub Mozoomdar*, 1 L. R., 7 Cal., 199, *Monindra Chanara Nandy v. Troylakyanath Burat*, 2 C. W. N., 760.

(3) *Subramanian v. Subramanian*, 9 I. C., 1199.

(4) *Sukhmandan v. Sadaram*, 13 C.P.L.R., 48 (46, 47).

(5) See *supra* § 103.

(6) *Dma v. Nathu*, 1 L. R., 26 Bom., 538 (542).

(7) *Bushell v. Bushell*, 1 Sch. & L., 100; *Hodson v. Dean*, 2 St. & Stu., 221; 2 W. & T. L. C. (7th Ed.), 194; *Preonath v. Ashutosh*, 4 C. W. N., 490.

(8) S. P. 5, *post*; *Radhabai v. Shamray*, 1 L. R., 8 Bom., 168; *Matadin v. Kasim Husain*, 1 L. R., 13 All., 434, F. B.; *Janki Prasad v. Kishen*, 1 L. R., 16 All., 478, F. B.

(9) *Per Lindeley, L.J.*, in *Bailey v. Barnes*, [1894] 1 Ch., 25, 35. Cf. s. 21, sub-s. 2 of the Conveyancing Act, 1881 (44 & 45 Vict., c. 41), in which the term "ought reasonably" is used in the same sense.

135. It goes without saying that an instrument must be *bona fide* in order to have priority.⁽¹⁾ No claim can be sustained on a registered document which has been given, accepted and registered, in fraud of a third party, in collusion with the grantor. Registration cannot confer validity upon an instrument which is *ultra vires*, or fraudulent.⁽²⁾

And even where the deed is not fraudulent, the holder thereof may forfeit the benefit of the rule by his own conduct. Thus where a registered mortgagee brought the property to sale, without specifying his previous mortgage which he was bound to disclose⁽³⁾ and without mentioning which he could not be said to have specified "the judgment-debtor's interest in the property to the best of his belief,"⁽⁴⁾ and subsequently he sought to eject the auction-purchaser who, relying on that specification, had paid the full price of the property, and it was contended on his behalf that his mortgage-deed being registered the purchaser must be deemed to have had notice of it, but the contention did not prevail inasmuch as he was held to have been guilty of active concealment of which he could not be allowed to reap the benefit.⁽⁵⁾ So again in another case where credit was obtained on the mortgage of property in which the existence of a deed of appointment previously executed was not mentioned, the mortgagee's title was not allowed to be blotted by applying to him the doctrine which does not encourage fraud nor enjoin upon the purchaser or mortgagee to search for the possible holder of a latent title or security.⁽⁶⁾ Indeed, when it is said that registration is notice, it may be said that since it amounts to possession, and is important as a completion of the title, it fixes subsequent parties with notice. Where therefore it does not subserve its chief purpose, it cannot be used to cloud up title clearly though subsequently acquired.⁽⁷⁾

136. Again, registration is notice only of registered documents, and not of unregistered documents under which holders of registered documents derive their title. Thus where A had gifted the land to B in 1881 and B subsequently sold them to C in 1882, and it appeared that A had purchased the land by an unregistered deed five years before he gifted them, and the sons of the original proprietor sold them to D in 1894. C then sued D on the strength of his deed, and it was contended for him that since he took under a registered sale, the infirmity of A's title ought not to affect him, but it was ruled that C could not take what A had no right to give, and on the question of C's registered sale being notice to D, it was held that it would be pushing the doctrine of constructive notice beyond all bounds to hold that it is notice of the unregistered document under which the holders of registered documents derive their title.⁽⁸⁾

(1) *Rahmatulla v. Sarutulla*, 1 B. L. R., 58, F. B.; *Gouri Kant v. Giridhar*, 4 B. L. R., 8; *Dookhai v. Nassir*, 20 W. R., 110; *Bhikdharee v. Kanhya*, 14 W. R., 24; *Ramphul v. Chundee*, 1 N. W. P. H. O. R., 204.

(2) *Waman v. Dhondiba*, 1 L. R., 4 Bom., 126, F. B.

(3) S. 218 (Act VIII of 1859), s. 237 (Act XIV of 1882).

(4) *Ib.*

(5) *Agar Chand v. Rakhma*, 1 L. R., 12 Bom., 678 (689); following *Dullab Sirkar v.*

Krishna, 3 B. L. R., 407; *Tukaram v. Ramchandra*, 1 L. R., 1 Bom., 314; *Hari v. Lakshman*, 1 L. R., 5 Bom., 514; *Tinnapa v. Murugappa*, 1 L. R., 7 Mad., 107.

(6) *Joshua v. Alliance Bank*, 1 L. R., 22 Cal., 185 (203); following *Agra Bank v. Barry*, 7 App. Cas., 185.

(7) See *per Sale, J.*, in *Joshua v. Alliance Bank*, 1 L. R., 22 Cal., 185 (204).

(8) *Chunilal v. Ramchandra*, 1 L. R., 22 Bom., 213.

137. Possession is Notice.—Possession is *prima facie* evidence of title,⁽¹⁾ and a person with a bad title is entitled to remain in possession until another person can disclose a better one.⁽²⁾ And indeed, law affords its protection to possession so far that a party dispossessed otherwise than in due course of law may claim to be reinstated if he sues his dispossessor within six months from his ejection.⁽³⁾ Ordinarily, possession is the only visible badge of ownership, and a man in possession is entitled to impute knowledge of that possession to all who may have to deal with any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held, nor is it necessary that such possession should be continuously visible or actively asserted.⁽⁴⁾ But in order to fix a party with notice it would appear that the possession must be actual, and at least juridical, for possession of a thief or a licensee is not such a possession of which a transferee has to take note.⁽⁵⁾ And so the possession of a vendor who has sold the property, and for which he has passed a receipt for the whole purchase-money, will not be constructive notice of any lien which he may have for unpaid balance, for after the purchase-money is fully acknowledged, no man could be expected to inquire whether the purchase-money had been paid.⁽⁶⁾ And although the purchaser of a lease is bound to inquire from whom the lessor derived his title, it is not expected that he is to take notice of all the circumstances under which the lessor derived his title,⁽⁷⁾ as for example, that the lease is bad, a fact depending on a number of circumstances *dehors* the lease.⁽⁸⁾ But if a person purchase or mortgage property in the possession of the tenant, the latter's possession is notice that he has some interest in the land, the nature of which the purchaser is bound to ascertain.⁽⁹⁾ But there is no authority for the proposition that notice of a tenancy is notice of the title of the lessor, and a purchaser neglecting to inquire into the title of the occupier is not affected by any equities other than those which such occupier may insist on.⁽¹⁰⁾ But the equities of the tenant in such cases extend not only to interests connected with his tenancy, but also to interests under collateral agreements which must, however, be connected with his occupation.⁽¹¹⁾ In any case the purchaser is not bound to conduct the inquiry for not only protecting himself against any interest of the tenant, but also for the purpose of guarding against interests of other

(1) S. 110, Indian Evidence Act (I of 1872); *Pedda Venkatapa v. Aroorli*, 2 M. L. A., 504 (514); *Tajudin v. Gvind*, 5 Bom. L. R., 14; *Hari v. Dhondi*, 8 Bom. L. R., 96.

(2) *Clarke v. Brindaban*, (1862) W. R. (F. B.), 20; *Gopee Nath v. Dyandhee*, 7 W. R., 485; *Soodukhuni v. Raj Mohun*, 11 W. R., 350; *Arumugam v. Perriyannan*, 25 W. R., 81, P. C.; *Deo Kullannal v. Kuppai*, 1 M. H. C. R., 85; *Ismail v. Mahomed*, I. L. R., 20 Cal., 834, P. C.; *Jugal Kishore v. Kartik Chunder*, I. L. R., 21 Cal., 116 (120); *Lep Singh v. Nimar*, I. L. R., 21 Cal., 244; *Thakur Singh v. Bhogeroj*, I. L. R., 27 Cal., 25; *Permaj v. Narayan*, I. L. R., 6 Bom., 215; *Krishnarav v. Vasuden*, I. L. R., 8 Bom., 371; *Gangaram v. Secretary of State*, I. L. R., 20 Bom., 798; *Hannantrav v. Secretary of State*, I. L. R., 25 Bom., 287 (290); *Ali v. Pachubibi*, 5 Bom. L. R., 264; *Hari v. Dhondi*, 9 Bom. L. R., 96.

(3) S. 9, Specific Relief Act (I of 1877); *Nisa Chand v. Kanchiram*, I. L. R., 26 Cal.,

579; *Shamz Churn v. Abdul*, 9 C. W. N., 158.

(4) 2 W. & T. L. C. (7th Ed.), 277; *Barnhart v. Greenshields*, M. P. C., 18; *Jones v. Smith*, 1 Hare, 43 (60); *Holmes v. Powell*, 8 De G. M. & G., 572; *Gunnamoni v. Bussunt*, I. L. R., 16 Cal., 414; *Morgan v. The Government*, I. L. R., 11 Mad., 419.

(5) *Tarubai v. Venkatrao*, I. L. R., 27 Bom., 43 (53).

(6) *White v. Wakefield*, 7 Sim., 401.

(7) *Attorney-General v. Backhouse*, 17 Ves., 293 (295).

(8) *Attorney-General v. Backhouse*, 17 Ves., 293.

(9) *Barnhart v. Greenshields*, 9 Moo. P. O., 18 (36).

(10) *Barnhart v. Greenshields*, 9 Moo. P. C., 18; followed in *Gunnamoni v. Bussunt Kumar*, I. L. R., 16 Cal., 414 (417); *Morgan v. The Government of Haiderabad*, I. L. R., 11 Mad., 419; *Hunt v. Luck*, [1904] 1 Ch., 429.

(11) *Penny v. Watts*, 2 De G. & S., 160.

persons.⁽¹⁾ But from the mere fact that the purchaser has constructive notice, the vendor is not relieved of his duty of apprising the purchaser of what is being sold, and if there is anything in the nature of the tenancies which affects the property, it is a duty which he cannot discharge by exclaiming, "If you had gone to the tenant and inquired, you would have found out all about it."⁽²⁾ If the possession is vacant the purchaser is not bound to inquire as to the title of the last occupier, and he will have no notice of the facts which he might have thus ascertained.⁽³⁾ Indeed, it is difficult to see how a possession, of which there are no visible signs, can put a purchaser on inquiry, and so affect him with notice.⁽⁴⁾ But where property is in possession of partners or tenants in common who carry on business thereon, there is notice that the part-owners have made some bargain about it, which gives each an interest in the share belonging to the others, and the purchaser is put upon inquiry into what the extent of that interest is.⁽⁵⁾ But although it is true that where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; yet, if at the time of the purchase, the tenant in possession was not the original lessee, but merely held under a derivative lease, and had no knowledge of the covenant contained in the original lease, it has never been considered want of due diligence in the purchaser, which was to fix him with implied notice, if he did not pursue his inquiries through every derivative lessee, until he arrived at the person entitled to the original lease, which could alone convey to him information of the covenant.⁽⁶⁾ Of course, possession is only notice of the title which the person in possession ostensibly sets up. Adverse possession, for example, cannot be inferred from the fact of possession unless it can be unmistakeably inferred from some act susceptible of no other explanation.⁽⁷⁾

138. The sufficiency of possession as notice is recognized in the Indian Registration Act,⁽⁸⁾ which whilst declaring in favour of title created by a registered instrument as against "any oral agreement or declaration relating to such property"⁽⁹⁾ excepts the agreement or declaration when it is accompanied or followed by delivery of possession. The reason for the exception is that possession being notice, the parties who take under a subsequent deed do so with notice of the title previously created, and of which they knew or might have known if they had been reasonably vigilant.⁽¹⁰⁾ Indeed, it is not because of possession *qua* possession that the prior interest is preferred but because possession is deemed to be constructive notice that the subsequent registered transferee is deemed to have no superior equity as against the prior transferee who has possession. Hence if the former take with notice, whether actual or constructive of the latter's interest, the same result will ensue.⁽¹¹⁾

(1) *Barnhart v. Greenshields*, 9 Moo. P.C., 18 (34); explaining *Bailey v. Richardson*, 9 Hare, 734.

(2) *Martyr v. Lawrence*, 2 DeG J. & S., 261.

(3) *Miles v. Langley*, 1 Russ. & M. 39; *Tajudin v. Gorund*, 5 Bom. L. R., 144.

(4) *Per James, L. J., Cavander v. Bulleel*, 9 Ch., 79 (82).

(5) *Per Mellish, L. J., Cavander v. Bulleel*, L. R., 9 Ch., 79 (85).

(6) *Per Cottenham. M. R., in Hanbury v. Litchfield*, 2 M. & R., 633.

(7) *Yamunabai v. Dhondi*, 5 Bom. L. R., 186; *Taylor v. Stibbert*, 2 Ves. J., 437; *Daniels v. Davison*, 16 Ves., 249; *Allen v. Anthony*, 1 Mer., 282; *Jones v. Smith*, 1 Hare, 50; *Bailey v. Richardson*, 9 Hare, 734;

cited and followed in *Barnhart v. Greenshields* 9 Moo. P. C., 18 (32-34).

(8) *Tarubai v. Venkatrao*, I. L. R., 26 Bom., 43 (53), and cases therein cited. Adverse possession means possession by a person holding the land on his own behalf, of some person other than the true owner, the true owner having the right to immediate possession (*Bejoy v. Kali Prosonno*, I. L. R., 4 Cal., 329).

(9) S. 48, Act III of 1877.

(10) See *supra* § 137.

(11) *Waman v. Dhondibz*, I. L. R., 4 Bom., 126, F. B.; *Nathu v. Phulchand*, I. L. R., 6 All., 581, and cases cited *post* foot-note (2), p. 90.

139. It has been before generally stated that possession to be notice must be actual and not merely constructive. Such possession cannot be inferred from mere proof of the payment of rent by the tenants.⁽¹⁾ So where the owner of the land executed an unregistered possessory mortgage in 1879 in favour of A, and subsequently in 1881 executed a deed of conveyance in his favour, but continued to remain himself in possession of the land as his tenant, and in 1883 he again sold the same land to B by a registered sale-deed, and A then sued B in ejectment, and relied upon his unregistered mortgage and sale and also his constructive possession, it was held that the mortgagor's possession as tenant of A afforded no notice either actual or constructive of A's title. Finding his intended vendor in possession, B would have no reason to suppose that he was there otherwise than as owner.⁽²⁾ But if in the above case the mortgage and sale-deed in favour of A or the *kabuliat* under which the mortgagor became a tenant, had been registered the case would have been different, for then the prior registered documents would have been notice to the subsequent purchaser.⁽³⁾ But where there are known to exist incidents attaching to the tenure of land, as in the zamindari leases of this country, it is incumbent upon the purchaser to inquire whether subordinate to the zamindar's interests there are cultivatory interests in the land which would have to be compensated or provided for. So where a person took a permanent lease of a cultivatory holding direct from the zamindar without making any inquiries as to who were the cultivators and on what tenure they held, and where the permanent lessee having commenced to build, one of the cultivators, being an occupancy-tenant, subsequently brought a suit in ejectment against him, it was held that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquiries as to the exact condition of the title, and that as he had not done so the doctrine of equitable acquiescence could not be applied in his favour.⁽⁴⁾ Registration then cures the defect of want of

(1) *Keamuddi v. Hara Mohan*, 7 C. W. N., 294 (296).

(2) *Waman v. Dhondiba*, I. L. R., 4 Bom., 126, F. B.; *Inam v. Khojabhai*, (1872) B. P. J., 101; *Ventatasa v. Nullamba*, 3 I. J., 317; *Krishnaji v. Ranaji*, (1874) B. P. J., 44; *Chenram v. Bunsram*, (1874) B. P. J., 49; *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 190; *Shivram v. Genu*, I. L. R., 6 Bom., 515; *Dundaya v. Chenbasappa*, I. L. R., 9 Bom., 427; *Nanaji v. Bapu*, (1893) B. P. J., 107; *Hati Singh v. Kuterji*, I. L. R., 10 Bom., 105; *Ganesh v. Bhaur*, (1890) B. P. J., 101; *Moreswar v. Dattu*, I. L. R., 12 Bom., 569; *Vinayak v. Vasudev*, (1894) B. P. J., 133; *Hari v. Hari*, 2 Bom. L. R., 110; *Karbasappa v. Dharmappa*, 2 Bom. L. R., 233; *Jwandas v. Framji*, 7 B. H. C. R., 45; *Gopal v. Krishnappa*, 7 B. H. C. R., 60; *Narsing v. Mt. Bevoah*, 5 B. L. R., 86; *Fazludeen v. Fakir Mahomed*, I. L. R., 5 Cal., 336; *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 597, F. B.; *Chunder Nath v. Bhairub Chunder*, I. L. R., 10 Cal., 250; *Chunder Kant v. Krishna*, I. L. R., 10 Cal., 710; *Bhalu v. Jakhu*, I. L. R., 10 Cal., 657; following *Wyatt v. Barwell*, 19 Ves., 439; *Abdul Hussein v. Raghu*, I. L. R., 13 Cal., 70; *Harunandun v. Jawed Ali*, I. L.

R., 27 Cal., 468; *Shanker v. Sher Zaman*, (1900) P. L. R., No. 26, overruling *Lehna v. Ganput*, (1890) P. R., No. 115, F. B., which overruled *Nizamuddeen v. Akbar*, (1889) P. R., No. 143; *Arur Singh v. Chuhut*, (1882) P. R., No. 37; *Aziz v. Ladha*, (1883) P. R., No. 102; *Ghulam v. Mura Khan*, (1883) P. R., No. 159; *Nallappa v. Ramalingachi*, I. L. R., 20 Mad., 250; *Krishnamma v. Suranna*, I. L. R., 16 Mad., 148 F. B.; overruling *Nallappa v. Ibrahim*, I. L. R., 5 Mad., 73; *Kondayya v. Gururappa*, I. L. R., 5 Mad., 39; *Modar v. Subbaroyulu*, I. L. R., 6 Mad., 88; *Muthanna v. Alibeg*, I. L. R., 6 Mad., 174; *Ram Atur v. Dhanauri*, I. L. R., 8 All., 540; *Dewan Singh v. Jadhoo*, I. L. R., 19 All., 145; s. c., I. L. R., 20 All., 252.

(3) *Moreswar v. Datta*, I. L. R., 12 Bom., 569; *Chunilal v. Ramchandra*, I. L. R., 22 Bom., 213.

(4) *Moreswar v. Datta*, I. L. R., 12 Bom., 569; *Itcharam v. Raiji*, 11 B. H. C. R., 41; *Hari v. Mahadaji*, 8 B. H. C. R., 50; *Sunder v. Gopal*, 4 B. H. C. R., 68; *Chintaman v. Shivram*, 9 B. H. C. R., 304; *Jetmal v. Sukhran*, (1875) B. P. J., 239; *Churaman v. Balli*, I. L. R., 9 All., 591.

possession so far that equally with possession it operates as notice to subsequent incumbrancers.⁽¹⁾ And in point of importance registration is more favoured than possession. For even if the mortgagor be in actual possession, the registration of the mortgage would be notice to the purchaser of the mortgagee's title.⁽²⁾ Hence failure to take possession does not deprive a man of the benefit of the rule which he obtains by registration, unless his omission can be attributed to fraud, concealment or negligence so gross as to amount to fraud.⁽³⁾

140. And since notice must be given at the time the subsequent interest is created, it follows that in order that possession may operate as notice it must be actual possession at the time the later interest is created, for a party cannot be expected to take note of some previous possession which may have been determined. Accordingly a purchaser under a registered sale-deed has priority over a prior purchaser under an unregistered sale-deed who had obtained possession over the property, but had lost it at the time of the execution of the second sale-deed.⁽⁴⁾ And so in another case it was observed: "In all cases to which we have referred, it will be observed that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on."⁽⁵⁾

141. On the question of possession as being sufficient notice, it may be noted that the Calcutta decisions appear to be somewhat conflicting. For while in some cases it has been so assumed⁽⁶⁾ or maintained⁽⁷⁾ cases are not wanting in which it has been laid down that possession is only a very cogent but by no means a conclusive evidence of notice.⁽⁸⁾ As Garth, C.J., in one case observed: "It had long been considered by this Court, and also by the Bombay High Court, that where a registered purchaser had notice that his vendor had previously conveyed away the property to some third person by an unregistered conveyance, it was contrary to equity and good conscience that his title (though under the registered deed) should be allowed to prevail. And this was also the law in England, where the language of the Registration Acts is much the same as in this country. But then came the further question whether the fact of the unregistered purchaser having taken possession was *conclusive evidence of notice*; and the Full Bench⁽⁹⁾ decided that it was not. But, at the same time, we

(1) *Bisheshar v. Muirhead*, I. L. R., 14 All., 862.

(2) *Vithu v. Ramji*, (1875) B. P. J., 297
Narsir v. Kripparam, (1877) B. P. J., 26
Nanobhat v. Lokshman, (1877) B. P. J., 83
Chintaman v. Dareppa, I. L. R., 14 Bom., 506.

(3) *Chintaman v. Dareppa*, I. L. R., 14 Bom., 506; *Shivram v. Saya*, I. L. R., 13 Bom., 229; *Nanaji v. Bapuji*, (1893) B. P. J., 107; *Balmukundas v. Moti*, I. L. R., 18 Bom., 444.

(4) *Shivram v. Saya*, I. L. R., 13 Bom. 229; followed in *Nanaji v. Bapaji*, (1893) B. P. J., 107. Here registration of a sale-deed would not pass the property, unless it is accompanied by the delivery of the deed to symbolize delivery of possession. *Mauladan*

v. Rughunandan, I. L. R., 27 Cal., 7; following *Sheo Naran v. Darbari*, 2 C.W.N., 207.

(5) *Barnhart v. Greenshields*, 9 Moo. P.C., 18 (34) see also *Morgan v. The Government of Haiderabad*, I. L. R., 11 Mad., 419.

(6) *Ghisu v. Amirulla*, (1881) A.W.N. 33; *Issuree v. Lall Beharee*, 21 W. R., 421.

(7) *Dinonath v. Auluck Moni*, I. L. R., 7 Cal., 753; explained in *Narain v. Dataram*, I. L. R., 8 Cal., 597 (607, 608), F. B.

(8) *Jugul Kishore v. Kartik Chunder*, I. L. R., 21 Cal., 100 (120).

(9) *Narain v. Dataram*, I. L. R., 8 Cal., 597 (608), F. B., in which, however, all that was held was that possession was not in all cases sufficient notice for it may be reasonably accounted for without necessarily affect-

all considered that such possession was in the great majority of cases *very cogent evidence of notice*; because every man, when he buys a property, is *prima facie* supposed to go and look at it or make some inquiries about it; and if, when he makes such inquiries, he finds that somebody else is in possession, he ought to inquire how he came there; and if he finds that he is in possession under a conveyance from the owner, though the conveyance is unregistered, he is not justified in equity and good conscience in buying the property himself. If he chooses to buy under such circumstances, he runs the risk of losing his money."⁽¹⁾ It is, however, conceded that possession as such may amount to notice unless it is properly accounted for. Thus where the subsequent purchaser had originally been a tenant of the property, and his possession was equally consistent with the continuance of such tenancy, as with his purchase, he could not rest his claim to priority on the fact of his prior possession.⁽²⁾

142. Is *lis pendens* constructive notice?—In England an Act of Parliament⁽³⁾ is notice to all the world, unless it is a private Act,⁽⁴⁾ which is not of itself notice to a purchaser. An Act of Legislature is equally a notice in this country. But final decrees of Courts are not of themselves notice to a purchaser,⁽⁵⁾ although decrees which do not terminate the suit such as decrees for partition or account or preliminary decrees on mortgage⁽⁶⁾ are of themselves notice to a purchaser, because the *lites pendentes* are not thereby terminated. In England, formerly *lis pendens* was itself regarded as notice, but by an Act passed in the beginning of Queen Victoria's reign⁽⁷⁾ it was enacted that a *lis pendens* should not bind a purchaser or mortgagee without *express* notice thereof, unless and until its registration is duly effected and which must be repeated every five years and which the courts are empowered to vacate on being satisfied that the litigation is not prosecuted *bona fide*.⁽⁸⁾ On the other hand where a *lis pendens* is not a sufficient protection to the plaintiff the Court is also empowered to grant an *interim* injunction restraining the other party from dealing with the estate to the prejudice of the plaintiff.⁽⁹⁾

143. Generally speaking, the judgment of a Court binds only the parties and their representatives in interest. But during the pendency of the suit no alienations can be validly made by any one whether a party to the suit or not, for if alienations *pendente lite* were permitted to prevail, it would be plainly impossible to prosecute any action to a successful termination,⁽¹⁰⁾ and indeed the very purpose of the action may be easily frustrated. Hence the maxim *pendente lite nihil innovatur* ⁽¹¹⁾ which, while forbidding any molestation with the property in suit and thereby subserving the purpose of the rule, does not

ing the second purchaser with notice of the first purchaser's title, and so making him a participator in the fraud of the common vendor, p. 608.

(1) *Nani Bebee v. Hafizullah*, I. L. R., 10 Cal., 1073 (1075); *Fuzludeen v. Fakir Mahomed* I. L. R., 5 Cal., 336 (350).

(2) *Fuzludeen v. Fakir Mahomed*, I. L. R., 5 Cal., 336 (350).

(3) Sugd., 753, Dart., 972.

(4) Sugd., 758.

(5) *Chunnilal v. Abdul Ali*, I. L. R., 23 All., 331 (334); *Thakur Prasad v. Gaya Sabu*, I. L. R., 20 All., 349.

(6) "There was no such doctrine that

men were to take notice of the decrees of this Court, though they were to take notice of a *lis pendens*." Per Lord Harwick in *Preston v. Tubbin*, 1 Ver., note; *Worsley v. Lord Scarborough*, 1 Ves., 571.

(7) 2 & 3 Vict., c. 11, s. 7.

(8) 30 & 31 Vict., c. 47, s. 2.

(9) *London and County Bkq. Co. v. Lewis*, 21 Ch. D., 401; following *Spiller v. Spiller*, 3 Swan., 556; s. 492, Code of Civil Procedure (Act XIV of 1882).

(10) *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 168, F. B.

(11) During a litigation nothing new should be "introduced."

absolutely forbid so as to invalidate all transfers, but only makes them subservient to the rights of the parties to the suit.⁽¹⁾

144. In England in the older cases the doctrine was said to be a branch of the law of constructive notice and has been so treated by the text writers.⁽²⁾ "*Lis pendens*," wrote Lord St. Leonards, "is of itself notice to a purchaser,⁽³⁾ unless it be collusive, in which case it will not bind him, but it is not of itself notice for the purpose of postponing a registered deed. A *subpœna* served was not, however, a sufficient *lis pendens* unless a bill was filed, but when the bill was filed the *lis pendens* began from the services of the *subpœna*. And the question must relate to the estate, and not merely to money secured upon it, but the case of a bill charging a particular estate with a particular trust, or of a bill to perpetuate testimony and establish a will is a sufficient *lis pendens*, but the plaintiff must not be guilty of laches in the prosecution of his suit."⁽⁴⁾ But in a leading case⁽⁵⁾ which has been since followed in this country⁽⁶⁾ *lis pendens* is held not to be founded upon the doctrine of constructive notice but upon the necessity of protecting the rights of the parties during the trial of their case.⁽⁷⁾ In that

(1) S. 52, *post*; *Munisami v. Dakshanamurthi*, I. L. R., 5 Mad., 371; *Balaji v. Khushalji*, 11 B.H.C. R., 24.

(2) E. g., Story, Eq. Jur., §§ 405—407; Sugd., 760, 761; Dart., pp. 972, 982, 983.

(3) Tot., 45; *Yeaveley v. Yeaveley*, 3 Ch. R., 25; *Digs v. Boys*, Tot., 254; *Culpepper v. Ashton*, 2 Ch. C., 116 (233); *Barns v. Cannan*, 1 Ch. C., 300; *Sorrel v. Carpenter*, 2 P. Wms., 482, 3 P. Wms., 117; *Garth v. Ward*, 2 Atk., 174; *Worsley v. Lord Scarborough*, 3 Atk., 392; *Walker v. Smallwood*, Amb., 676; *Hill v. Worsley*, Hard., 320; *Goldson v. Gardiner*, 1 Ver., 459; *Bishop of Winchester v. Paine*, 11 Ves., 194; *Going v. Farrell*, Beat., 472; *Tyler v. Thomas*, 95 Beav., 47.

(4) Sugd., 758. The same learned author while sitting as Judge, said "A decree for account does not put an end to a suit; it is a continuation of the litigation, and, consequently, the suit operates as notice to all the purchasers." *Higgins v. Shaw*, 2 Dr. & War., 361.

(5) *Bellamy v. Sabine*, 2 Phill., 425, 1 De. G. & J., 566.

(6) *Faiyaz Husain v. Prag Narain*, 11 O.W.N. 561, P.O.; *Gulabchand v. Dhondi*, 11 B. H. C. R., 64; *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 168, F. B.; *Balaji v. Khushalji*, 11 B. H. C. R. 24; following *Kasim v. Unnodaprasad*, 1 Hyde, 160; *Manual v. Sangapalli*, 7 M. H. C. R., 104; *Abhoy v. Annamalai*, I. L. R., 12 Mad., 180.

(7) *Dinonath v. Shama Bibi*, I. L. R., 28 Cal., 23; *Bazayet Hossein v. Dooli Chand*, I. L. R., 4 Cal., 402 (404, 410), P.O.; following *Metcalfe v. Pulvertoft*, 2 V. & B., 200; *Bellamy v. Sabine*, 1 DeG. & J., 566; *Iakshmandas v. Dasrat*, I. L. R., 6 Bom., 168; *Bellamy v. Sabine*, 1 DeG. & J., 566, is inconsistent with a later case; *Tyler v.*

Thomas, 25 Beav., 47, but this view is open to great difficulty (Sugd., 760). "In *Bellamy v. Sabine* the principles upon which the doctrine depends were fully discussed. The circumstances were shortly these: In 1827 A, a tenant for life, sold his life-estate to B, tenant in tail in remainder; shortly afterwards, B suffered a recovery, and sold the estate to C in fee; in 1828 B died, leaving D, his heir-in-law, who, if no recovery had been suffered by B, would have been next tenant in tail. D, in 1830, filed a bill against A and C to set aside both sale transactions, on the ground of fraud pending the suit and before a decree was made C mortgaged part of the estate to E. In 1835 a decree was made, dismissing the bill against A, but setting aside the sale to C as fraudulent, and directing a reconveyance from C to D, free from incumbrances, on payment of what should be found due from D to C. Subsequently A, who had not received his purchase-money, filed a bill against D, C and C's incumbrancers, for specific performance of his contract, and the question was as to the right of priority between A for his unpaid purchase-money, and E the mortgagee *pendente lite* for his mortgage-debt. Wood, V. C., on the ground that a person who buys pending a suit is to be bound by the result in the same way as if he had been a party to it, postponed the claim of E to that of A; but on appeal to the Full Court, Lord Cranworth, after reviewing the earlier authorities, rested the doctrine not on the ground of implied (constructive) notice, the consequence of which might be that the person affected with notice is affected with notice of everything reasonably deducible from or appearing in the suit; but on the ground that a litigant party cannot, pending the litigation, confer any right to the property in dispute so as to prejudice the oppo-

case Lord Cranworth said: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute so as to prejudice the opposite party; where a litigation is pending between a plaintiff and a defendant as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage of sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."⁽¹⁾ After referring to the previous case, ⁽²⁾ the same learned Judge continued: "the language of the Court in these cases certainly is that *lis pendens* is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that, *pendente lite*, neither party to the litigation can alienate the property in dispute so as to affect his opponent."⁽³⁾ But whether the doctrine be based on the maxim *pendente lite nihil innovatur* or on the doctrine of constructive notice, practically there is no substantial difference between *lis pendens* and having notice of the suit.⁽⁴⁾ There can be no doubt that the view which connects *lis pendens* with constructive notice is manifestly open to the objection that, as Lord Talbot observed, as judgments are infinite⁽⁵⁾ a party cannot possibly be expected to take note of all suits whenever and wherever instituted, such vigilance can certainly be not attributed to an ordinary man of business, and which is the foundation of the doctrine of constructive notice. These observations are only made in regard to the state of law in this country, where even now there exists no rule for the docketing or registration of

site party; and held that the pendency of *D*'s suit against *A* and *C* did not amount to notice of the equitable rights of *A* against *C*; and Lord Justice Turner also laid it down that the doctrine is not founded upon any of the peculiar tenets of a Court of equity as to implied or constructive notice; but that it is a doctrine which prevails alike both at law and in equity, resting on this foundation, *viz.*, that it would be impossible that any action or suit could be brought to a successful termination if alienation *pendente lite* were permitted to prevail."

(1) *Bellamy v. Sabine*, (1857) 1 DeG. & J., 566 574, 584; 26 L. J. (N. S.), 479.

(2) *Culpepper v. Ashton*, 2 Ch. C., 115, 221; *Sorell v. Carpenter*, 26 Wms., 482; *Garth v. Ward*, 2 Atk., 174; *Worsley v. The Earl of Scarborough*, 2 Atk., 392.

(3) *Bellamy v. Sabine*, 1 DeG. & J., 566. To the same effect Sir Thomas Plumer, M. R., in *Metcalfe v. Ulvertoft*, 2 Ves. & B., 200 (205). In the old real actions the judgment bound the lands, notwithstanding any alienation by the defendant *pendente lite* (*See Co. Litt.*, 344 (b), 2 Just., 376). This was based not on any principle arising from

implied notice, but on the maxim *pendente lite nihil innovatur* (Co. Litt., 344 (b), 2 Just., 376; *Trye v. The Earl of Aldborough*, 1 Ir. Ch. R., 666; *Guskell v. Durdin*, 2 Ball. & B., 167; *Govng v. Farrell*, Beatty, 472; *Balaji v. Khusalji*, 11 B. H. O. R., 24; *Kasim v. Unnodapersaud*, 1 Hyde, 160). ("It is an equitable principle of universal application." *Maria Varden v. Appundi*, 6 M. H. C. R., 80 where the general doctrine is discussed by Holloway, J.). *Umamoyi v. Tarini*, 7 W. R., 225; *Hunooman v. Koomeroonissa*, (1884), W. R. (F.B.No.), 40; *Manual v. Sangapalli*, 7 M. H. C. R., 104 (following *Bellamy v. Sabine*); *Krishnappa v. Bahiru*, 8 B.H.O.R., 55 (some doubt expressed as to the applicability of the rule to this country) explained away in *Balaji v. Khusalji*, 11 B. H. C. R., 24 (30), explaining *Anundo v. Dhondro*, 14 M.I.A., 101; *Gulab Chand v. Dhondi*, 11 B.H.C.R. 64. (4) *Per* Sir Richard Couch in *Kailas Chandra v. Pulchand*, 8 B.L.R., 474; followed in *Kasumunnissa v. Nitratan*, I. L. R., 4 Cal., 79 (85, 86); *Ahoy v. Annamalai*, I. L. R. 12 Mad., 180.

(5) 2 Eq. Ca. Ab. 682, D. N. (b).

judgments which are "infinite" indeed to be rummaged through successfully by any litigant.

145. In England the law of *lis pendens* has been materially narrowed down since the passing of the statute,⁽¹⁾ which enacts that a *lis pendens* unless duly registered shall not affect a purchaser without express notice. No similar enactment has been passed in this country and the rule, as it existed in England before the passing of the Victorian statute, would accordingly still prevail here.⁽²⁾ According to the state of law, a purchaser *pendente lite*, although *bona fide* and without notice would be bound by the decree,⁽³⁾ if there had been a close and continued prosecution of the suit. He was also bound by an interlocutory decree or a decree for account.

146. There is, however, this difference that if before the stage the summons is served on the defendant when *lis pendens* begins,⁽⁴⁾ the defendant has notice of the institution of the suit, he will be bound by the rule, and any subsequent alienation would be subject to it.⁽⁵⁾ The alienee *pendente lite* cannot get over the infirmity of his title by pleading that he had taken without notice. For the rule is quite independent of it, and a party is bound by it whether or not he had notice of the suit. But as in a transfer with notice, an alienation *pendente lite* is not void for all purposes, but is valid except so far as it is inconsistent with the rights which may be established by the decree in the suit.⁽⁶⁾ And the alienee cannot be allowed to plead that he is not bound by the decree as he had no notice of it or was not a party thereto.⁽⁷⁾ But if the suit result in proceedings unexpected from its nature and the relief sought, the question of notice would again emerge into prominence. Thus where a judgment-debtor filed an objection to the attachment of certain property and his objection being allowed and the property being released from attachment was sold by him to a third party, but in the meantime an appeal was preferred against the order of release which was ultimately compromised and a portion of the property was agreed to be liable, the attachment being continued for that portion which was eventually sold to another purchaser who thereupon sued the first purchaser for possession, his claim was negatived on the ground that the first sale was made to a *bona fide* purchaser without notice who was not to be damaged by the unexpected compromise in which the suit resulted.⁽⁸⁾

And even where a decree has been obtained, but has been allowed to remain unexecuted for seven years, a purchaser of property therein comprised without

(1) 2 & 3 Vict., c. 11.

(2) *Gulabchand v. Dhondi*, 11 B. H. C. R., 64 (67); citing *Kasim v. Unmudapersaud*, 1 Hyde, 160; *Unamoyi v. Tarini*, 7 W. R., 225; *Hunooman v. Komeroonissa*, (1864) W. R. (F. B., No.), 40; *Manuel v. Sangapalli*, 7 M. H. C. R., 104, s. 223, Act VIII of 1859.

(3) *Robb*, 1342, citing *Worsley v. Earl of Scarborough*, 3 Atk., 392; *Sorrell v. Carpenter*, 26 Wms., 482; *Walker v. Smallwood, Amb.*, 676. And see *Herbert's case*, 3 P. Wms., 116; *Garth v. Ward*, 2 Atk., 575; *Bishop of Winchester v. Payne*, 11 Ves., 194; *Self v. Madok*, 1 Vern., 459; *Moore v. McNamara*, 2 Ba. & Be., 186; *Fleming v. Page*, Finch, 320.

(4) *Radhasyam v. Sibn*, I. L. R., 15 Cal., 6 & 7; *Abhoy v. Annamalai*, I. L. R., 12 Mad., 180; *Parsotam v. Saneshilal*, I. L. R., 21

All., 408.

(5) *Abhoy v. Annamalai*, I. L. R., 12 Mad., 180; *Jogendra v. Fulkumari*, I. L. R., 37 Cal., 77; *Jogendra v. Ganendra*, 4 C. W. N., 254. *Faiyaz Husan v. Prag Narain*, 11 C. W. N., 561, P. C.

(6) *Munisami v. Dakshanamurthi*, I. L. R., 5 Mad., 371; *Raoji v. Krishnaji*, 11 B. H. C. R., 139; *Raj Kishen v. Radha*, 21 W. R., 349; *Lalakali Prosad v. Bulu Singh*, I. L. R., 4 Cal., 789; *Motilal v. Kerabuldin*, I. L. R., 25 Cal., 179, P. C.; *Faiyaz Husain v. Prag Narain*, 11 C. W. N., 561, P. C.

(7) *Dinnonath v. Shama Bibi*, I. L. R., 28 Cal., 23.

(8) *Kishory Mohun v. Mahomed*, I. L. R., 18 Cal., 188 (195); following *Kailash Chunder v. Fulchand*, 8 B. L. R., 474.

notice of the decree could not be ejected as the decree-holder had done nothing to keep the decree alive and in activity and that there had not been continuous *litis contestatio*.⁽¹⁾

147. Notice of deed is notice of its contents.—If one has actual notice of an instrument affecting one's title, he is fixed with constructive notice of all other documents which an examination of the instrument would have brought to his knowledge. And since notice of a deed is notice of its contents, it follows that actual notice of a deed is also constructive notice of all the material facts affecting the property which appear on the face of the deed or could be reasonably inferred from its contents.⁽²⁾ This, however, implies that the persons affected thereby had a fair opportunity of ascertaining the terms of such an instrument.⁽³⁾

148. But the principle should be held to relate only to the deeds which affect the property and not to deeds which may or may not affect it, for whilst it is *crassa negligentia* to fail to examine the former, failure to examine the latter is not. Then, again, the presumption of knowledge must be taken along with the other circumstances, namely, the nature of the document perused, the date and description thereof, and whether it is a deed which necessarily affected the title. The English law on the subject has undergone important modifications since the passing of the Conveyancing Act.⁽⁴⁾ Formerly, the law generally held a person liable for non-inspection without restriction as to date, and it was considered immaterial whether the deed contained the neglected information in the recital, descriptive clause or elsewhere. Thus then where a deed recited a mortgage,⁽⁵⁾ a lease,⁽⁶⁾ a settlement⁽⁷⁾ or a will,⁽⁸⁾ it was incumbent upon the intending transferee to prosecute his inquiries as far back as the deeds afforded any clue to the title to be investigated. And indeed it may be generally laid down "that a purchaser with notice of a deed necessarily forming part of the chain of title of a vendor or lessor, and therefore necessarily affecting the property, has constructive notice of and is bound by its contents and is not protected from the consequences of not looking at the deed, even by the most express representation of the vendor or lessor that it contains nothing in any way affecting the title."⁽⁹⁾ Where the instrument does not necessarily form part of the chain and the transferee is assured that it does not affect the title and he thereupon abstains from further inquiry, he cannot be equitably fixed with the notice of the contents of the instruments he has failed to inspect, upon the same principle that a man knows what he ought to know. A person affected with notice of a lease is affected with notice of the covenants restrictive or otherwise therein contained.⁽¹⁰⁾ But he is not bound with onerous covenants of an unusual character, unless before entering into the agreement he had a fair opportunity of examining the lease and ascertaining for himself the terms of such covenants.⁽¹¹⁾

(1) *Venkatesh v. Maruti*, 1 I.L.R., 12 Bom., 217; following *Kinsman v. Kinsman*, 1 Russ. & M., 622.

(2) *Talner v. Flouner*, 1 Ch. C., 269; *Moore v. Bennett*, 2 Ch. C., 246; *Nebo v. Hammond*, 30 Beer, 493.

(3) *Raja Ram v. Krishnasami*, 1 I. L. R., 16 Mad., 301.

(4) S. 3, 44 and 45 Vict., c. 41.

(5) *Bisco v. Earl of Banbury*, 1 Ch. C., 207.

(6) *Coppin v. Fermighough*, 2 B. & O. Ch.,

291.

(7) *Davies v. Thomas*, 2 Y. & C., Ex. C., 234.

(8) *Davies v. Thomas*, 2 Y. & C., Ex. C., 234; *Burgoyme v. Hatton Barn*, Ch., 237.

(9) 2 W. & T. L. C. (7th Ed.), 217.

(10) *English & Scottish, &c., Co. v. Brunton*, [1892] 2 Q. B., 709; *Patman v. Harland*, 17 C. D., 353 (357); explaining *Jones v. Smith*, 1 P. B., 244.

(11) *Taylor v. Stilblack*, 2 Ves. J., 487.

* **149.** The same rule that applies to leases also holds good in the case of sub-leases,⁽¹⁾ but where the contract is inchoate or a case for rescission is made out the rule would then give way, for the duty that is cast upon the purchaser does not relieve the vendor of his duty to make full disclosures within his power. So Jessel, M.R., observed: "If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, 'if you had used due diligence you would have found out that the statement was untrue. You had the means of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity not only as regards specific performance but also as regards rescission, that this is not an answer."⁽²⁾ And the same learned Judge in another case, ⁽³⁾ said: "His representation is not got rid of by constructive notice." In one case it was held that notice of an instrument is notice of the equity as of a charge affecting the property under that instrument,⁽⁴⁾ but this view is not warranted by principle or other precedents.⁽⁵⁾ And notice of a draft or of an intention to execute a deed does not affect the transferee with notice of the deed subsequently executed.⁽⁶⁾ It should be noted that these rules apply only to the parties to an instrument, but not to attesting witnesses. A witness subscribing to a deed is not necessarily fixed with notice of its contents for "a witness in practice is not privy to the contents of a deed."⁽⁷⁾ "It constantly happens," observed Garth, C. J., "that persons subscribe deeds as witnesses without having the least notion what they contain, and if people were to be held bound by any instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature."⁽⁸⁾

150. No Notice.—Where a debt is payable on notice, the institution of the suit to recover is not notice.⁽⁹⁾ And judgments and decrees are not notices of themselves, although registered. In England statutory provision has been made to declare that a purchaser is not affected even by express notice of them unless they be registered and re-registered,⁽¹⁰⁾ but it is doubtful if this view will be followed in this country, for a person who buys in the face of a decree of which he has express notice has himself to thank if the decree is put in force against him. An advertisement in a newspaper is not a constructive

(1) *Per Fry, L. J.*, in *Reeve v. Berridge*, 20 Q. B. D., 523 (527); following *Cossec v. Collinge*, 3 M. & K., 283.

(2) *Grosvenor v. Green*, 28 L. J. (Ch.), 173; *Smith v. Capron*, 7 Haro, 185 (on the question that a person must have had a fair opportunity of ascertaining for himself the provisions of the original lease).

(3) *Hyde v. Warden*, 3 Ex. D., 72, as explained by *Fry, L. J.*, in *Reeve v. Berridge*, 20 Q. B. D., 523 (527).

(4) *Redgrave v. Hurd*, 20 Ch. D., 13; *Hyde v. Warden*, 3 Ex. D., 72. And to the same effect *per Fry, J.*, "we cannot but observe that there is great practical convenience in requiring the vendor, who knows his own title, to disclose all that is necessary to protect himself rather than in requiring the purchaser to demand an inspection of the vendor's title-deed before entering into a contract, a demand which the owners of property would in some cases be unwilling to concede, and which is not in our opinions in accordance with the usual course of busi-

ness in sales by private contract." *Reeve v. Berridge*, 20 Q. B. D., 523 (528).

(5) *Jones v. Rummel*, 14 Ch. D., 588 (590). Cf. *Co v. Coventon*, 37 Bom., 378.

(6) *Hamilton v. Royce*, 2 Sch. & L., 315.

(7) *Sugd.*, 781; *Hipkins v. Amery*, 2 Gif., 212; *Greenslade v. Dare*, 20 B., 284; *Colhoy v. Sydenham*, 2 B. & Ch., 391. *Per Lord Thurlow* in *Beckett v. Cordley*, 1 Ves. J., 55. *Chunder Dutt v. Bhagwat Narain*, 3 C.W.N., 207; *Imam Ali v. Baijnath*, I.L.R., 33 Cal., 613 (622); *Rajlakh v. Gokul Chandra*, 3 B.L.R., 57, P.C.; *Ram Chunder v. Hari Das*, I.L.R., 9 Cal., 463 (468); distinguishing *Matadeen v. Mussoodun*, 10 W. R., 298; *Ganpat Singh v. Gopal*, 1 C. P. L. R., 67; *Collier v. Baron*, 2 Nag. L. R., 34 (38).

(8) *Ram Chunder v. Hari Das*, I. L. R., 9 Cal., 463 (468); *Abhoy Churn v. Attarmoni*, 13 C. W. N., 931.

(9) *Moore v. Pechell*, 22 Beav., 172.

(10) 3 & 4 Vict., c. 82, s. 2; 18 & 19 Vict., c. 15, s. 5.

notice, even though the party charged may be shown to have been its subscriber.⁽¹⁾ Notice of an intention to commit bankruptcy or of the facts which may or may not amount in law to an act of bankruptcy,⁽²⁾ is not generally sufficient notice of bankruptcy.⁽³⁾ The doctrine of constructive notice has in one case been held not to apply to commercial transactions. Thus where a bill of lading referred to the charter party, it was pressed upon the court that the holder of the bill of lading must be deemed to have taken it with notice of the charter party, but the contention did not prevail Lindley, L. J., observing: "And as regards the extension of the equitable doctrine of constructive notice to commercial transactions, the courts have always set their faces resolutely against it. . . . In dealing with the estate in land title is everything and it can be leisurely investigated; in commercial transactions, possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralyzing the trade of the country."⁽⁴⁾ In another case the doctrine was held to be inapplicable to negotiable instruments.⁽⁵⁾ The doctrine, however, that constructive notice does not apply to commercial transactions must be understood as being subject to certain recognized exceptions. Thus where a person dealing with an agent has actual knowledge of his limited authority, it is sufficient to put him upon inquiry as to its extent.⁽⁶⁾ And so again where the purchaser admitted that he had no knowledge whether the seller was acting as principal or agent, he was held to have notice that the seller was an agent with limited authority.⁽⁷⁾ Then, again, apart from the doctrine of notice the question of gross negligence and the like are essentially material in determining the question upon principles which are akin to constructive notice. As Lord Blackburn observed: "If the facts and circumstances are such that the jury or whoever is to try the question come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong. . . . I think, that was dishonestly."⁽⁸⁾ And this was conceded by Lord Herschell, L. C., when he said: "But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him."⁽⁹⁾

It would appear that a minor cannot be fixed with constructive notice unless he fraudulently conceals his age and thereby somebody suffers.⁽¹⁰⁾ And while there is such a thing as constructive notice, there is no such thing known to law as constructive estoppel.⁽¹¹⁾

(1) *Nagle v. Baylor*, 3 Dr. & War., 60 (73).

(2) *Ex parte Halifax*, 2 M.D. & DeG., 544; *Ex parte Glynn*, 6 Jur., 839; *Conway v. Nall*, 1 C. B., 643; *Ex parte Robinson*, 32 L. T., 280, cited Robb., 1325.

(3) *Evans v. Hallam*, L. R., 6 Q. B., 713.

(4) *Manchester Trust v. Furness*, [1895] 2 Q. B., 539 (545); following *Serrano v. Campbell*, [1891] 1 Q. B., 283; *Fry v. Chartered Mercantile Bank of India*, L. R., 1 C. P., 689.

(5) *Per Lord Herschell*, L. C., in *London Joint Stock Bank v. Simmons*, [1892] A. C., 201 (221); followed in *Manchester Trust v. Furness*, [1895] 2 Q. B., 539 (546).

(6) *London Joint Stock Bank v. Simmons*, [1892] A. C., 201 (229); explaining *Cooke v. Eshelby*, 12 App. Cas., 271; *Sheffield v. London, &c., Bank*, 13 App. Cas., 333.

(7) *Cooke v. Eshelby*, 12 App. Cas., 271; *George v. Claggett*, 2 Sm. L. C. (1896), 135, 2 W. & T., L. C. (7th Ed.), 229.

(8) *Jones v. Gordon*, 2 App. Cas., 616.

(9) *London Joint Stock Bank v. Simmons*, [1892] App. Cas., 201.

(10) *Ganesh v. Bapu*, I. L. R., 21 Bom., 198.

(11) *Parsotam v. Narbada*, 3 C.W.N., 517, P. C.

151. Notice of a covenant cannot be deemed notice that the covenant has not been performed, and so where the mortgage was made, with covenant to insure against fire, and to apply the money in rebuilding or repairing the premises, or at the option of the mortgagee in discharge of the money then due to him, and a fire occurred, but before the rebuilding the mortgagor purchased an adjoining slip of ground, and rebuilt upon both properties, and then mortgaged the whole of the property, including the buildings and the slip to another, and the deed recited the former mortgage in the usual way. The first mortgagee then claimed as against the second mortgagee the benefit of the expenditure on the slip and the portion of the buildings on it, on the ground of notice of the covenant, it was held that notice of covenant was no notice of the breach or that expenditure had been incurred without the consent of the first mortgagee.⁽¹⁾

152. Presumption and Proof of Notice.—It is sometimes stated that the presumption created in favour of notice is irrebuttable,⁽²⁾ but the statement requires qualification. For while it is true that there may be cases in which the presumption may be so strong as to be irrebuttable still it is not a principle which is the necessary adjunct of a notice. Indeed, as has been observed in a well considered judgment,⁽³⁾ the doctrine is a dangerous one, and as observed by Lord Esher, M. R., "It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them."⁽⁴⁾ The doctrine should not be extended beyond its strict legitimate purpose.⁽⁵⁾ "It is an inference of fact drawn because you cannot look into a man's mind, but you can infer from his conduct whether he is speaking truly or not, when he says that he did not know of particular facts." There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred."⁽⁶⁾ Constructive notice is therefore only presumed when there is no direct evidence that no notice existed.⁽⁷⁾ And it follows that in order to rebut the presumption created, facts will always be admitted to overthrow it. Initially the *onus* lies on a person who claims priority over another, on the ground that he took with notice of an earlier security, to prove that he had such notice.⁽⁸⁾ If, for instance, the defendant claims to be a purchaser without notice, it has been held that the plaintiff will have to prove the notice.⁽⁹⁾ But this view is hardly consonant with reason and justice. For if the defendants set up a special plea which, if proved, would give him priority, why should the plaintiff be called upon to prove the contrary of a fact before it is established?⁽¹⁰⁾ No doubt, the *onus* of

(1) *Harryman v. Collins*, 18 Beav., 11.

(2) *Bewitt v. Loosmore*, 9 Hare, 449 (455).
"Knowledge which the court imputes to a person upon a presumption so strong that it cannot be allowed to be rebutted, that the knowledge must have been communicated."
"Constructive notice in its nature is no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted." (Sugd., 577, citing 2 Aust., 438).

(3) *Allen v. Seckham*, 11 Ch. D., 790; *English & Scottish, &c., Co. v. Brunton*, [1892] 2 Q. B., 700 (708).

(4) *English & Scottish, &c., Co. v. Brunton*, [1892] 2 Q. B., 700 (708).

(5) *Doorga Narain v. Baney Madhub*, I. L. R., 7 Cal., 199; *Adams v. Great North*,

&c., Ry., [1891] A. C., 31 (46).

(6) *English & Scottish, &c., Co. v. Brunton*, [1892] 2 Q. B., 700 (708).

(7) *Earl of Portsmouth v. Lord Effingham*, 1 Ves., s. 435.

(8) *Lalubhai v. Bai Amrit*, I. L. R., 2 Bom., 299 (303).

(9) *Eyre v. Dolphin*, 2 B. & B., 290 (303); *Atul Kristo v. Muttylal*, 3 C. W. N., 30 (32); *Lalubhai v. Bai Amrit*, I. L. R., 2 Bom., 299 (303); cf. the principle "*Ei incumbit probatio qui dicit, non qui negat*." (The *onus* of proof lies on him who asserts, and not on him who denies).

(10) In England the trend of decisions is clearly to place *onus* on the party who affirms it; *Royal British Bank v. Turquand*, 6 E. & B., 327; followed in *In re Hampshire*

proof is not an inflexible burden which permanently rests upon the shoulders of one party, but, on the other hand, it may be shifted and re-shifted according as the evidence of one party preponderates over that given by the other.⁽¹⁾ Where the presumption of the law fixes a party with notice, there can be no doubt but that it shifts the burden of proof on the party denying it who must then come forward with new evidentiary matter.

153. Thus where but for the plea of *bona fide* purchase without notice,

Pleadings.

the defendant can show no better equity, he must clearly and positively deny notice either at or before the execution of the deed or payment of the consideration, although payment of consideration and a mere denial is sufficient.⁽⁴⁾ It should be observed that in order that notice may affect one, it is necessary that he should have received it before he had parted with his money, or placed himself in a position where he could not resist the payment, as would be the case where the rights of third parties had attached.⁽³⁾ On the question whether the party setting up want of notice in support of his title must prove it, the Privy Council have in one case given vent to expressions which would appear to leave no room for doubt: "Let it be conceded," they said, "that a purchaser for value, *bona fide* and without notice of the charge, whether legal or equitable, would have had in these courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the case. To give effect to the legal estate as against its prior equitable title, would be an adoption of the English law; and to adopt it and yet reject qualifications and restrictions would be scarcely consistent with justice."⁽⁴⁾ And the same Board in another case observed: "It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry, that, if prosecuted, would have led to a discovery of it."⁽⁵⁾

154. The doctrine of notice is thus now not only an equitable doctrine, —the creature of the Court of Chancery,⁽⁶⁾ but is founded on the universal principles of justice.⁽⁷⁾ For a person who purchases with wilful notice of the

Land Co., [1896] 2 Ch., 743 (747); cf. *Per Vaughan Williams, J.*, *ib.*, p. 745.

(1) The term Burden of Proof like the Latin "*onus probandi*" is said to be misleading, as commonly used, it may mean (a) the burden of establishing a case, whether by a preponderance of the evidence, or beyond a reasonable doubt; and (b) the duty or necessity of introducing evidence either to establish such a case, or to meet an adverse amount of evidence sufficient to constitute a *prima facie* case. In the first sense the burden never shifts, but in the second sense, it may shift constantly, as one scale or the other preponderates. *Best's Evidence* (8th Ed.), 268; followed in *Bhola v. Bhagwant*, 13 C.P.L.R., 159.

(2) *Moor v. Mayhew*, 1 Ch. C., 34; *Story v. Lord Windsor*, 2 Atk., 630; *Attorney-Gen-*

ral v. Gover, 2 Eq. Cas. Ab., 685; *Jones v. Thomas*, 3 P. Wms., 243; *Girdhar v. Hakim Chand*, 8 B. H. C. R., 75 (78); *Savaklal v. Ora*, 8 B. H. C. R., 77 (83); cf. *Radhanath v. Gishorne*, 14 M. I. A., 1 (15).

(3) *Story*, Eq. Juris. (2nd Eng. Ed.), § 400 b; *Collinson v. Lister*, 20 Beav., 356; O. A. 7 DeG. M. & G., 634.

(4) *Varden Seth v. Luckpathy*, 9 M. I. A., 303 (326); *Babee Jeebunissa v. Umul Chunder*, 18 W. R., 151.

(5) *Ramcoomar v. McQueen*, 18 W. R., 166 (168), P. O.

(6) *Per Phear, J.*, in *Seedee Nazeer Ali v. Ojoodhya*, 8 W. R., 399 (408); *English & Scottish, &c., Co. v. Brunton*, [1892] 2 Q. B., 700 (708).

(7) *Story*, Eq. Juris. (2nd Eng. Ed.), § 395.

legal or equitable title of other persons " will not be permitted to protect himself against such claims; but his own title will be postponed, and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes by such conduct, *particeps criminis* with the fraudulent grantor; and the rule of equity, as well as law, is, '*dolus et fraus nemini patrocinari debent.*' And in all such cases of purchasers with notice, courts of equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat." The plea as to notice is, therefore, not to be regarded as merely a pugilistic plea, but one which justly strikes at the root of title. It must, therefore, be early taken and sufficiently proved, and it is doubtful if it can be allowed to be raised at a subsequent stage of the suit. But at the same time it is not a prerequisite that it should have been raised in *totidem verbis* if it can be inferred from a full statement of all the facts known to the party.⁽¹⁾ A party pleading want of notice has seldom more to do than prove the negative by his own evidence that he had no notice. It is then open to the other side to question him as to his means and opportunities for knowledge, and indeed any fact evidencing his culpability or carelessness. But when a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him; that he would have acquired it, but for his gross negligence in the conduct of the business in question. When it is sought to affect a purchaser with constructive notice, the question is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.⁽²⁾

155. In England the testimony of counsel, attorney or agent of the transferee is inadmissible to prove notice,⁽³⁾ and the same rule has been, with some modifications, enacted in this country,⁽⁴⁾ The transferee is not bound to produce opinions given and drafts prepared by counsel.⁽⁵⁾ and where the two parties had employed the same attorney, the privilege is confined to such communications as were made by either party in the character of his own attorney only.⁽⁶⁾ A communication made by mistake to an attorney is not protected, and an attorney may give evidence of the time of executing a deed.⁽⁷⁾ An attorney attesting a deed is, however, bound to disclose all that passed at the time of execution.

A purchaser with notice, being in equity a trustee for the successful party, is bound to account for the rents and profits actually realized,⁽⁸⁾ but he is not, like a mortgagee in possession, responsible for what, without his default or neglect, he might have received, and he will be entitled to all just allowances.

156. Although cases are conceivable when a *bona fide* purchaser without notice may not be damnified for not pleading absence of notice⁽⁹⁾ still it is but seldom that the courts will condone omission to deny notice, but where the facts are fully

**What must be
pleaded.**

(1) *Luchmun v. Kali Churn*, 19 W. R., 292. P. C.; followed in *Kashory Mohun v. Mahomed*, 1 L. R., 18 Cal., 188 (197).

(2) *Per* Lord Cranworth, L. C., in *Ware v. Lord Egmout*, 4 DeG. M. & G., 473; *Attorney General v. Stephens*, 6 DeG. M. & G., 134 (148); *Montefiore v. Browne*, 7 H. L. C., 241 (269).

(3) *Wilson v. Rastall*, 4 T. R., 753; *Wright v. Mayer*, 6 Ves., 280.

(4) Ss. 126, 127, 128, Indian Evidence Act (1 of 1872).

(5) *Manser v. Dix*, 1 Kay. & Jo., 451; Sugd., 785.

(6) *Parry v. Smith*, 9 M. & W., 681.

(7) Sugd., V. & P. (14th Ed.), 786.

(8) *Howell v. Howell*, 2 My. & Cra., 478; Sugd., 786.

(9) See § 188, *supra*

stated from which absence of notice may be inferred, it would be a mere technicality to insist upon a specific denial. In England if the purchaser neglect to plead it, he is not allowed to avail himself of it as a defence.⁽¹⁾ In every case, however, the transferee must make unreserved disclosures, mentioning, amongst other things, the actual payment of consideration in good faith. Consideration, however, may or may not be specified, provided its nature is sufficiently indicated so that it is not illusory or fraudulent.⁽²⁾ If fraud is alleged it must be denied as specifically and particularly as charged. The title of a purchaser for valuable consideration without notice is a shield to defend the possession of the purchaser, not a sword to attack the possession of others.⁽³⁾ Where a party is personally cognizant of the facts which constitute his defence, it is essential that he should tender his own evidence, for his failure to do so is justly liable to be misconstrued.⁽⁴⁾ The evidence given to establish notice must be clear and distinct, and, as it was said in one case, "amounting in fact to fraud."⁽⁵⁾ But this is scarcely correct, unless the term be used in the generic sense as comprising all non-feasances, in which case again, the statement is open to the manifest objection of mistaking incautiousness for fraud.

157. Purchase with notice only affects the conscience of the person who had

Persons affected. notice. Hence a purchaser from a vendor who has himself purchased with notice is not bound by the rule, for the *bona fide* purchaser of an estate for valuable consideration purges away the equity from the estate in the hands of all persons who may derive title under it, with the exception of the original party whose conscience stands bound by the meditated fraud. If the estate becomes revested in him, the original equity will attach to it in his hands.⁽⁶⁾ And so a person with notice of an equitable claim may validly purchase of one who bought *bona fide* and without notice,⁽⁷⁾ although this circumstance may influence the court with respect to costs. But a purchaser cannot be compelled to accept a title depending upon proof of the seller not having had notice of an incumbrance. And although a purchaser buying from a trustee without notice would be protected, yet the trustee will still be bound by the trust were he to repurchase the estate, for his liability did not cease by the sale. The reason for the rule of equity, that a purchaser of property, though for valuable consideration, and taking the legal estate, yet with notice of a prior incumbrance, purchases subject to such incumbrance is that such purchaser is acting *mala fide*, in taking away the rights of the prior incumbrancer by getting the legal estate, while knowing that a prior purchaser has the right to it. But a purchaser, for valuable consideration without notice of the prior right of a third person, is not guilty of, or party to, a fraud upon the rights of a prior purchaser. The courts of equity, therefore, will not interfere with his right to the possession, enjoyment and disposal of the property; and though, subsequently to his purchase, he may become aware of the prior incumbrance, yet he has the right to convey a subsequent purchaser

(1) *Phillipps v. Phillips*, 7 Jur. (N. S.), 1094, 8 Jur. (N. S.), 145; *Lady Bodmin v. Venderbendy*, 1 Ves., 179; *Cason v. Romual Pre. C.*, 226 ("The notice must be positively and not evasively denied." *Kerr on Fraud*, 431.)

(2) *Moor v. Mayhew*, 1 Ch. C., 34; *Wagstaff v. Read*, 2 Ch. C., 156.

(3) *Patterson v. Slaughter*, Amte., 292, Sugd., 791.

(4) *Rutto Singh v. Bajrang*, 18 C. L. R.,

280, P. C.

(5) Sir G. J. Turner, L. J., in *Chadwick v. Turner*, L. R., 1 Ch., 310, 319, following *Wpatt v. Barwell*, 19 Ves., 435.

(6) *Dayal v. Jivraj*, I.L.R., 1 Bom., 237 (246); following *Le Nere v. Le Nere*, 1 Ves., 64; *Carter v. Carter*, 3 R. & Johns, 617; *Bates v. Johnson*, Johns., 316, distinguishing *Pilcher v. Rawlins*, L. R., 7 Ch., 259.

(7) *Dayal v. Jivraj*, I. L. R., 1 Bom., 237 (247).

who, at the time of such subsequent conveyance has notice of the prior right of the third person; and such subsequent purchaser will take the property free from the incumbrance, for neither is he guilty of any fraud in accepting what his vendor had a right to convey, nor would the *bona fide* purchaser without notice be able, otherwise, freely and completely to dispose of the property which he innocently acquired. On the same principle, any subsequent purchaser, however remote, though having notice, must be protected. Where, therefore, A having notice of B's equitable mortgage purchased from C, who, also with such notice, had purchased from D, a *bona fide* purchaser for value without notice, A would take the property free from B's equitable mortgage.⁽¹⁾

158. A purchaser for value from a decree-holder is not affected by notice of the fraud by which the decree was obtained. A purchaser, however, is deemed to have notice of the fraud which clearly appeared on the face of the decree. But a purchaser cannot be visited with the consequences of an implied notice of fraud, which was not discovered by the court, or the officers of the court, or the counsel concerned in the cause, whose duty it is not to permit the court to make a decree not warranted by the facts of the case.⁽²⁾

The doctrine of constructive notice is equally applicable to Government, but it must then be more cautiously applied.⁽³⁾

159. Notice of a fact is notice of its reason.—Notice of a fact is also notice of its reason.⁽⁴⁾ But this is only a presumption and may be rebutted by evidence.⁽⁵⁾ Thus notice of the legal estate being outstanding, is notice of the trusts on which it is held: and notice that the title-deeds are in possession of a third party is *prima facie* notice of any charge he has upon the property. So notice that the title is a mortgage-title, seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption.⁽⁶⁾ So, also, notice, that the occupier holds as tenant to A, is notice of A's title. So, notice that the rents are received by A, is notice of A's title, and of the instrument under which he claims and of the character in which he receives them. So, notice that receipts have been given to, and accepted by the vendor for an annual payment as "rent," but which the vendor and purchaser claiming under him subsequently contend was in fact a rent-charge, is notice to the purchaser of the payee's title to the freehold.⁽⁷⁾ Imputed notice, however, does not extend to matters relating to motives and objects, but must have reference only to rights created or affected by the transaction.⁽⁸⁾ Persons who deal with companies must be taken to have had notice of the memorandum and its articles of association.⁽⁹⁾

160. Who are Agents.—A person who employs another to act for him is entitled to the benefits which he receives through his agency, and he is

(1) *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., 213 (292); *Sarat Chunder v. Gopal Chunder*, I. L. R., 20 Cal., 296 (311), 1 P. C.

(2) *Chitamber v. Kristappa*, 4 Bom. L. R., 249 (251); *Bowen v. Evans*, 1 J. & L., 257.

(3) *Secretary of State v. Dattatraya*, 3 Bom. L. R., 923 (930).

(4) *Semble Marfield v. Barton*, L. R., 17 Eq., 15.

(5) *Hewitt v. Loosmore*, 9 Hare, 449; *Jones v. Smith*, 1 Hare, 43; *Esplin v. Pemberton*, 3 DeG. & J., 547; *Patman v. Harland*,

17 Ch. D., 353; *Kanayalal v. Pyarabai*, I. L. R., 7 Bom., 145.

(6) *Dart. V. & P.* (6th Ed.), p. 977.

(7) *Dart. V. & P.* (6th Ed.), p. 976.

(8) *Eyre v. Burmester*, 10 H. L. C., 90 (114), 11 E. L. R., 959 (968), on estoppel by execution of release, see *Hunter v. Walters*, L. R., 11 Eq., 316; *Heath v. Crealock*, L. R., 18 Eq., 242, L. R., 10 Ch., 34.

(9) *Whitechurch, Ltd. v. Cavanagh*, [1902] A. C., 117.

therefore equally liable for any liability incurred thereby.⁽¹⁾ *Qui facit per alium facit per se.*⁽²⁾ An agent is a person employed to do any act for another, or to represent another, in dealings with third persons. The person for whom such act is done, or who is so represented, is called the principal.⁽³⁾ A person does not become an agent of another merely because he gives him advice in matters of business. Agency is founded upon a contract either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it. The essence of the matter is that the principal authorises the agent to represent or act for him in bringing, or to aid in bringing the principal into contractual relation with a third person.⁽⁴⁾ Any adult may employ an agent, but as between the principal and third persons any person may become an agent, but no person who is not a major and of sound mind can become an agent so as to be responsible to his principal.⁽⁵⁾ For example, a wife ordering domestic necessities on her husband's behalf would not be liable to the husband, but the husband would be liable to the tradesman who supplied them. Thus then while there is no valid contract between the principal and the agent, there may be one between the principal and a third party. The authority given to an agent may be express or implied.⁽⁶⁾ No consideration is necessary to create an agency, the mere acceptance of the office by the agent being a sufficient consideration for the appointment.⁽⁷⁾ A bailee or depositary expressly or impliedly undertaking to do something more than the mere passive custody of the thing bailed is clothed with the duties and implied engagements of a mandatory and he then becomes an agent.⁽⁸⁾ Thus a solicitor employed to do a merely ministerial act, such as the procuring the execution of a deed, does not make him solicitor of the party so as to affect him with constructive notice of matters within the solicitor's knowledge.⁽⁹⁾ But the counsel, attorney, solicitor, or pleader acting on behalf of a party becomes his agent, even though he may be employed only in part, and not throughout the transaction.⁽¹⁰⁾ Similarly, commission agents, brokers and factors are agents within the scope of their legitimate and limited duties. And so it has been provided in the English Conveyancing Act, 1882,⁽¹¹⁾ that a purchaser shall not be prejudicially affected by notice of any instrument, fact or thing, unless, in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent."⁽¹²⁾ And the same rule is enacted by the Indian Contract Act.⁽¹³⁾

161. Directors and officers of public companies stand to the companies in the position of their agents, and any information received by them in that

(1) S. 226, Indian Contract Act (IX of 1872).

(2) "He who acts through another acts through himself."

(3) S. 182, Indian Contract Act (IX of 1872).

(4) *Mohesh Chunder v. Radha Kishen*, 6 C. L. J., 580.

(5) S. 184, Indian Contract Act (IX of 1872).

(6) *Ib.*, s. 186. (For meaning of the terms "express" and "implied" authority

see s. 187.)

(7) S. 185, Indian Contract Act (IX of 1872). *Vishnucharya v. Ramchandra*, I. L. R., 5 Bom., 253.

(8) Inst. Bk. 3, tit. 27, Addison's Contracts (9th Ed.), pp. 788, 864.

(9) *Wylie v. Pollen*, 32 L. J., Ch. (N.S.), 782.

(10) Sugd., V. & P. (14th Ed.), 756.

(11) 45 & 46 Vict., c. 39.

(12) S. 3, Conveyancing Act, 1882.

(13) S. 229, Indian Contract Act (IX of 1872).

capacity would be deemed to be conveyed to the company which they represent. Counsel,⁽¹⁾ attorneys⁽²⁾ and pleaders,⁽³⁾ of parties are agents, so that their acts and knowledge within the scope of their authority are the acts and knowledge of their clients. Even an articulated clerk whom the solicitors of a puisne mortgagee sent to complete the mortgage-transaction on their clients' behalf would affect the principal with notice, if he is shown to have taken part in proceedings which ought to have put him on inquiry.⁽⁴⁾

162. It may be noted that the English Conveyancing Act has, as regards the effect of notice to agent, considerably modified the previous law.⁽⁵⁾ Thus, while formerly where the solicitor of the purchaser was himself the vendor, and had knowledge of an undisclosed blot in the title, notice thereof would have been imputed to his client the purchaser,⁽⁶⁾ but it is now no longer so imputed.⁽⁷⁾ In determining the question of notice, it should not be readily assumed that all agencies are alike, or are governed by the same rule. As Lord Halsbury, L.C., in one case said: "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of the principal depends upon the specific authority he has received. . . . To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word 'agent' that plausibility is given to reasoning which requires the assumption of some such proposition."⁽⁸⁾ Where A with notice of an incumbrance purchases in the name of B, and then agrees that B shall be the real purchaser, who thereupon pays the purchase-money without notice of the incumbrance, it has been held that inasmuch as B approved of the unauthorized purchase he constituted A his agent *ab initio*, though he did not employ him nor know anything of the purchase till after it was made.⁽⁹⁾

163. Limits of Liability.—In order to affect the principal with notice, five things are essential, namely, that (i) the agent must have received notice during the agency, (ii) the knowledge must come to him as agent, (iii) it must be in the same transaction, (iv) it must be *material* to that transaction, and (v) it must not have been fraudulently withheld from the principal.

164. The first requisite is self-evident. The principal ceases to have the legal identity which existed between him and his agent as soon as the agency is determined. The latter is then under no liability to disclose and the former therefore ceases to be liable. But so long as the agency remains "it must be taken for granted that

(1) *Wyllie v. Pollen*, 3 DeG. J. & S., 596

(2) *Mohori Bibi v. Dharmodas*, I. L. R., 30 Cal., 539 (545).

(3) *Ibrahimibhai v. Fletcher*, I. L. R., 21 827 (856), F.B.

(4) *Gokul Das v. Eastern Mortgage and Agency Co.*, 10 O.W.N., 276.

(5) The section practically restores the judgment of Lord Hardwicke in *Warwick v.*

Warwick, 3 Atk., 294.

(6) Sugd., V. & P. (14th Ed.), 756.

(7) Dart, V. & P. (6th Ed.), 988, 2 W. & T. L. C. (7th Ed.), 231; *In re Weir*, 58 L.T. P., 792.

(8) *Blackburn Low & Co. v. Vigors*, 12 App. Cas., 531 (537, 538).

(9) *Coote v. Mamnion*, 5 Bro. P. C., 355.

the principal knows whatever the agent knows."⁽¹⁾ "It is not a mere question," the Privy Council in one case remarked, "of constructive notice of inference of fact, but a rule of law which imputes the knowledge of the agent to the principal or (in other words) the agency extends to receiving notice on behalf of his principal of whatever is material."⁽²⁾ "If notice to the agent were not notice to the principal, notice would be avoided in every case by employing agents."⁽³⁾ No one by delegating to an agent to do what he might do himself can place himself in a better position than if he did the thing himself.⁽⁴⁾ As Lord Hatherley, L.C., said: "It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is a part of his duty to inform himself is actual notice to the client. Mankind would not be safe if it were held under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by the solicitor."⁽⁵⁾ And so where a party negotiates through an attorney, the knowledge of the attorney must be taken to be the knowledge of the principal himself.⁽⁶⁾ And hence where a mortgager employs an attorney who also acts for the mortgagee in the mortgage-transaction, the latter must be taken to have notice of all facts brought to the knowledge of the attorney; and therefore, where the court rescinded the contract of mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy or was put upon inquiry as to it, it was held that the mortgagee was not entitled to any compensation.

165. And on a similar principle it is settled that the information must have

(ii) **Knowledge must be as Agent.**

been communicated to the agent as such,⁽⁷⁾ for information not so derived was not obtained *in the course of the business* transacted by him for his principal, and which he was not bound to disclose to him. Hence where one person is an officer of two companies his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by that company to receive the notice; and if the common officer has been guilty of fraud, or even irregularity, the court will not draw the inference that he has fulfilled these duties. Hence where the directors of a company were empowered to borrow money on its behalf, but not beyond a certain limit without the consent of a general meeting which gave the required consent, but the notices summoning the meeting had not, as required by the regulations of the company, specified that borrowing beyond the limit was to be authorized by the meeting. The money was borrowed from a society, the secretary of which was also the secretary of the

(1) *Per* Asburst, J., in *Fitzherbert v. Mather*, 1 T. R., 12; *Proudfoot v. Montehore*, L. R. 2 Q. B., 511; *Jared v. Clements*, [1902] 2 Ch., 399.

(2) *Rampal Singh v. Balbhaddar*, I.L.R., 25 All., 1 (17), P. C.

(3) *Per* Joyce, J., in *Berwick & Co. v. Price*, [1905] 1 Ch., 632 (639); *Per* Lord Northington, L. C., in *Sheldon v. Cox*, 2 Eden, 224 (228).

(4) *Berwick & Co. v. Price*, [1905] 1 Ch.,

632 (639).

(5) *Rolland v. Hart*, L.R., 6 Ch., 678 (681, 682).

(6) *Dhurmo Dass v. Brahmo Dutt*, I.L.R., 25 Cal., 616, O. A.; *Bhomo Dutt v. Dharmo*, I. L. R., 26 Cal., 381 (387), F. B., O. A.; *Mohori Bibi v. Dharmadas*, I. L. R., 30 Cal., 539 (545), P. C.

(7) *See* s. 229, Illus. (b), Indian Contract Act (IX of 1872).

company, and he knew of the irregularity. On the question arising as to whether the society should be deemed to have had notice of the invalidating irregularity, because of the knowledge of it of the secretary, it was held that it could not, inasmuch as it was not within the scope of his duty either to give notice to the society of the information received by him, or to receive it.⁽¹⁾ In another case where the common officer of two companies receives information as an officer of one company, notice will not be imputed to the other company, unless the common officer had some duty imposed upon him to communicate that knowledge to the other company, and had some duty imposed on him by the company, which is alleged to be affected by the notice to receive the notice.⁽²⁾ So where *K*, who was a director of company *A*, and was also interested in company *B* having ascertained in his private capacity that company *B* proposed to borrow a sum of money for a purpose outside the scope of its business induced company *A* to advance the money to company *B* on the security of a debenture of that company, and the money was applied by company *B* in the manner proposed. Company *B* had a general power of borrowing under its memorandum and articles of association for the purposes of its business. No other director of company *A* except *K* knew how the money was intended to be applied, company *B* having failed the liquidator sued for a declaration that the mortgage to company *A* was *ultra vires*, which must be deemed to have had notice of the impropriety of the loan through their agent *K*. But it was held that *K*'s knowledge could not be imputed to company *A*, inasmuch as *K* owed no duty to that company, either to receive or to disclose information as to how the borrowed money was to be applied, and that the debentures was a valid security.⁽³⁾ Notice to a solicitor in the country is notice to a purchaser, although he acts by his town agent, and notice to the town agent to the purchaser's attorney in the country would also be notice to the purchaser, even though the purchase be made under the direction of a court of equity.⁽⁴⁾ And notice to the clerk of a solicitor employed in a given transaction is also notice to the client.⁽⁵⁾

166. Thirdly, the knowledge must have been imparted to the agent in the same transaction in which he is empowered to act.⁽⁶⁾ A

(iii) Limited by
authority.

special agent appointed for a limited purpose is not bound to disclose to his employer information which he has received in the course of his employment as the general agent of another person. For example, a broker employed to effect a particular insurance is not liable to disclose to the assurer any information which he may have obtained unconnected with the special purpose for which he has been employed. So where the plaintiff instructed a broker to re-insure an overdue ship, and whilst acting for him he received information material to the risk, but which he did not communicate to him, and the plaintiff effected a re-insurance through the broker's

(1) In *re Hampshire Land Co.*, [1896] 2 Ch., 743 (748, 749); following *Gule v. Lewis*, 9 Q. B., 730 (743); explaining in *re Marseilles Extension Ry., Co.*, L. R., 7 Ch., 169; *Perry v. Hall*, 2 D. & G. F. & J., 38.

(2) In *re Marseilles Extension Ry., Co.*, L. R., 7 Ch., 161; in *re Hampshire Land Co.*, [1896] 2 Ch., 743 (748); in *re David Payne & Co.*, [1904] 2 Ch., 608 (616).

(3) In *re David Payne & Co., Ltd.*, [1904] 2 Ch., 608. As to *ultra vires* Davis' case, L. R., 12 Eq., 516, dissented from.

(4) *Norris v. Le Neve*, 3 Atk., 26.

(5) *Pike v. Stephens*, 12 Q. B., 165.

(6) Before the Conveyancing Act, 1882, it was held that if the previous transaction in which knowledge was obtained was closely followed by and connected with another, or if it is clear that the previous transaction was present in the mind of the agent when engaged in another transaction, knowledge there acquired would be imputed to the principal. Sugd., V. & P. (14th Ed.), 757

London agents and also another re-insurance through another broker. It afterwards appeared that the ship had, in fact, been lost some days before the plaintiff tried to re-insure, and it was held that the knowledge of the first broker was not the knowledge of the plaintiff and that he was entitled to recover upon the policies of re-insurance.⁽¹⁾ But the local agent or canvasser of a company empowered to negotiate the terms of proposals for insurance has larger powers, and if he knows that an intending assurer is one-eyed and does not mention the fact to the company, the latter will be deemed to have notice of the fact that they were insuring an one-eyed man, and so if the policy be for "the complete and irrecoverable loss of sight in both eyes," and the insured loses the other eye, the company cannot be heard to plead that they were ignorant of the partial disablement, for the knowledge was obtained by the agent when he was acting within the scope of his authority, and it must be imputed to the company.⁽²⁾

167. Fourthly, the knowledge must be material to that transaction, for an agent is not bound to attend to minutiae. So the transferee of a mortgage would not be affected by the knowledge of his solicitor employed in the assignment of a mortgage subsequent to the original mortgage, so as to prevent him from making further advances since such knowledge was not material to the business of the assignment.⁽³⁾ So, although the knowledge of the pleader is the knowledge of the client (§ 160) still the latter is not affected with the general legal knowledge upon a subject, such as cantonment tenures.⁽⁴⁾ It has been moreover held that a denial of a liability in the course of a pleading does not operate as notice.⁽⁵⁾

168. In order to affect the principal with notice it is generally speaking immaterial whether the knowledge has or has not been actually communicated to him. As Lord Chelmsford says: "(v) Communication immaterial." "Notice which affects a principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor, who either knows or has imparted to him in the course of his employment some fact which affects the transaction, the principal is bound by the fact, whether it is communicated to or concealed from him."⁽⁶⁾ But for a purchaser of property to be affected with constructive notice of a prior charge through his solicitor, it is necessary that the latter himself must have had actual notice.⁽⁷⁾

169. Fraudulent suppression of information by Agent.—And it is settled that the imputation of notice cannot be rebutted by proof of non-disclosure, unless the information is withheld by the agent by fraud, designed to conceal the facts from his clients. The reason of the rule is thus stated by Lord Hatherley, L.C.:—"The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor and can never be allowed

(1) *Blackburn Low & Co v. Vigors*, 12 App. Cas., 531; following (*Cockburn, C. J.*, in) *Proudfoot v. Montefiore*, L. R., 2 Q. B., 511 (521); explaining *Fitzherbert v. Mather*, 1 T. R. 12; *Gladstone v. King*, 1 M. & S., 35; *Ruggles v. General Insurance Co*, 12 Wheat. 408.

(2) *Bawden v. London, &c., Assurance Co.*, [1892] 2 Q. B., 534.

(3) *Per Westbury, C.*, in *Wyllie v. Pollen*,

32 L. J. Ch. (N. S.), 782.

(4) *Ibrahimbhai v. Fletcher*, I. L. R., 21 Bom., 827 (856), F.B.

(5) *Balaji v. Bhikaji*, I. L. R., 8 Bom., 164; *Bhikabhai v. Bai Bhare*, I. L. R., 27 Bom., 418 (424).

(6) *Esplin v. Pemberton*, 3 DeG. & J., 547.

(7) *Croser v. Cartwright*, L. R., 7 H.L., 731; followed in *Greender v. Mackintosh*, I. L. R., 4 Cal., 897 (910).

to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor. It cannot be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain."⁽¹⁾ But, as has been observed before, where the solicitor has fraudulently withheld knowledge from the principal the general rule gives way. But the exception appears to be subject to two conditions: (i) It must be shown that distinct fraud was meditated in the same transaction with a view to conceal the facts for the purpose of defrauding the client, and (ii) the fraud was so effectually concealed from the client as to give the latter no warning sufficient to put him on inquiry. Probably these exceptions are supportable on the reason that in such cases the conduct of the agent raises an inevitable presumption that the notice had not been communicated,⁽²⁾ although on this point the authorities are not unanimous, and it has been suggested that the act done by the agent cannot be said to have been done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.⁽³⁾ Without endeavouring to enter into the region of speculative ratiocination one thing is certain that the exceptions themselves are universally acknowledged. The first point may be illustrated by the case in which a solicitor took a mortgage of the equity of redemption and sub-mortgaged it, and then subsequently he joined with the first mortgagee and the mortgagor in a new mortgage, and, acting as solicitor for all parties, he concealed the sub-mortgage from the new mortgagee; and in which case the new mortgagee was fixed with notice of the sub-mortgage through the solicitor and took subject to it.⁽⁴⁾ The second point may be illustrated in a variety of ways as where fraud is apparent on the face of the deed, or there exist other circumstances sufficient to put the client upon inquiry, in which case notice would be imputed to him independently of the fraud practised by the solicitor. Thus where the solicitor of the purchaser being also one of the three trustees, executed an assignment of leasehold property held jointly by them to the purchaser, and forged the signatures of his two co-trustees and, also the requisite assent of the *cestui que trust* to the sale, it was held that the circumstances attending the transaction were sufficient to affect the purchaser with notice of some trust, if not the actual nature of it; and that he had constructive notice of trust through the knowledge of his solicitor.⁽⁵⁾ And so, where even as a matter of fact information is shown not to have been communicated to the principal, and where loss must fall on one of the two innocent parties through

(1) *Rolland v. Hart*, L.R., 6 Ch., 678 (682).

(2) *Per Fry, J.*, in *Cave v. Cave*, 15 Ch. D., 639 (644); following *Thompson v. Cartwright*, 38 Beav., 178; *Rolland v. Hart*, L.R., 6 Ch., 678; *Soomer v. Rahintala*, 6 Bom., L. R., 800 (811).

(3) Lords Chelmsford and Hatherley cited *per Fry, J.*, in *Cave v. Cave*, 15 Ch. D., 439 (644). So Sir R. T. Kindersley, V. C.:—"It is a moot question upon what principle this doctrine rests. It has been held by some that it rests on this; that the probability is so strong that the solicitor would tell his client what he knows himself; that it amounts to an irresistible presumption that he did tell him; and so you must presume actual knowledge on

the part of the client. I confess my own impression is, that the principle on which the doctrine rests is this: that my solicitor is my *alter ego*; he is myself; I stand in precisely the same position as he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I should have the advantage of what he knows without the disadvantage. But whatever be the principle upon which the doctrine rests, the doctrine itself is unquestionable,"—*Boursot v. Savage*, L. R., 2 Eq., 134 (142).

(4) *Atterbury v. Wallis*, 8 DeG. M. & G., 454.

(5) *Boursot v. Savage*, L. R., 2 Eq., 134.

the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence was trusted or employed.⁽¹⁾ A common solicitor of both the parties colluding with one to the prejudice of the other does not affect him with notice.⁽²⁾

170. Notice to Trustees.—Notice to a trustee is generally governed by the same rule as a notice given to an agent. But in the case of several trustees it has been decided that notice to one trustee is notice to all, because it is the duty of that trustee to pass on the notice which he receives to the other trustees, and in the absence of evidence to the contrary it will be presumed that he did his duty.⁽³⁾ But where that trustee dominated the fund, and has made the first assignment, it is futile to give him notice of the second assignment, because his obvious interest is to conceal from the puisne incumbrancer the first incumbrance he has made; for if the person proposing to make an advance were aware of the first incumbrance he would probably refuse to advance money on the security of the second assignment.⁽⁴⁾ Such a question is, of course, quite different from that arising when there is a contest between assignees of a fund of personal estate vested in trustees as to priority. In that case it is established that, if one only of the trustees in existence at the date of the second assignment had notice of the prior assignment, the earlier assignee does not lose his priority. It has also been held that an assignee who has given notice to one only of several trustees is not entitled to priority over a subsequent assignee who takes his assignment after the death of the trustee to whom notice has been given.⁽⁵⁾ But an effective notice is not displaced by any change of the trustees; so that if notice be given, say, to all of the trustees, and they all cease to be trustees, being replaced by others who have no notice, the original notice is good.⁽⁶⁾

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872: and sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877.⁽⁷⁾

171. Analogous Law.—No chapters and sections of the Act in particular relate to contracts. The law relating to the transfer of property is itself a branch of the law of contracts in its wide sense as dealing with the extinction of obligations created by contract. And this view was present to the mind of the Law Commissioners who observed: "When the body of substantive civil law enacted for India is re-arranged in a more compact and convenient form than that of fragmentary portions from time to time passed

(1) *Doorga Narain v. Baney Madhub*, 1. L.R., 7 Cal., 199; *Hunter v. Walters*, 7 App. Cas., 75.

(2) *Sharpe v. Foy*, L. R., 4 Ch., 35.

(3) *Wilkes v. Greenhull*, 29 Beav., 387; *O. A. DeF. & J.*, 147; *In re Phillips' Trusts*, [1903] 1 Ch., 188 (186, 187); *In re Lake*, [1903] 1 K. B., 151.

(4) *Browne v. Savage*, 4 Drew., 635; *In re Dallas*, [1904] 2 Ch., 385 (411); *Lloyd's Bank v. Pearson*, [1905] 1 Ch., 865 (873).

(5) *Freeman v. Laing* [1899] 2 Ch., 355 (358); followed in *In re Phillips' Trusts*, [1903] 1 Ch., 183 (187). The question of notice as affecting priority will be found set out in ss. 48 and 78, *post*.

(6) *In re Wyatt*, (1892) 1 Ch., 188; *Ward v. Duncombe*, [1893] A.C., 369; *In re Dallas*, [1904] 2 Ch., 385 (599).

(7) The last sentence was added by the Amending Act (III of 1885), s. 3.

by the Legislature, the chapters on sale, mortgage, lease and exchange contained in the present Bill will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regarding the transmission of property between living persons." By declaring the provisions of the Act relating to registration as supplemental, the Legislature has effectually overruled the contention made ⁽¹⁾ that the provisions of the Registration Act ⁽²⁾ were left unaffected by the Act.

The second sentence beginning with the words "and section fifty-four" was added by the Amending Act, 1885,⁽³⁾ in order to remove a difficulty which had arisen in the interpretation of the Act. Section 54, paragraphs 2 and 3, relate to sales how made, and section 54 relates to mortgage when to be by assurance; section 107 relates to leases how made and section 123 to gifts how effected. All these sections must now be read as supplemental to the Indian Registration Act which, so far as they go, they both supplant and supplement.

172. Principle.—Section 54 (4) having come up for construction, in a case ⁽⁴⁾ decided soon after the passing of the Act, it was observed that while it enacted that sale of immoveable property of a value less than Rs. 100, "may be made either by a registered instrument or by delivery of the property," the Indian Registration Act only enacted in favour of the compulsory registration of the instruments of sale of the value of one hundred rupees and upwards, and thus the provisions of the two Acts were so far in conflict that in the case of sales of less than Rs. 100 in value, while the one had the effect of abolishing optional registration, which by itself conveyed no interest in property the other still purported to create a valid title by an unregistered conveyance. Thus, for example, while an unregistered sale of property, for say, Rs. 99, would convey a good title under the Registration Act, it would be, wholly ineffectual under the Act unless it was accompanied by delivery, in which case the execution of the deed would be of no consequence. Then, again, in a competition between a registered and an unregistered instrument⁽⁵⁾ as preference is given to the former, the question whether an unregistered sale which conveys a perfectly good title should be postponed to a subsequently registered conveyance again re-opened the question from another standpoint. As was observed by Garth, C.J.: "I would only add with reference to the judgment which has been delivered by my learned brother Prinsep, that I entirely agree with him as to the injustice which has frequently been done by the system of what is called 'optional registration,' with the professed object of relieving poor people from a burden, the law of optional registration has made them in numbers of cases, the victims of fraud and litigation. I have already expressed my opinion very strongly to the Government upon that subject. And as to the suggestion of my learned brother, that the Legislature should interfere to prevent this unhappy state of things, it has already, as I understand, been carried out. As I read the Transfer of Property Act, which was passed the other day, section 54 does virtually abolish optional registration. No transfer can be now made, after that Act comes into operation, by any instrument in writing unless it is

(1) *Per Prinsep, J., in Narain Chunder v. Dataram*, 1. L. R., 8 Cal., 597, F.B.; *Khatu Bibi v. Madhuram*, 1. L. R., 16 Cal., 622; overruled in *Makhan Lal v. Bunku*, 1. L. R., 19 Cal., 623, F. B.

(2) Ss. 17 & 49, Indian Registration Act (XVI of 1908).

(3) S. 3, Act III of 1885.

(4) See *per Garth, C. J., in Narain Chunder v. Dataram*, 1. L. R., 8 Cal., 597 (612), F.B.

(5) S. 50, Act III of 1877.

registered. It is true that, in the case of possessory interests the value of which is less than Rs. 100, an oral transfer coupled with possession will pass the property ; but there will be no such thing as a *transfer in writing*, unless it is registered.”⁽¹⁾

1.73. The effect of the clause is then to modify the corresponding provisions of the Indian Registration Act which must be read as subject to the provisions of the Act relating to registration. This would have been clear without even the addition of the amending clause, if regard were had to the rule of interpretation, by which, in case of a conflict, a particular statute is allowed to modify a more general one. But the point was admittedly overlooked ⁽²⁾ in two Calcutta cases, which were, however, soon afterwards overruled.⁽³⁾ On a similar principle it has been held in Madras, that notwithstanding the Government notification issued under the provisos to section 17 (d) of the Registration Act, leases falling under section 107 of the Act are compulsorily registrable.⁽⁴⁾

For a fuller discussion of the effect of the section on the Act, reference must be made to the various sections mentioned therein.

(1) *Narain Chunder v. Dataram*, I.L.R. 8 Cal., 597 (612), F.B. The dictum of Garth C.J. was dissented from in *Khatu Bibi v. Madhuram*, I.L.R., 16 Cal., 621, which has however, been overruled in *Makhanlal v. Banku*, I.L.R., 19 Cal., 623, F.B.

(2) *Narain Chunder v. Dataram*, I.L.R. 8 Cal., 597, F.B. ; *Khatu Bibi v. Madhuram*

I.L.R., 16 Cal., 622 ; see per Prinsep, J., in *Makhanlal v. Banku*, I.L.R., 19 Cal., 623 (626), F.B.

(3) *Makhanlal v. Banku*, I.L.R., 19 Cal., 623, F.B.

(4) *Vairananda v. Miyakan*, I.L.R., 21 Mad., 109.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A) *Transfer of Property whether moveable or immovable.*

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

"Transfer of property" defined.

174. Analogous Law.—As is obvious from the sub-heading! sections 5 to 37 apply to all property whether moveable or immovable.⁽¹⁾ This section is taken from the New York Code.⁽²⁾ The term "transfer of property" means nothing more than what is conveyed by the terms "conveyance" or an "assignment" in English law. The word "property" must be understood in its widest sense, for it not only includes tangible property, but also an interest therein.⁽³⁾ The English Conveyancing and Law of Property Act⁽⁴⁾ defines property thus: "Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal and any debt, and anything in action, and any other right or interest."⁽⁵⁾ The Amending Act of 1882⁽⁶⁾ very slightly alters this definition. It runs thus: "Property includes real and personal property, and any debt and anything in action, and any other right or interest in the nature of property, whether in possession or not." A more comprehensive definition of the term is, however, to be found in the English Bankruptcy Act, where it is thus defined: "Property includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of, or incident to property as above described."⁽⁷⁾ An attempt was made to insert a definition of the term in the Act, and the following definition was proposed in the Draft Bill: "The 'ownership' of a thing is the right of one or more persons to possess and use it to the exclusion of others. Such ownership is either absolute or qualified. The thing of which there may be ownership is called 'property'."⁽⁸⁾ In a Full Bench

(1) *Harguwan v. Baijnath*, 4 I.C., 144 (145).

(2) S. 458; see marginal note against the section in the revised Bill.

(3) S. 58, *post*; *contra* in *Matadin v. Kazim Husain*, I.L.R., 13 All., 432 (473), F. B., overruled in *Ram Shankar v. Ganeshi Pershad*, 4 A.L.J.R., 273, F.B.

(4) 44 & 45 Vict., c. 41.

(5) S. 2 (i).

(6) 45 & 46 Vict., c. 39 (passed 10th August 1882), S. 1 (4) (i). In *re Bradshaw*, [1902], 1 Ch., 436.

(7) S. 168 (1). Bankruptcy Act (46 & 47) Vict., c. 52; cf. also s. 44, in which "power" is included in the term.

(8) S. 3 Bill, 1879, taken from N.Y. Code, para. 159.

case of the Allahabad High Court, (1) Edge, C.J., however, remarked "that the law in England or works on Equity or Jurisprudence can, in my opinion, no more help us to a construction of the word 'property' in Chapter IV than can Webster's Dictionary." (2) But Mahmud J., followed the interpretation given to the term in the English law, and observed: "In the Transfer of Property Act itself in section 3 the phrase immoveable property is not fully explained any more than the word 'property' itself. But I think that section 6 of that enactment in making exceptions to the capability of transfer of property must be understood to use the term *property* in its widest and most generic legal sense, for otherwise the exceptions would be wholly unnecessary. That sense is, I think, well represented in the meaning assigned to the word in Wharton's Law Lexicon, where it is represented to mean: 'The highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which does not depend on another's courtesy. Property is of three sorts: absolute, qualified and possessory.' " (3) This opinion finds a support in the view taken by the Calcutta High Court, (4) and must, so far as it goes, be looked upon as the correct one, though it may be pronounced to be somewhat too narrow inasmuch as the term is used to denote not only the right which one has over things, but also the things themselves which are capable of bearing rights. And this is now acknowledged to be the correct view even in Allahabad where the earlier precedent has been since overruled. (5) Property has been divided into (i) moveable and (ii) immoveable, and it has been again divided into (i) tangible or corporeal things, and (ii) intangible or incorporeal things, the latter being valuable rights of various kinds which are unaccompanied with the possession of anything corporeal, but which being regarded objectively as a source of profit are included in the term. Property then is a generic term for all that a person has dominion over, and includes within its purview all the interests into which it is capable of division. Thus, if a property is mortgaged to one, then it is leased to another for a term, both the mortgagee and lessee on the one hand and the mortgagor on the other will possess interests therein, which is their respective property. Accordingly an "actionable claim," an "equity of redemption of a vested remainder," "a share in an estate," (6) are included in the term "property."

175. Property is then the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which any person can have. (7)

Besides the things usually comprised in the term and which are regarded as fit objects of ownership, the term comprises other things and rights which are

(1) *Matadin v. Kasim Husain*, I. L. R., 13 All., 432, F.B., overruled in *Ran. Shankar v. Ganesli Parshad*, 4 A. L. J. R., 273, F. B.

(2) *Ib.*, p. 462.

(3) *Ib.*, p. 473.

(4) *Budra Perkash v. Krishna*, I. L. R., 14 Cal., 241 (Actionable claim is 'property'); *Unesh Chunder v. Tahur Fatima*, I. L. R., 18 Cal., 164, P. C. (vested remainder is property); *Muchiram v. Ishan Chunder*, I. L. R., 21 Cal., 568, F.B. ('Actionable claim' and the right of redemption are property); *Kanti Ram v. Kutubudin*, I. L. R., 22 Cal., 33 (Equity of redemption is property); *Beni Madhub v. Somendra*, I. L. R., 23 Cal., 795; *Nutu v. Venkatachullam*, I. L. R., 20 Mad.,

35; see also *Rajankinath v. Hari Mohan*, I. L. R., 12 Cal., 470; *Lalla Jugdeo v. Brij Behari Lal*, I. L. R., 12 Cal., 505; *Subhamal v. Venkatarama*, I. L. R., 10 Mad., 289; *Rathnasami v. Subramanaya*, I. L. R., 11 Mad., 56; *Nilakanta v. Krishnasami*, I. L. R., 13 Mad., 225, F. B.; *Nanabin v. Anant*, I. L. R., 2 Bom. 353.

(5) *Ram Shankar v. Ganesli Parshad*, 4 A. L. J. R., 273, F. B.

(6) *Mahomed v. Kashi Nath*, 3 C. W. N., 180 (a case under the Assam Land and Revenue Regulation).

(7) *Per Langdale, M. R.*, in *Jones v. Skinner*, 5 L. J. Ch., 90; *Gabriel v. Solomon*, 4 C. W. N., 70.

equally capable of individual ownership. Thus a share in an industrial concern⁽¹⁾ the power of appointment under a settlement,⁽²⁾ equitable estates for life and *pur autre vie*,⁽³⁾ legal and equitable choses in action, including mortgage-debts, annuities and pensions, the benefit of building agreements and similar non-descript equities are all included in the term. So under the Bankruptcy Act a bankrupt's claim to have an absolute conveyance set aside and declared to be only a security has been held to fall into the same category.⁽⁴⁾ A husband's interest in a wife's chose in action which he has not reduced into possession is property.⁽⁵⁾ The hereditary interest in land of a tenant subject to the payment of a small quit-rent, and who holds it on condition of furnishing to the Zemindar a few men in aid of the regular police, is similarly treated.⁽⁶⁾ A *hat* is property so that the rents and profits derivable therefrom may be validly transferred.⁽⁷⁾ A Hindu idol is property and may be recovered by suit, though it cannot be made the subject of an unrestricted alienation.⁽⁸⁾ A franchise of ferry being a right known to the law is property.⁽⁹⁾ But wide though the term is, it does not include the future receipts in a person's business.⁽¹⁰⁾ And hence the attachment of malikana rights payable for ever was refused, except so far as it related to any specific amount then payable or likely to become payable.⁽¹¹⁾ The right of a person to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, is in the nature of an actionable claim, being a right to claim specific performance of an agreement to transfer land, and falls within the term.⁽¹²⁾ Alimony being an allowance paid by the husband for the separate maintenance of his wife is not within the concept.⁽¹³⁾ And so the money allowance charged on land for the maintenance of a Hindu widow would appear to fall into the same category, for probably it cannot be transferred,⁽¹⁴⁾ and certainly not if it is prospective merely.⁽¹⁵⁾ But an allowance to a wife under a deed of separation is "property,"⁽¹⁶⁾ which term should also include an interest either in or in the income of immoveable property assigned to her by way of maintenance.⁽¹⁷⁾ But according to Hindu law, the interest of an heir, expectant on the death of a widow in possession, is not property,⁽¹⁸⁾ but a mere contingency.⁽¹⁹⁾ So an unascertained interest in a partner-

(1) *Hiralall* (In the matter of), I.L.R., 32 Bom., 505.

(2) *Joshua v. Alliance Bank*, I.L.R., 22 Cal., 202, Will's R.P. (18th Ed.), 356, 363. But Fry, L.J., observed: "The power of a person to appoint an estate to himself is no more his 'property' than the power to write a book or to sing a song"—*Re Armstrong*, 55 L.J.Q.B., 579.

(3) *Re Huggins*, 21 Ch. D., 85; *Tuffuzul Hossein v. Raghunath*, 14 M.I.A., 40; *Bhoy-rub v. Madhub*, 6 C.L.R., 19.

(4) *Seear v. Lawson*, 15 Ch. D., 426.

(5) *Re Biaggi*, 26 S. J., 417.

(6) *Ramessur v. Golamee*, 24 W.R., 309.

(7) *Golam Mohiuddin (Syed) v. Mt. Parbati*, 13 C.W.N., 596.

(8) *Subbaraya v. Chellappa*, I.L.R., 4 Mad., 315; *Dwarkanath v. Jannobee*, 4 W.R., 79.

(9) *Matthews v. Peache*, 5 E. & B., 546 (557); *Newton v. Cubitt*, 12 C. (B. N. S.), 32 (58), O.A., 19 C.B. (N.S.), 864; *Coves Urban Council v. Southampton, &c., Packet Co.*, [1905], 2 K. B., 287.

(10) *Ex parte Nichols*, 22 Ch. D. 782; *Re Toward*, 14 B. & D., 810; *Re Davis*; *Ex*

parte Itawlings, 22 & B. D., 193.

(11) *Nilkunto v. Hurro*, 1 L. R., 3 Cal., 414; cf. *Turoj v. Balalehar*, 1 L. R., 22 Bom., 39.

(12) *Rudra v. Krishna*, 1 L. R., 14 Cal., 241.

(13) *Re Robinson*, 27 Ch. D., 160; *Anderson v. Lady Hay*, 7 I.L.R., 113, Will's P.P. (15th Ed.), 509; see cases under S. 6, *post*.

(14) *Bhogrub v. Nubo*, 5 W. R., 111.

(15) *Bipro v. Deo Narain*, 3 W. R. (Mis.), 16; *Monessur v. Kishen Protap*, 23 W. R., 427; *Haridas v. Baroda*, I.L.R., 27 Cal., 38.

(16) *Jump v. Jump*, L. R., 8 P. D., 169.

(17) Cf. *Dwala v. Apaji*, I.L.R., 10 Bom., 342; followed in *Gulab v. Bansidhar*, 1 L. R., 15 All., 371.

(18) *Ramachandra v. Dharmo*, 15 W. R., 17, F.B.; *Koraj Koonwar v. Komal Koonwar*, 6 W. R. 34; but see *Gaur Hari v. Radha*, 12 W. R. 54.

(19) *Bhoobun v. Thakoordoss*, 15 W. R., 18 note, F. B.; *Bahadur v. Nobab Singh*, I.L.R., 24 All., 94 (107), P.C.; *Nund Kishore v. Kanes Ram*, I.L.R., 29 Cal., 355; *Sham Sunder v. Achan Kunwar*, 2 C. W. N., 279, P. C.

ship, (1) a right of suit (2) or of appeal (3) are not comprised in the definition. For the same reason unpaid capital in a Joint Stock Company is similarly treated. (4) And where the words occur in debentures, it does not include the capital of the company uncalled up at the commencement of the liquidation, though the words used be "future property." (5) But there can be no doubt that a company may create charge upon its uncalled capital, by apt words or where its meaning is unmistakable. So a gift of "all my property in the county of N." will pass everything belonging to the donor or owner which he had a general power, including the debts due to the testator. (6) The future wages or salary of a servant before it is earned is obviously a mere expectancy, and not property, and as such it cannot be either attached or assigned. (7)

The right of a particular person to use of a trademark is capable of protection, but it is not property, though it is sometimes spoken of as such, (8) and it cannot be transferred. (9) But a right of property is possessed by the author in this composition such a right exists in the abstract thing as distinguished from the concrete thing—the words written upon the paper. (10)

From these illustrations, by no means exhaustive, it will be seen that the term being used in the variety of senses it is difficult to describe its attributes with precision. In the next section, however, the subject will receive a more exhaustive treatment.

176. Meaning of transfer.—Like the word "property" the term "transfer" is also used in its widest and most generic sense as comprehending all the species of contract which pass real rights in property from one person to another. (11) "Transfer" is alienation, amounting to a divestiture of the transferor's rights, but also includes such limited and restricted alienations as are allowed by law. The term implies the making over of possession or control, an alienation of property or some interest therein made as between living persons. It does not include a power of devise. And so in the Bengal Tenancy Act, where the latter is sought to be included, the expression used is transfer or devise. (12) The term "transfer" does not necessarily import conveyance of all the transferor's interest in the property. (13) Thus a "mortgage" or a "lease" is a transfer, and is so treated in the Act, although it does not exhaust the interest which the transferor is capable of passing. Strictly speaking, the word transfer may mean (i) the process or act of conveyance or making over something to another, not necessarily absolutely, or (ii) the document by which the property is transferred. But the term is here confined to denote only a

(1) *Abott v. Abott*, 5 B.L.R., 382; *Parvathesam v. Bapanna*, I.L.R., 13 Mad., 447; *Dwarkan Mohun v. Juckhimuni*, I. L. R., 4 Cal., 384; dissented from *Jagat v. Iswar*, I. L. R., 20 Cal., 693.

(2) *Deury v. Haradham*, 3 W. R. (Mis.), 8; *Mahomed v. Shio Sevuk*, 6 N. W. P. H. C. R., 95; *Carapiet v. Pannalal*, 14 W. R., 152; *Shyam Chand v. Land Mortgage Bank*, I. L. R., 9 Cal., 695.

(3) *Bipro v. Deo Narain*, 3 W. R. (Mis.), 16.

(4) *Bank of South Australia v. Abrahams*, L. R., 3 P. O., 265. Property should be distinguished from a right to acquire it—*Howard v. Patent Ivory Co.*, 38 Ch. D., 156.

(5) *In re Streatham and General Estates Co.*, [1897] 1 Ch., 15; *In re Russian & Co.*,

Ld., [1896] 2 Ch., 149.

(6) *Tyrone v. Waterford*, 29 L.J. Ch., 486.

(7) *Debi Prasad v. Lewis*, 6 A. L. J. R., 227; cf. S. 6 (a), *post*.

(8) *Reddaway v. Benham*, [1896] A. C., 199 (209, 210).

(9) *Ullman & Co. v. Cesar Leuba*, 13 C.W. N. 82, P. C.

(10) *Macmillan & Co. v. Dent*, [1907] 1 Ch., 107.

(11) *Gopal Pandey v. Parsotam*, I.L.R., 5 All., 121 (137) F. B. Mahmud, J., in *Matadin v. Hazim Hussein*, I. L. R., 13 All., 432 (476); *Anandi Bai v. Harlal*, 15 C. L. R. 1 (5).

(12) *Anandi Bai v. Harlal*, 15 C. P. L. R., 1 (5).

(13) *Cf. Narandas v. Parshoram*, 4 B.L.R., 550.

transitive act, and indeed, its sense is further restricted by the definition which restricts it only to alienations *inter vivos*. An alienation by will in execution of a decree, (1) or on insolvency would, really speaking, be as much a transfer as those dealt with in the Act, but these have been designedly excluded from its consideration. And the term must therefore be read in the Act in the narrow and artificial sense conferred on it by the section. But since the Act mainly deals only with the transfers of immoveable property, the definition covers a larger ground than taken up by the Act. In its present meaning a transfer of property postulates at least two living persons, the transferrer and transferee. A person cannot transfer property to himself, though he may create a trust in his own favour (2) but he may do so to himself conjointly with another. The conveyance may be in present or in future, but the property itself must be existent, at least potentially, as the property of the grantor. (3) But the transfer of a future property, though not dealt with in the Act, may still operate as a contract which may be specifically enforced as soon as the property comes into being. (4) As observed by Lord Westbury: "If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives his consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagor or purchaser immediately on the property being acquired." (5) Then, again, as regards the parties to a transfer the term "living person" no doubt includes also juridical persons, such as corporations, idols, and the like, since such persons being the creatures of law are regarded as standing on the same footing as other living beings. And it would appear that the definition should not be confined to transfers of a contractual character, for it is wide enough to comprehend a deed of appointment under a settlement. (6) The species of transfer treated of in the Act are (i) by sale, exchange or gift, which exhaust the aggregate of rights called ownership, and (ii) by lease, and mortgage which create only certain limited interest in the property in favour of another, although it is possible that those rights may in certain cases approximate as nearly as possible absolute ownership. The Act does not deal with settlements, partition, or trusts. The first two subjects were proposed to be included in the Bill of 1877, (7) but the subjects were found to be unsuitable to the scheme of a skeleton Act and were consequently struck out. The provisions relating to partition were, however, subsequently enacted in a separate Act, (8) and the subject of trusts was similarly separately legislated upon. (9) The law of partition can hardly be regarded as a branch of the law of transfer as here defined, for beyond effecting a change in the mode of enjoyment, partition does not effect any change in the rights of the parties. But in so far as the change of the mode of enjoyment may be regarded as allied to exchange, the subject may be conceded to be so far cog-

(1) *Dinendro v. Ramkumar*, 1 I. L. R., 7 Cal., 118.

(2) *Bai Maha Kore v. Bai Mangla*, I. L. R., 35 Bom. 403 (407, 408).

(3) *Petch v. Tutin*, 15 M. & W., 110; *Clements v. Matthews*, 11 Q. B. D., 808; *Samsuddin v. Abdul Husein*, I. L. R., 31 Bom., 165 (172).

(4) *Collyer v. Isades*, 19 Ch. D., 342 (351); *Holroyd v. Marshall*, 10 H. L. C. 191 (but the property must be sufficiently specified); *Belding v. Read*, 34 L. J. (ex.), 212; *Leatham v. Amor*, 47 L. J. (Q. B.), 581.

(5) *Holroyd v. Marshall*, 10 H. L. C., 191, cited by Brown, L. J., in *Clements v. Matthews*, 11 Q. B. D., 808 (818).

(6) *Joshua v. Alliance Bank*, I. L. R., 22 Cal., 185 (202). The subject of appointment was treated in the Bill of 1877 (Ch. XII, s. 73-92).

(7) CHAP. VII (SS. 49-57) dealt with settlements, and Chap. XIII (SS. 93-98) dealt with partition.

(8) Act IV of 1893.

(9) Act II of 1882.

nate and might with advantage have been included in the Act, as indeed, it was in the Draft Bill.

177. The law of the transfer of property is, strictly speaking, not a branch of the law of contracts, although "in the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale and is so easily distinguishable that one may deal with it as a contract. In cases of trust or marriage the agreement is far reaching in its objects, and the obligations incidental to it are either contingent or at any rate remote from its main purpose of immediate separation."⁽¹⁾ In a contract the obligations arise directly, whereas in a transfer of property they arise only incidentally, the immediate object of the agreement being to effect the transfer of property.

178. **Transfer and Trust.**—A transfer of property must be distinguished from a devise⁽²⁾ of the creation of a trust which the provisions of which are regulated by another enactment⁽³⁾ which however requires the transfer of property in certain cases even of trust⁽⁴⁾ and a question may then arise whether what was done was sufficient to amount to the transfer of property, and if not whether it would still amount to a trust. Such a case could not arise where an interest is created by a will or the author is his own trustee.⁽⁵⁾ In other cases a trust of immovables may be created by a registered instrument signed by the author of the trust or the trustee, and if it relates to moveables then it must be created as in the case of immovables or by transfer of ownership to the trustee.⁽⁶⁾ Similarly, in England by the operation of the Statute of Fraud⁽⁷⁾ an express trust of land of an interest therein is enforceable only if it is created by will or evidenced by some writing signed by the settler, showing clearly what the intended trust is, or referring to some other document which does so. But the same rule does not extend to implied or constructive trusts,⁽⁸⁾ which also saved by the Indian enactment.⁽⁹⁾ There is no vital difference between the forms required for the effectuation of a transfer and trust relating to immovable property since both must be evidenced by a registered instrument, but since attestation is necessary to complete a transfer by mortgage or gift, it may often raise a question whether an instrument failing as a gift could still operate as a trust. The subject will have to be discussed in the sequel.⁽¹⁰⁾

As regards the transfer of moveable property being an actionable claim the difference between a transfer and a trust is more material since the assignment of an actionable claim requires writing⁽¹¹⁾ whereas its trust might be created by

(1) Anson's Contracts (9th Ed.) 3.

(2) *Anandi Bai v. Harlal*, 15 C. P. L. R. 1 (5).

(3) Act II of 1882.

(4) *Ib.*, S. 6.

(5) S. 5, Act II of 1882. *Bai Mahakore v. Bai Mangla*, I.L.R., 35 Bom, 403 (407),

(6) *Ib.*

(7) 29 Charles, II, C. 9, S. 7.

(8) An implied trust must be distinguished from a constructive trust. The former is not expressed by the settler but is founded on an unexpressed but yet his presumable intention, and if this trust is implied in favour of the

author himself it is deemed a resulting trust. A constructive trust, on the other hand, is raised by the construction of equity in order to satisfy the demands of justice, without reference to any presumable intention of the parties.

(9) S. 94, Indian Trusts Act (Act II of 1882). But since this section only relates to constructive trusts. *Quere* whether it saves also an implied trust. As to the difference between the two see the note, *supra*.

(10) S. 122 *post*, §2356-2359.

(11) S. 180, *post*.

parol.⁽¹⁾ Such was held to be the case where one T. C. in anticipation of death handed over his property to the defendant his brother, and verbally directed him to pay certain specified debts and to apply the surplus for the necessities and support of his family and which Pigot J. held to be a good trust in favour of T. C.'s creditor.⁽²⁾ Here there was a transfer, though it was impressed with a trust. But where there is no transfer there is no trust. So where one Sadashiv insured his life expressed to be for the benefit of his wife and the latter objected to its attachment by her husband's creditor, the Court threw out her claim holding that inasmuch as the insured had not divested himself of his beneficial interest under the policy by its assignment as provided by S. 130 or by signed declaration of trust as provided by S. 5 of the Indian Trusts Act, it still remained his property.⁽³⁾ But the following case presents more difficulty. One Damodar Das made a credit entry in his books in favour of his wife Harkore and upon which interest was calculated and added and from which she withdrew small sums and then died. Upon her death Damodar wrote to her four daughters assuring them that the money gifted by him to his deceased wife was at their disposal. Later on he changed his mind and by his will left it to the three sons of one of his daughters, whereupon his three other daughters sued the former and the question turned upon the effect of the first entry read in the light of the declaration made on Harkore's death. The Subordinate Judge held that Damodar Das had made a gift of the money to his wife Harkore and that the plaintiffs were therefore entitled to recover their share in the same, and though this view was affirmed on appeal the learned judges were divided on the legal effect of the transaction; Chandavarkar J., holding that it created a valid trust in favour of Harkore while Heaton J., held that there was no trust but that the relation between Damodar and his wife was merely that of depositree and depositor, but which in the circumstances of the case made no difference in the decision.⁽⁴⁾

[For a further discussion of this subject reference should be made to the discussion under Section 122 *post*.]

179. Conveyance to Unborn Persons—Although this Act only deals with alienations made as between living persons still subject to certain restrictions, an interest may be created in favour of persons yet unborn. The limits within which such alienations are permitted are prescribed in sections 13 to 16 and in section 20.

6. Property of any kind may be transferred, except as
What may be otherwise provided by this Act or by any other
transferred. law for the time being in force :

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred.

(1) S. 5 para (2), Indian Trusts Act (Act II of 1882).

(2) *Suddasook v. Ram Chunder*, I.L.R., 17 Cal., 620 (628, 629).

(3) *Shankar v. Umabai*, I.L.R., 37 Bom., 471 (478); *Cleaver v. Mutual Reserve Fund*

Life Association, (1892) 1 Q. B., 147, distinguishing *Bhikaji v. Dattatrya*, 2 Bom. L.R., 888.

(4) *Bai Mahakore v. Bai Mangla*, I.L.R., 35 Bom., 408.

- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.
- (e) A mere right to sue cannot be transferred.⁽¹⁾
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.
- (h) No transfer can be made (i) in so far as it is opposed to the nature of the interest affected thereby; or (ii) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872;⁽²⁾ or (iii) to a person legally disqualified to be transferee.
- (i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.⁽³⁾

180. Analogous Law.—This section enunciates both a general proposition as it enumerates certain exceptions to which it is subject. Transfers are favoured of law, but there are certain limits within which it favours them. These are defined in the exceptions, which are to be read as supplemental to those elsewhere provided, whether in the other enactments or in the rules of Hindu, Muhammadan, or Buddhist law which are uncontrolled by the provisions of this Chapter.⁽⁴⁾ In the face of the positive prohibition here enacted, there is no room for the application of the doctrine of English equity which upholds an assignment of such interests if made for a valuable consideration. As was observed in a case.⁽⁵⁾ Though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable."⁽⁶⁾

(1) This Clause has been amended by S. 3 (Act II of 1900) for the following as originally enacted " (c) A mere right to sue for compensation for a harm illegally caused cannot be transferred."

(2) The words in sub-clause (2) have been substituted by S. 3 (ii) of Act II of 1900 for the following: " For an illegal purpose " as

originally enacted.

(3) The clause (i) has been added by S. 4 of the amending Act (III of 1985).

(4) S. 2 (d).

(5) *Chauncy v. Graydon*, 2 A. E. K., 616 (621) 26 E. R. 771.

(6) *Sumsuddin v. Abdul Husein*, I.L.R., 31 Bom. 165 (172).

181. Principle.—In so far as this section is declaratory of the general principle in favour of free alienations, it enunciates a rule the propriety of which has long since been recognized. "It may happen," says Bentham, "that possessing a thing by a lawful title, we wish to dispossess ourselves of it, and to abandon its enjoyment to another. Shall such an arrangement be confirmed by the law? Doubtless it shall be. All the reasons which plead in favour of the old proprietor change sides with the transfer, and then plead in favour of the new one. Besides, the former proprietor must have had some motive for abandoning his property. Motive is pleasure or equivalent; pleasure of friendship or of benevolence, if the thing was given for nothing; pleasure of acquisition, if it was a means of exchange; pleasure of security, if it was given to ward off some evil; pleasure of reputations, if the object was to acquire the esteem of others. It seems, then, that the transfer must increase the enjoyment of the parties interested in it. The acquirer stands in the place of the conferrer as to the old advantages, and the conferrer acquires a new advantage. We may then lay it down as a general maxim, that every alienation imports advantage. A good of some sort is always the result of it."⁽¹⁾ But where the transfer, if permitted, would occasion injury to one of the parties or to the public, it should be restrained if it is attended by more evil than good. The nine exceptions in the section would generally be found to reconcile themselves to this principle.⁽²⁾

182. Meaning of Words.—"Property of any kind." For the meaning of the term "property" see Introduction § and s. 5, §§ 158, 159. It of course includes an actionable claim,⁽³⁾ dealt with in Chapter VIII. The mortgagor's estate known as the equity of redemption is similarly property capable of being transferred.⁽⁴⁾ For other words, see *post*.

183. What Property may be transferred.—The principle underlying the general rule here enunciated has been before examined. And the general notion of the term has been discussed in the commentary on the last section (§§ 158, 159). It is proposed here to continue the same discussion, but in the form which it must necessarily assume having regard to the rule to be presently expounded. The term "Property" is not perspicuous enough by itself, and being a word often used in vulgar parlance, it has acquired a variety of meanings which bear no analogy to its legal concept. Generally speaking property is a thing which is an object of ownership. And the object of ownership is to afford either happiness or security. And consequently men are apt to speak of the object of the property as property itself. It is in this figurative sense that the term is used when the wife is spoken of as the property of her husband; and the rights which are the sources of profits have been similarly idealised into incorporeal objects, and which present the greatest difficulty to their scientific classification. Indeed fictitious entities of this kind have been so unreservedly created that the term has been enlarged beyond all recognition. Thus when liberty or reputations is spoken of as a man's best property, the term is no more than a figure of speech to import something of

(1) Theory of Legislation (Hildreth's Ed.), Ch. II, p. 168.

(2) "No contract is void in itself; none is valid in itself. It is the law which, in either case, grants or refuses validity. But for granting or refusing it, reasons are necessary. Equivocal generation is banished from sound physiology; perhaps some day it will be ban-

ished from jurisprudence. This void in itself is precisely an equivocal generation." Bentham's Theory of Legislation (Hildreth's Ed.), Chap. II, pp. 173, 174.

(3) *Rudra Prakash v. Krishna Mohan*, I. L.R., 14 Cal., 241 (244).

(4) *Kapil Deo v. Ram Rakha*, 7 A. L. J., 1191 (1198).

value.⁽¹⁾ All these varieties of uses of the term will have to be eliminated from our present consideration, as they do not constitute property in the eye of the law, independently of which there is no property which is the mere creature of law.⁽²⁾ "The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest."⁽³⁾

184. Transfer of Future Property.—The property which obtains legal recognition so as to endow it with a transferable character must in the first place be existent. For there can be no transfer of a thing which is non-existent. As the Privy Council in one case observed: "How can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in *future*, and upon the happening of a contingency; of which a purchaser may claim a specific performance, if he comes into court showing that he himself has done all that he was bound to do."⁽⁴⁾ So in another case Lord Macnaghten said: "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."⁽⁵⁾ Hence, where it was agreed between two parties that in consideration of certain proceedings to be instituted jointly by them in which one of the parties was to finance the litigation in which the other claimed certain property against a stranger, and to whom on the success of which half of the property recovered was to be made over, it was held that the agreement did not operate as a present transfer of the property, but only as an agreement to transfer it upon the happening of certain contingencies.⁽⁶⁾ The same principle ran through the decision of the other cases in which a party transfers the next year's indigo crop, or the future rents and profits of a village or land⁽⁷⁾ or other property that may come into existence

(1) Bentham's *Principles of Morals and Legislation*, 231. The lexicographical meaning is of little use in interpreting a legal term. *Tulsha Pershad v. Ram Narain*, I. L. R., 12 Cal., 117 (130), P. C.; *Agni Bindu v. Mohun*, I. L. R., 30 Cal., 20 (29).

(2) Bentham's *Theory of Legislation* (Hildreth's Ed.), Chap. VIII, p. 111.

(3) *Ib.*, p. 112.

(4) *Raja Sahib Pahlad Sen v. Budhu Singh*, 2 B. L. R., 111 (117), P. C., 12 M. I. A., 275; followed in *Ranee Bhabosondree v. Issurchunder*, 11 B. L. R., 36 (41), P. C.

(5) *Tailby v. Official Receiver*, 13 App. Cas., 523 (543); *Chauncy v. Greydon*, 2 A. L. R.,

616 (621); *Sumsuddin v. Abdul Husein*, I. L. R., 31 Bom., 165 (172). *Palinappa v. Lakshmana*, I. L. R., 16 Mad., 429 (434); *Baldeo Pershad v. Miller*, I. L. R., 31 Cal., 667 (675). To the same effect *per Cotton, L. J.*, in *re Clarke* 36 Ch. D., 348 (351), in *re Dallas*, (1904) 2 Ch., 365 (393, 394).

(6) *Ranee Bhabosondree v. Issurchunder*, 11 B. L. R., 36 (41), P. C.; followed in *Tara Soondaree v. The Collector of Mymensing*, 13 B. L. R., 495, P. C.; *Gungahurry v. Roghuhram*, 14 B. L. R., 307.

(7) *Shet Singh v. Sri Ram*, I. L. R. 30 All., 246; *Mangal Samy v. Subbiah*, 6 I. C., 504 (505).

in future.⁽¹⁾ In all such cases, however, the transfer, in fact constitutes no more than a contract to be performed on a future date. As Jessel M. R., observed: "A man cannot in equity any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."⁽²⁾ Thus, where a party provided another with funds for the purpose of litigation on promise that he was "to take out of the amount which may be collected from the defendants the whole of the amount incurred on account of the said costs," he was entitled to enforce the agreement and the charge thereby created upon the moneys subsequently collected from the judgment-debtor. And such property would form a specific fund for the purposes of the charge which would attach to it notwithstanding that it has been substituted by certain other property.⁽³⁾ Such contracts are however not transferable within the contemplation of the Act, and if they are enforced, it is because they fall under the rule of equity which, in the absence of any enactment, the courts are enjoined to administer.⁽⁴⁾ But before any such agreement could be given effect to, the property must be sufficiently specified so as to be capable of identification upon their coming into existence. As Lord Westbury said: "A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person."⁽⁵⁾

185. But such a contract must, like all other contracts, be supported by consideration, granted which, the incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained. And where the contract is sufficiently clear it must not be thrown out because it was not more definite. Thus where the grantee is to have all the future property of the grantor on Blackacre and on all other premises which may happen to be his thereafter, the property was held to be sufficiently ascertainable to give effect to the contract.⁽⁶⁾ And so long as it is ascertainable on its coming into existence, it is immaterial that it was vaguely described, for "vagueness comes to nothing if the property is definite at the time the court is asked to enforce the contract:"⁽⁷⁾ *certum est qui certum reddi potest.*⁽⁸⁾ Hence the assignment of his property by a manu-

(1) *Misri Lal v. Mozhar Hossain*, I.L.R., 13 Cal., 262; following *Lala Tilockdhari v. Furlong*, 2 B.L.R. (A.C.), 230. To the same effect *Congreve v. Evetts*, 10 Exch., 298; *Hops v. Hayley*, 5 Ell. & Bl., 880 (845).

(2) *Collyer v. Isaacs*, 19 Ch. D., 342 (351), cited at the bar in *Clements v. Matthews*, 11 Q. B. D., 808 (811), and in *Palaniappa v. Lakshmanan*, I. L. R., 16 Mad., 425 (433); *Bansidhar v. Sant Lal*, I. L. R., 10 All., 133 (135).

(3) *Palaniappa v. Lakshmanan*, I. L. R., 16 Mad., 429.

(4) *Palaniappa v. Lakshmanan*, I. L. R., 16 Mad., 429 (434); following *Misri Lal v. Mozhar Hossain*, I. L. R., 13 Cal., 262 (264);

Bansidhar v. Sant Lal, I. L. R., 10 All., 133 (136).

(5) *Holroyd v. Marshall*, 10 H. L. C., 191 (209, 210); explaining *Mogg v. Baker*, 10 M. & W., 195 (198).

(6) *Clements v. Matthews*, 11 Q. B. D., 808 (817).

(7) *Per Cotton*, L. J., in *In re Clarke*, 36 Ch. D., 353; *Tailby v. Official Receiver*, 19 App. Cas., 523 (536), *In re D'Epineuil*; *Tadman v. D'Epineuil*, 20 Ch. D., 758; *Danubian Sugar Factories v. Inland Revenue Commissioners*, 70 L. J. Q. B., 218.

(8) "A thing is certain which is capable of being ascertained."

factorer including all the book debts which might become due and owing or which might during the continuance of the security become due and owing to the mortgagor was held to pass all future book debts, though not limited to book debts in any particular business and incurred after the assignment whether in the business carried on by the mortgagor at the time of the assignment or in any other business.⁽¹⁾ And such an assignment would be valid against the trustee in the event of the assignor's subsequent bankruptcy, provided that the debt was due at the date of the assignment, though it was not payable until a future time,⁽²⁾ and which distinguishes the other case where nothing being due at the date of the assignment, a debt which might become due to the trustee in his bankruptcy at a future time, in which case nothing would pass because there was nothing to assign.⁽³⁾

186. But an instrument which purports to create merely a charge on future debts, does not amount to an equitable assignment of the debts in favour of the creditor.⁽⁴⁾ On the same principle the assignments of the future cargo of a ship⁽⁵⁾ and future patent rights⁽⁶⁾ were upheld. It was in the last case contended that an agreement to sell what an inventor may invent, or acquire a patent for before he invented it, is against public policy since it would discourage inventions, but Sir C. Jessel, M. R., observed: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."⁽⁷⁾ Accordingly numerous cases⁽⁸⁾ have been decided to illustrate the general principle which must now be taken to be settled that, where the consideration has been given, courts of equity will give effect to the agreement if it be in any way possible, and will not yield to the dishonest plea on the part of the covenant or that the covenant is too vague for specific performance, unless it is impossible to ascertain its meaning or to give it any reasonable effect.⁽⁹⁾ And the rules apply equally to marriage-settlements.⁽¹⁰⁾ In England the assignment of a debt or chose in action is, since the passing of the Judicature Act, 1873,⁽¹¹⁾ governed by that Act. But that Act does not give any new rights, but only affords a new mode of enforcing the rights previously existent and recognized.⁽¹²⁾ However, the

(1) *Tailby v. Official Receiver*, 13 App. Cas., 523, reversing *Official Receiver v. Tailby*, 18 Q. B. D., 25, restoring *Tailby v. Official Receiver*, 17 Q. B. D., 88, overruling *Belding v. Read*, 3 H. & C., 955, *In re D'Epineuil*, 20 Ch. D., 758, approving *In re Clarke*; *Coombe v. Carter*, 36 Ch. D., 348.

(2) *In re Davis & Co., Ex parte Rawlings*, 22 Q. B. D., 193; following *Brown v. Metropolitan, &c., Society*, 28 L. J. Q. B., 236.

(3) *Ex parte Nichols*, 22 Ch. D., 782, explained *per Lord Esher, M. R., and Fry, L. J.*, in *In re Davis & Co.; Ex parte Rawlings*, 22 Q. B. D., 193 (198, 199).

(4) *Punithavelu v. Bashyam*, I. L. R., 25 Mad., 40 (41); see *per Bhashyam Ayyangar, J.*, *ib. at p. 415*, citing *Tennant v. Trenchard*, I. L. R., 4 Ch. A., 537 (543, 544).

(5) *Lindsay v. Gibles*, 5 De G. & J., 690.

(6) *Printing, &c., Co. v. Sampson*, L. R., 19 Eq., 462 (466).

(7) *Ib.*

(8) *Lewis v. Madocks* 8 Ves., 150; 17 Ves., 48; *Randall v. Willis*, 5 Ves., 262; *Hardy v. Green*, 12 Beav., 182; *Fyfe v. Abuthnot*, 1 De G. & J., 406; *Bennett v. Cooper*, 9 Beav., 252; *In re Panama, &c., Co.*, L. R., 5 Ch., 318, and cases cited *supra*.

(9) *Per Kay, J.*, in *Clarke: Coombe v. Carter*, 35 Ch. D., 109 (114); distinguishing *Belding v. Read*, 3 H. & C., 955.

(10) *In re Clarke; Coombe v. Carter*, 35 Ch. D., 109 (114).

(11) 36 & 37 Vict., C. 66, s. 25, sub-s. 6.

(12) *Walker v. Bradford Old Bank*, 12 Q. B. D., 511 (515).

subject will have to be more closely examined while discussing the corresponding provisions enacted in the Act.⁽¹⁾

187. Property not in possession.—From what has been observed before, it would appear to follow that the transferrer may validly dispose of property of which he was not in possession at the time of disposition. But, if there be anything against the rule in the Hindu or Mahommedan law it would, of course, give way.⁽²⁾ As regards the require-

Hindu Law. ments of Hindu Law it appears to have been at one time held in a series of cases decided in Bombay⁽³⁾ that the transferrer could not validly convey property of which he was out of possession. This view seems to have received for a time additional authority from a decision of the Privy Council,⁽⁴⁾ the erroneous headnote of which was responsible for the erroneous decisions that were given upon its authority.⁽⁵⁾ But as soon as the question again went up before the Board of the Privy Council, that high tribunal reviewed the Hindu text,⁽⁶⁾ which they said had "reference to the comparative strength of a title with possession and a title without it,"⁽⁷⁾ and finally they observed: "Their Lordships see no reason why a gift or contract of sale property, whether moveable or immovable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law."⁽⁸⁾ This pronouncement naturally turned the tide against the current of the Bombay decisions,⁽⁹⁾ which thenceforward followed the view of the Privy Council which appears to have been throughout in harmony with the decisions of the High Courts at Madras⁽¹⁰⁾ and Calcutta.⁽¹¹⁾ An undivided coparcener in a joint Hindu family may then validly mortgage his undivided share in the family property, and his death before the mortgagee's suit would not nullify the mortgage.⁽¹²⁾

188. But under Mahommedan law possession is essential, and it has accordingly been held that a gift by a Mahommedan not in possession is null and void, for the Prophet has said: "A gift is not valid without seisin."⁽¹³⁾ So Sargent, C. J., observed: "We think that this statement of the law of gifts is not consistent with any other conclusion than that delivery and seisin are of the essence of a gift, and that, there-

(1) Ch. VIII, q. v.

(2) S. 2(d), ante.

(3) *Harjwan v. Nardu*, 4 B. H. C. R., 31; *Mathews v. Girdhari Lal*, 7 B. H. C. R., (O. J.), 1; *Girdhar v. Daji*, 7 B. H. C. R., 4; *Kachu v. Kachoba*, 10 B. H. C. R., 491; *Lalubhai v. Bai Amrit*, 1 L.R., 2 Bom., 299; *Bai Suraj v. Dalpatram*, 1 L.R., 6 Bom., 380, F. B.; (in which however it was conceded that a person whose estate is in possession of a trespasser may sell his right of entry as such); *Vasudev v. Tatia*, 1 L.R., 6 Bom., 387 (view qualified); but in *Bhukan v. Bhairji*, 1 B. II. O. R., 19, the contrary was laid down, and this view was afterwards restored by the Privy Council.

(4) *Rajah Sahib Perhlad v. Babu Budha Singh*, 12 M. I. A., 306.

(5) See Sir R. Couch in *Kalidas v. Kanhaya Lal*, 1 L.R., 11 Cal., 121 (133), P. O.

(6) *Yajnyavalkya Dig. Bk.*, 2 V., 32.

(7) *Kalidas v. Kanhaya Lal*, 1 L.R., 11

Cal., 121 (132), P. C.

(8) *Ib.*, p. 135.

(9) *Ugarchand v. Madapa*, 1 L. R., 9 Bom., 324.

(10) *Virabhadra v. Hari Rama*, 3 M. H. C. R., 38; *Vasudeva v. Narasanna*, 1 L.R., 5 Mad., 6; *Ramasami v. Marimuthu*, 1 L.R., 6 Mad., 404.

(11) *Gungahurry v. Raghuram*, 14 B. L. R., 307; *Lokenath v. Juggobundhoo*, 1 L. R., 1 Cal., 297; *Narain v. Dattaram*, 1 L.R., 8 Cal., 597; *Modun Mohun v. Futtarumissa*, 1 L. R., 13 Cal., 297.

(12) *Palaniandy v. Veramalai*, 15 M. L. J. R., 486.

(13) *Hedaya Vol. III*, p. 291; *Mohinudin v. Manchershah*, 1 L.R., 6 Bom., 650; *Meher Ali v. Tajudin*, 156, holding that *Kalidas v. Kanhaya Lal*, 1 L.R., 11 Cal., 121, P.O., only settled the rule of Hindu Law and did not affect Mahommedans.

fore, no right of any description passes without them, as must be the case when the donor is not himself in possession.”(1)

189. Hindu Endowments.—The right of worshipping a god or goddess and receiving a share of the offerings may be transferred, but only to a competent person within the line of succession,(2) but the religious endowment cannot be so transferred,(3) though its income may be temporarily pledged for necessary purpose, such as repairs, &c., of the temple.(4) According to the Indian Common Law relating to Hindu religious institutions, the landed endowments thereof are as a rule inalienable.(5) Though proper derivative tenures conformable to custom may be created with reference to such endowments they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged. Their revenues alone may be pledged for the necessities of the institution.(6) But according to the view taken in a case of the Calcutta High Court, not only the income but the property itself may be alienated for legal necessity. And when a *shebait*, as such, trespasses on the property of another and so commits a tort and he is sued for and cast in damages, the debutter property may be sold in execution of such a decree.(7) A right of worship of a Hindu idol is inalienable,(8) and so is the right of the priest to perform the services and to receive the customary remuneration.(9) Such things are *res extra commercium* and cannot be made the subject of hucksterage and sale. Indeed, were such alienations permitted, the purchaser might be a Mohamadan or a Christian, who would be both unwilling and unable to perform the worship and thus the very object of the endowment might be defeated.(10) And it has been even held that a priest contravening the rule and mortgaging his office is not precluded from raising the question that his priestly office with emoluments is inalienable.(11) And an assignment of such an office with the lands attached thereto followed by a consent-decree passed on the footing of such assignment may be subsequently set aside by the assignor.(12) “A former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible course against which he is seeking to protect the property, though it would be

(1) *Palakdhari Rai v. Manners*, 1 L. R., 23 Cal., 179; *Womesh Chunder Chatterjee v. Chunder Charn Roy Chowdhry*, 1 L. R., 3 Cal., 203; *Juggobundho Ghose v. Manickchand*, 7 M.L.A., 263. See also *Gopal Pandey v. Badrinath*, 1 L. R., 5 All., 121 (F. B.).

(2) *Mancharam v. Pranshankar*, 1 L. R., 6 Bom., 298; but *contra* in *Prasanna Kumar v. Saroda*, 1 L. R. 22 Cal., 989; *Gobinda v. Debendra*, 12 C.W.N., 98 (102).

(3) *Collector of Thana v. Hari Sita Ram*, 1 L. R., 6 Bom. 546 (552) (F.B.).

(4) *Collector of Thana v. Hari Sita Ram*, 1 L. R. 6 Bom. 546 (552); *Prosunno Kumar Debya v. Golabchand Babu*, L.R., 2 I.A., 145, 151; *Narayan v. Chintaman*, 1 L. R., 5 Bom., 393, 396; In *Krishna Kishore v. Sukha Sindhu*, 10 C.W.N., 1000 (1002). Debutter property was held to be alienable for legal necessity.

(5) *Rajeshwar v. Gopeshwar*, 1 L. R., 34 Cal., 828 (835).

(6) *Shubessuree v. Mathooranath*, 13 M. I. A., 270; *Narayan v. Chintaman*, 1 L. R., 5 Bom., 393; *Collector of Thana v. Hari*, 1

L. R., 6 Bom., 546 (552); *Nallayappa v. Ambalarana*, 1 L. R., 27 Mad., 465 (472), F.B.; *Shiva Rao v. Nagappa*, 1 L. R., 29 Mad., 117. In Allahabad the property itself may be aliened, *Parshotam v. Dat Gir*, 1 L. R., 25 All., 296.

(7) *Krishna Kishore v. Sukha Sindhu*, 10 C.W.N., 1000; *Nitya Gopal v. Mani Chandra*, 12 C.W.N., 63.

(8) *Kalicharan v. Bangshi*, 6 B.L.R., 727; 15 W. R., 339; *Rajeshwar v. Gopeshwar*, 1 L. R. 34 Cal., 828 (833).

(9) *Dubo v. Srinibas*, 5 B. L. R., 617.

(10) *Jaggernath v. Kishen*, 7 W. R., 266; *Drobo v. Sr-neebash*, 14 W. R., 409; *Kalee Charan v. Bungshce*, 15 W.R., 339; *Srimati Mallika v. Ratanmani*, 1 C. W. N., 493; *Mancharam v. Pransankar*, 1 L.R., 6 Bom., 298; *Kuppa v. Dorasami*, 1 L. R., 6 Mad., 76; *Rajah Vurmah v. Ravi Vurmah*, 1 L.R., 1 Mad., 235.

(11) *Srimati Mallika v. Ratanmani*, 1 C.W.N., 493.

(12) *Subbarayudu v. Kotayya*, 1 L.R., 15 Mad., 389.

reason for excluding him from the administration of the property as *shebait*. The Court could not with any propriety, say: 'We will decline to protect the property, and have it further exposed to loss, and decline to make a declaration, that it is trust-property, merely because they would not trust the plaintiff with its administration.' "(1) And so it has been held that the question may be raised at any stage of the suit or even in second appeal though not specifically pleaded. (2)

190. But since inalienability is based upon the principle that no stranger should be permitted to intrude himself into the management of the endowment, it is conceivable that there could be no objection to the transfer of the right of worship of a joint family idol to a member of the family, who might even appoint a fitting proxy to do the worship. (3) And it has been accordingly held that the alienation of a religious office to a person standing in the line of succession, *e.g.*, by a divided member to his sister's son, (4) or to grandchildren by way of relinquishment, (5) would be unobjectionable if the transferee was not disqualified for the performance of the office by personal unfitness, but in Madras the rule has been further narrowed down by the transfer being allowed, in the absence of special usage, to only the immediate heir. (6) But in the case of an absolute failure of succession, (7) or in the case of a family idol the consensus of the family might give the existing dedication another direction, but the consensus of the trustee could not likewise do it in the case of a public temple. (8) Indeed, the trustee of an endowment has, as such, no power to transfer his trust to another. And where a trustee is empowered to appoint another trustee to act for him, the power is personal to him and cannot be transferred. (9) In the case of a Hindu idol or temple inalienability being the rule is presumed, but the presumption may be rebutted by adducing evidence of well proved and established custom. (10) But the custom to be proved must be one which regulates the particular institution. (11) But no custom that would uphold the sale of a trust for the pecuniary advantage of the trustee could be held as anything but bad in law. (12)

With regard to the rules of succession, it may be generally premised that usually they depend upon the nature of each particular foundation or office, and in respect of it custom and practice must govern and prevail over the test

(1) *Jagat Mohini v. Sookhimoni*, 17 W. R., 41, P. C.; followed in *Srimati Mallika v. Ratanmani*, 1 C.W.N., 493.

(2) *Kuppi v. Dorasami*, I.L.R., 6 Mad., 76; *Rajaram v. Ganesh*, I. L. R., 23 Bom., 131.

(3) *Ukoor Doss v. Chunder Sekhur*, 3 W. R., 152.

(4) *Mancharam v. Pranshankar*, I.L.R., 6 Bom., 298; *Duleo v. Srinivas*, 5 B.L.R., 617; *Kuppi v. Dorasami*, I.L.R., 6 Mad., 76.

(5) *Sitarambhat v. Sitaram*, 6 B.H.C. R., 250; *Rajaram v. Ganesh*, I.L.R., 23 Bom., 131 (136).

(6) *Kuppi v. Dorasami*, I. L. R., 6 Mad., 76; followed in *Narayana v. Ranga*, I.L.R., 15 Mad., 183.

(7) *Durga Bibi v. Chanchal*, I.L.R., 4 All., 81; following *Rajah Vurmah v. Ravi Vurmah*, I. L. R., 1 Mad., 235, P. C.

(8) *Kumvar Doorganath v. Ram Chunder*, I.L.R., 2 Cal., 347, P. C.

(9) *Rup Narain v. Junko*, 3 C.L.R., 112; following *Kali Churun v. Golabi*, 2 C.L.R., 129; *Rajah Vurmah v. Ravi Vurmah*, I. L. R., 1 Mad., 235 (248), P. C. This rule was by their Lordships said to fall under the broad principle "*delegatus non potest delegare*" (a delegate cannot delegate away his own authority).

(10) *Rajah of Cherakal v. Mootha Rajah*, 7 M. H.C.R., 210; *O. A. Rajah Vurmah v. Ravi Vurmah*, I. L. R., 1 Mad., 235, P. C.; *Gobinda v. Debendra*, 12 C.W.N., 98; *Rangasami v. Ranga*, I.L.R., 16 Mad., 146.

(11) *Rajah Vurmah v. Ravi Vurmah*, I L. R., 1 Mad., 235 (250), P. C.; following *Greedharee v. Nundokissore*, 11 M.I.A., 428. In re *Rameswaram Pagoda*, 1 I.A., 209 (225); *Rajeshwar v. Gopeshwar*, I. L. R., 84 Cal., 828 (833).

(12) *Rajah Vurmah v. Ravi Vurmah*, I. L. R., 1 Mad., 235 (252) P. C.; *Kuppi v. Dorasami*, I. L. R., 6 Mad., 76 (78); *Ramalingam v. Vythilingam*, I. L. R., 16 Mad., 490, P. C.

law which prohibits both partition and alienation.⁽¹⁾ But while custom may uphold a limited right of partition and alienation, compulsory alienation by way of sale in execution of decree has been disallowed in all cases as being both opposed to Hindu law and public policy.⁽²⁾ But the fact that the property is an endowment does not necessarily prevent its devolution by the ordinary rules of succession. Indeed, there are endowments in which, notwithstanding a religious dedication, property descends to heirs subject to a trust of charge for the purpose of religion.⁽³⁾

191. Power of Alienation.—As regards private alienations it is impossible to generalize, for the constitution and rules of religious brotherhoods, endowments, and offices attached to Hindu temples are not uniform in their character, and custom often determines succession not only in a case of disputed succession, but also when there is a failure of heirs.⁽⁴⁾ Where the terms of the creation of an endowment are known, and no incidents have become engrafted thereupon by time and usage, then the question would mainly be one of construction. If the dedication in favour of a deity is absolute, it constitutes the property a *debutter*, and as such inalienable. Where, however, the donor made a gift of his property to his mother, as manager of an idol, adding "the right and power of gift are yours; I and my heirs shall have no liability, claim or right" the donee was held to possess the right of alienation though the gift in her favour was impressed with a trust in favour of the idol.⁽⁵⁾ Property given for the maintenance of a muth though primarily inalienable may be lost by the operation of the statute of limitation. And where the head of a muth alienates property as a trustee thereof, and for a valuable consideration, the vendee cannot be ejected after twelve years from sale.⁽⁶⁾

192. Mahommedan Endowments.—The rule as to alienations of endowed property, under Mahommedan law, stands on a different footing. As a rule, such property being devoted to charitable uses, and impressed with a charitable trust, is inalienable. This is invariably true of property declared to be *waqf*, whatever may have been the intentions of the donor. A *waqf* is the dedication of some specific property, whether moveable or immovable, permanently to pious or charitable uses, so that from the moment of its appropriation it becomes the property of God, and in which the donor ceases to have all interest, its usufruct being thenceforward devoted to the purpose of the grant, the property itself being both inalienable and non-heritable in perpetuity.⁽⁷⁾ And the rule in this respect is so rigid that even a temporary alienation, as by way of mortgage or on a lease of any portion of the property, is void, even

(1) *Rajah Mutlu v. Perinayagum*, 1 I.A., 209; *Greedharce v. Nundokissore*, 11 M.I.A., 405; *Rajah Vurmah v. Ravi Vurmah*, I.L.R., 1 Mad., 235; *Durga Bibi v. Chanchal*, I.L.R., 16 Mad., 490; *Rajaram v. Ganesh*, I.L.R., 23 Bom., 131 (136, 137).

(2) *Dabo v. Simbas*, 5 B.L.R., 617; *Kalee Churn v. Bungshee*, 15 W.R., 339; *Malik v. Ratan*, 1 C.W.N., 493; *Ganesh v. Ramkrishna*, I.L.R., 12 Bom., 366; *Rajaram v. Ganesh*, I.L.R., 23 Bom., 131; *Durga Bibi v. Chanchal*, I.L.R., 4 All., 81.

(3) *Jagadindra v. Hemanta*, I. L. R., 29 Cal., 129, P. C.

(4) *Rangasami v. Ranga*, I.L.R., 16 Mad., 146; *Rajaram v. Ganesh*, I. L. R., 23 Bom.,

131.

(5) *Hara Sunder v. Basunta Kumar*, 9 C. W.N. 154.

(6) Art. 134, Limitation Act (XV of 1877); *Dattagiri v. Dattatrya*, 4 Bom. L. R., 743, distinguishing *Gnanasanbunda v. Velu*, 2 Bom. L. R., 597, P. C.

(7) *Jewun Das v. Shah Kuheer-ooddeen*, 2 M. I. A., 390 (421); following *Mt. Qadira v. Shah Kaheer-ooddeen*, 3 S. D. R., 407; *Hidaya*, Bk. XV. (Hamilton's Translation, Vol. II., p. 334); *Syed Asheeddeen v. Sreemutty Drobo Moyee*, 25 W. R., 557; *Hassan v. Sagwa*, I. L.R., 24 Bom., 170; *Shama Churn v. Abdul*, 3 C. W. N., 158; *Sarkum v. Rahaman*, I.L. R., 24 Cal., 83.

though its object be to benefit the endowment.⁽¹⁾ A *waqf* may be created with the object of maintaining the descendants of the grantee. But such grants must be distinguished from those made to an individual in his own right, and for the sole purpose of his maintenance, although the grantee may have been enjoined to give the grantor the benefit of his prayers.⁽²⁾ Certain properties appear to partake of the nature of *waqf* from their very user, such as cemeteries or lands occupied by tombs. The *waqif* may create a *waqf* or settlement for any lawful purpose and in favour of any person or class of persons, male or female, major or minor, a relation or a stranger. The donor may assign his property for a mosque or *massa-allah* (prayer-ground), a poor-house or a caravanserai, in all of which cases the incident of inalienability would at once affix itself to the property so dedicated.⁽³⁾ But if at the time of the *waqf* the property was already burdened with a debt, the endowment will still take effect, but subject to the burthen, which may be enforced against it by sale or otherwise, in which case the endowment be rendered void as against the purchaser, but not as against the heirs of the dower, so that the surplus sale-proceeds will be subject to the endowment.⁽⁴⁾

193. In certain cases a distinction seems to have been drawn between an out-and-out *waqf* and grants where the whole of the usufruct is not devoted to religious purposes, but the land is a heritable property burdened with a trust, as, for example, the maintenance of a saint's tomb, in which case the land is said to be alienable subject to the trust.⁽⁵⁾ But it is difficult to reconcile this view with the accepted doctrine, unless on the principle that the estate being heritable was not subject to *waqf*, but to a trust of a nature which could be as well performed by the alienee. But even if so, if the trust be of a permanent character, and the property is tied up for that purpose, how can the trust be faithfully discharged by alienee who may not even belong to the faith. But where the dedication is illusory, there being a mere charge for some charitable purposes on the profits of an estate strictly settled on the settler's family in perpetuity and not dedicated in substance to charitable uses, there is then no valid *waqf*, and no consequent restriction on alienation.⁽⁶⁾ Again, Mahomedan law is strongly against attaching any right of inheritance to an endowment, and a *mutwali* is not on his death succeeded by his heirs, who would take his temporal assets.⁽⁷⁾ And the office of *mutwali* being a trust of a personal nature, it cannot be transferred, nor the endowed property conveyed to any person whom the acting *mutwali* may select.⁽⁸⁾ But the founder of a *waqf* has a right to reserve the management and appointment of a *mutwali* to himself, and he may then exercise his power in favour of any person to the office, and thus convey the property to him.⁽⁹⁾ And so where property is endowed by the proprietor and it devolves on his widow as trustee (*mutwali*), it would retain all its original

(1) *Moulvee Alidoolla v. M. S. Rajesri*, (1846), 5 S. D. A., 266; *Soojat Ali v. Zumerooddeen*, 5 W. R., 158 (in which a *mirasi* tenure at a fixed rent was set aside).

(2) *Bibee Kunez v. Bibee Saheba Jan*, 8 W. R., 313 (315).

(3) *Nemaichand v. Mir Golam*, 3 I.C., 353 (355).

(4) *Hajra Begum v. Khajah Hossein*, 4 B. L. R., 86; upheld on review in *Khajah Hossein v. Hazra Begum*, 12 W. R., 344.

(5) *Futtoo Bibee v. Bhurru Lal*, 10 W. R., 299.

(6) *Phulchand v. Akbar*, I. L. R., 19 All.,

211; *Muhammad v. Rasulan*, I. L. R., 21 All., 329; following *Mahomed v. Amarchand*, I. L. R., 17 Cal., 498; *Abul Fata v. Russomaya*, I. L. R., 22 Cal., 619, P. C.; approving *Bikani v. Shuk Lal*, I. L. R., 20 Cal., 116, F. B.; see for fuller discussion S. 129 *post*, commentary.

(7) *Gulam v. Mohamed*, 8 M. H. C. R., 63; *Abdulla v. Zain Sayad*, I. L. R., 13 Bom., 555; *Syedun v. Allah* (1864), W. R., 327.

(8) *Wahid Ali v. Ashruff*, I. L. R., 8 Cal., 732.

(9) *Advocate-General v. Fatima*, 9 B. H. C. R., 19.

incidents.⁽¹⁾ The terms *altamgha* or *inam* in a royal grant do not by themselves negative the idea of a *waqf* if from the general tenor of the grant no higher interest was intended to be conveyed, and such properties would then be subject to the same rule as an express *waqf*.⁽²⁾ The grant of emoluments attaching to such office as that of an *imamat*, *monjani* or a *khitabat* is for similar reasons untransferable.⁽³⁾

It has been before observed that *waqf* property can on no account be alienated by the party in possession, but in case of necessity the *mutwali* is empowered to alienate the trust-property with the sanction of the *Kazi*, or the Judge by which must now be understood a Civil Court of superior jurisdiction in the district.⁽⁴⁾ Even then, it is only the income and not the corpus that can be pledged to tide over an emergency.⁽⁵⁾

194. Agricultural holdings.—Agricultural holdings are ordinarily non-transferable save and except as provided by the various local Acts regulating them. These Acts would then be the "other law for the time being in force" which supersedes the provisions of this section. It is not intended, nor is it possible to set out here even the leading principles governing these land tenures, for they are not only subject to local laws, but they are also subject to local customs of which the decided cases can afford but a few instances.

195. Service Tenures.—Property which is by its nature or constitution impartible is also as a rule inalienable. Thus estates succession to which is governed by the rule of primogeniture are from their nature impartible, though inalienability is by no means their invariable incident.⁽⁶⁾ But almost all the ancient Zemindaris being in the nature of quasi-sovereignities are both impartible and inalienable and usually descend to a single heir in accordance with the terms of their creation, or long-established custom. Similarly, service-grants, such as the Ghatwal tenure in Bengal,⁽⁷⁾ vatan lands in Bombay,⁽⁸⁾ or Karnams in Madras⁽⁹⁾ being held subject to conditions of service are as such absolutely inalienable.

196. Ghatwali tenures were created by the Mahommedan Government in order to provide both a police and military force to watch and guard the western marches of Bengal against the inroads of lawless tribes. It thus became a necessary incident of such tenures that they should be incapable of alienation, so that their profits might remain unimpaired for each succeeding Ghatwal, and, thus enable him to render the

(1) *Fegredo v. Mahomed*, 15 W. R., 75; *Sheik Abdool v. Pooran Babee*, 25 W. R., 542.

(2) *Mt. Quadira v. Shah Kuheeroodeen*, 3 S. D. A., 407; approved in *Jewun Das v. Shah Kuheeroodeen*, 2 M. I. A., 390 (420, 421).

(3) *Mirzam v. Hudayabbi*, 3 Bom. L. R., 772; *Sheikh Karmodin v. Nawab Mir Sayad*, I. L. R., 10 Bom., 119.

(4) *Shama Churn v. Abdul*, 3 C.W.N. 158; following *Mt. Rajeshwari v. Mahomed*, 7 Sel. Rep., 320; *Jewun Das v. Shah Kuheeroodeen*, 1 M. I. A., 422.

(5) *Nemzi Chand v. Mir Golam*, 3 I.C. 353 (4958).

(6) *Girdharee v. Koolahul*, 2 M.I.A., 344.

(7) *Leelanund v. Monorunjun*, 5 W. R.,

101; In re *Sarwan Singh*, 2 I. J. (N. S.), 149; *Seelanund v. Nusseeb Singh*, 6 W. R., 80; *Chutro v. Assistant Commissioner*, 14 W. R., 203; *Jogeswar v. Nimai*, 1 B. L. R. (N.S.), 7; *Kali Pershad v. Anand Roy*, I.L. R., 15 Cal., 471, P. C.

(8) S. 20, Reg. XVI of 1827, SS. 5, 7, Hereditary Offices Act (II of 1874); *Radhabai v. Anantrav*, I. L. R., 9 Bom., 198 (210), F. B.

(9) *Venkata v. Rama*, I. L. R., 8 Mad., 249; *Chandramma v. Venkaraiju*, I.L.R., 10 Mad., 226; *Venkatarayadu v. Venkataramayya*, I. L. R., 15 Mad., 284; *Dharanipragada v. Kadambari*, I. L. R., 21 Mad., 47; *Subbaraya v. Kamu*, I.L.R., 23 Mad., read 47.

full and efficient service of his office.⁽¹⁾ Ghatwali tenures thus became perpetual leases subject to a condition of service.⁽²⁾ Some Ghatwals, as those of Khurduckpore, pay a fixed rent payable in money and service, and cannot be ejected by the Zemindar for misconduct,⁽³⁾ nor are their lands liable to sale in execution of decrees or capable of private alienation except with the consent of the Zemindar;⁽⁴⁾ but these may be regarded as exceptions to the rule which entitles the Zemindar to resume the grant on cessation of service.⁽⁵⁾ The estate is necessarily not heritable, and although in the usual course the estate descends from father to son, the latter does not take until his appointment is confirmed by the Zemindar,⁽⁶⁾ and from which it follows that there can be no coparcenary interest in a Ghatwali tenure, which is the exclusive property of the Ghatwal for the time being,⁽⁷⁾ and whose right to possess the land depends upon the tenure of the office,⁽⁸⁾ so that the son succeeding to the office is not liable to pay the arrears of rent due by his father.⁽⁹⁾ But certain tenures were created hereditary before the decennial settlement, and these are not resumable on the suggestion that the Ghatwali services are no longer required.⁽¹⁰⁾ Permanent grant may be inferred from long possession,⁽¹¹⁾ and tenures created before the permanent settlement are not resumable so long as the Ghatwals are willing and able to perform the services.⁽¹²⁾ The Ghatwals of Beerbhoom appear to hold such tenures, which though inalienable, are still estates held in perpetuity subject only to the payment of rent and performance of services, and they are empowered to create under-tenures,⁽¹³⁾ but so as to enure beyond the life of the grantor.⁽¹⁴⁾ Ghatwali tenures,⁽¹⁵⁾ and their under-tenures,⁽¹⁶⁾ are not liable either to sale or attachment in execution of decrees. The surplus proceeds of such a tenure collected during the lifetime of the judgment-debtor are liable to be taken in execution as being personal property, but profits accumulated after the death of the judgment-debtor are not so liable. There are several local varieties of Ghatwali tenures possessing their own characteristic incidents, but they mainly differ as regards their liability to resumption and re-assessment which is mainly dependent in a great measure upon the nature of the particular

(1) *Narain v. Badi Roy*, I.L.R., 29 Cal., 227 (229); *Grant v. Bungshee*, 15 W.R., 38 40.

(2) *Leelanund v. Monorunjan*, 5 W.R., 101.

(3) *Munrunjun v. Leelanund*, 3 W.R. 84.

(4) *Leelanund v. Doorqabutti*, (1864) W.R., 249; *Lalla Gooman Singh v. Grant*, 11 W. R., 292 (a case of Ghatwali taluk in Bhagulpore; *Anundo Rai v. Kali Prosad*, I. L. R., 10 Cal., 677; *Kali Pershad v. Anand Roy*, I. L. R., 15 Cal., 471, P. C.

(5) *Leelanund v. Sarwan*, 5 W. R., 292; *Leelanund v. Nusseeb*, 6 W. R., 80.

(6) *Mahbub v. Patasu*, 1 B. L. R., 120; *Jall Dharee v. Brojo Lall*, 10 W. R., 401.

(7) *Chhatradhari v. Saraswati*, I. L. R., 22 Cal., 156; *Sona v. Leelanund*, 5 W. R., 290.

(8) *Debee Narain v. Sree Kishen*, 1 W. R., 321.

(9) *Nilmonee v. Madhub*, 1 B. L. R., 195; *Binode Ram v. Deputy Commissioner*, 6 W. R., 129, on review, 7 W. R., 178; *Jogeswur v. Nimai*, 1 B. L. R. (S. N.), 7.

(10) *Kooldeep Narain v. Government of*

India, 14 M. I. A., 247; O. A., from *Kooldeep Narain v. Mohadeo*, B. L. R. (Sup. vol.), 559; *Leelanund v. Government of Bengal*, 6 M. I. A., 101; *Erskine v. Government*, 8 W. R. 232.

(11) *Erskine v. Manick Singh*, 6 W. R., 10.

(12) *Leelanund v. Munrunjun*, I. L. R., 3 Cal., 251; *Leelanund v. Munrunjun*, 13 B.L. R., 124, P. C.

(13) *Rungolall v. Deputy Commissioner*, W. R. (F. B.), 34; *Mukurbhanoo v. Kostoora*, 5 W. R., 313; *Davies v. Debee*, 18 W. R., 376.

(14) *Grant v. Bangsi*, 6 B. L. R., 652.

(15) *Kustora v. Binoderam*, 4 W.R. (Mis.), 4; *Rajkewsar v. Bunshidur*, I. L. R., 23 Cal., 873; following the last, and distinguishing *Bally Dobeey v. Ganeai Deo*, I. L. R., 9 Cal., 388; cf. *Bukronale v. Nilmoni*, I. L. R., 5 Cal., 389; *Leelanund v. Government of Bengal*, 6 M. I. A., 101; followed in *Nilmoni v. Bukronath*, I. L. R., 9 Cal., 187, P. C.

(16) *Bally Dobeey v. Ganeai Deo*, I. L. R., 9 Cal., 388.

tenure,⁽¹⁾ or the terms of the particular grant.⁽²⁾ A Ghatwali tenure may be held by either a male or a female.⁽³⁾

197. The Ghatwali tenures of Bengal resemble closely the vatan holdings of Bombay which were also service-grants made by the Government, and which are governed by the Acts ⁽⁴⁾ of the Legislature passed to create, define or recognize those ancient tenures. A vatan tenure was originally a life-estate, so that the son was not bound by the mortgage executed by his father, and would take the land free of the mortgage,⁽⁵⁾ and for the same reason adverse possession did not begin to run against the heir till from the death of the vatandar, when he became entitled to succeed.⁽⁶⁾

Vatan lands; Inam lands are now alienable within the limits prescribed by the Vatandar's Act.⁽⁷⁾ But the enfranchisement of an inam in favour of the widow whose estate is inalienable as against the reversioner will not enlarge her estate so as to make it alienable.⁽⁸⁾ As inam lands are inalienable, it follows that the successor to the inamdar is not bound by the alienation made by the latter. So a mortgagee of a service inam cannot, after the death of the service-holder who granted the mortgage, proceed to recover his debt by sale of the service-holding in the hands of the successor, even though the latter may be the son of the mortgagor, and may have inherited the office as such.⁽⁹⁾ While a Ghatwali tenure may be held by a woman, they are incapacitated from holding the office of Karnam.⁽¹⁰⁾ Originally a service-grant, such lands have now been recognized as heritable in permanently-settled districts.⁽¹¹⁾ The rights of a *mulraiya*t as a village headman or settlement-holder is called in certain tracts are both transferable, saleable and attachable but in their entirety.⁽¹²⁾

Karnam lands.

Lands held by Kazis in virtue of their office are not hereditary, being ordinarily held by them during the term of their appointment, but they may become hereditary by creation or custom.⁽¹³⁾ Chakran lands allotted to chowkidars in Bengal in lieu of service are inalienable beyond the chowkidar's term of office, and any tenant whom he may settle on the land has no higher position than that of a tenant-at-will.⁽¹⁴⁾

(1) As to Khurgpur tenures, see S 8, Beng. Reg. I of 1793; *Leelanund v. Government of Bengal*, 6 M.L.A., 101, P.C., and cases *supra*. Digwari tenure in Ramgurh is held to correspond closely with the Ghatwali tenure—*Num Narayan v. Tekant Ganjhu*, 12 C.W.N., 178; *Brojo Nath v. Durga Prasad*, I.L.R., 34 Cal., 753 (772); *Durga Prasad v. Brojo Nath*, I.L.R., 39 Cal. 696 (702).

(2) *Davies v. Dabee*, 18 W. R., 376; *Forbes v. Mir Mahomed*, 13 M. I. A., 438 (464).

(3) *Kasloora v. Manohur*, (1864) W. R., 39; *Doorga v. Doorga*, 20 W. R., 154.

(4) Bom. Reg. XVI of 1827, Hereditary Offices Act (XI of 1843), Vatandar's Act, Bom. Act II of 1874 amended by Bom. Act V of 1886.

(5) *Jaggiwandas v. Imdad Ali*, I.L.R., 6 Bom., 211; *Padapa v. Sanivrao*, I. L. R., 24 Bom., 556, P.C.; approving *Kali v. Hanmappa*, I. L. R., 5 Bom., 435.

(6) *Ravlojirav v. Balvantrav*, I. L. R., 5 Bom., 437.

(7) Bom. Act III of 1874, see SS. 18—21,

69, 71, 83.

(8) *Raja of Venktagiri v. Raja Muddu-krishna*, I. L. R., 26 Mad., 15.

(9) *Minakshisundaram v. Chockalinga*, 5 M. I. J. R., 10; *Lottikar v. Wagle*, I. L. R., 6 Bom., 596.

(10) *Alymalammal v. Venkataramnappa*, (1884) Mad. S. D. A., 83; *Venkataramanna v. Ramanujasami*, I. L. R., 2 Mad., 312; *Chandramma v. Venkataraju*, I. L. R., 10 Mad., 226.

(11) S 7, Mad. Reg. XXIX of 1802, S. 11 Mad. Reg. XXV of 1802; *Kumarasami v. Orr*, I. L. R., 20 Mad., 145.

(12) *Darbari v. Beni Rai*, I. L. R., 32 Cal., 1014.

(13) *Jamal v. Jamal*, I. L. R., 1 Bom., 633; *Dondsha v. Ismalsha*, I. L. R., 3 Bom., 72; *Baba v. Nassaruddin*, I. L. R., 18 Bom., 103; *Dharamadas v. Hafasji*, I. L. R., 19 Bom., 250.

(14) *Ramkumar v. Ram Newaj*, I. L. R., 31 Cal., 1021 (1023).

198. Enfranchisement of service Inam.—As observed before, a service inam is held subject to the conditions which form the consideration for its continuance. But such inam may be enfranchised, the effect of which would then be to convert it into ordinary property subject to the payment of rent, but not to a regrant upon resumption.⁽¹⁾ The occupant will then be considered to take the estate not as his self-acquisition, but in continuation of the former title,⁽²⁾ and this is so even where the enfranchisement is in favour of one member of a joint family and the title deed is granted to him.⁽³⁾ The enfranchisement is merely a release of the reversionary rights of the crown and of the obligation of service and does not alter the incidents of the estate either in regard to its mode of descent or partibility.

199. This section, after enunciating a general proposition as to the transferability of all kinds of property, enumerates nine exceptions of common occurrence where property cannot be transferred. These are most important exceptions though they are not exhaustive, as they do not include untransferable property under "other laws."

200. The chance of an heir-apparent.—With this clause may be

Clause (a).

compared section 60 (K) of the Code of Civil Procedure (4) which excludes from liability to attachment or sale in execu-

tion of a decree "an expectancy of succession by survivorship or other merely contingent or possible right or interest."⁽⁵⁾ The clause is not artistically worded, but it was no doubt enacted to strive at transfers of a mere possibility or expectancy not coupled with any interest or growing out of any existing property. It could not, for example, strive at agreements by expectant heirs, such as an agreement to divide a particular property in a certain way on the happening of a particular contingency.⁽⁶⁾ The legislature prohibits certain transfers either out of policy or because it has in view the benefit of particular individuals. In the former case the transfer is void, the prohibition being construed literally and strictly, whereas in the latter case it would be open to the persons benefited to waive the benefit, introduced in their favour, and on such waiver, the transfer would be given effect to.⁽⁷⁾ The prohibition of this clause is of the former kind, being based on principles of public policy, so that it could not be waived by consent of the party affected by the transfer nor could the Court give effect to the consent even though it may have passed a decree thereupon, as it was observed in a case: "Any terms of a contract which are opposed to public policy are invalid and will not be enforced by the courts. So far as the decree embodied unlawful terms of a compromise it is inoperative and will not be enforced."⁽⁸⁾

201. In England an agreement, in marriage articles to convey to the husband a third part of what shall come to the father of the wife on the death of his father, is good, and equity will

English Law.

(1) *Gunnaiyan v. Kamakchi*, I. L. R., 26 Mad., 349 (347); followed in *Pingala v. Bomireddipalli*, I. L. R., 30 Mad., 434, F. B.

(2) *Yanumula (Sri Raja) v. Yanumula (Sri Raja)*, 13 M.I.A., 333.

(3) *Gunnaiyan v. Kamakchi*, I. L. R., 26 Mad., 339 (349); followed in *Pingala v. Bomireddipalli*, I. L. R., 30 Mad., 434, F. B.

(4) Act V of 1908; S. 266 (K), Act XIV of 1882.

(5) *Umesh Chunder v. Zabur Fatima*, I. L. R., 18 Cal., 164 (177), P. C.

(6) *Ram Nirunjan v. Prayag Singh*, I. L. R.,

8 Cal., 138; *Nasirul Haq v. Fayzul Rahman*, 8 A. L. J. R., 275 (279); *Kanti Chandra v. Ali Nabi*, I. L. R., 33 All., 414.

(7) *Raja of Vizianagram v. Danivada*, I. L. R., 28 Mad., 84 (86).

(8) *Lakshmanaswami v. Rangamma*, I. L. R., 26 Mad., 31 (33); *Nagappa v. Venkat Rao*, I. L. R., 24 Mad., 265; *Raja of Vizianagram v. Danivada*, I. L. R., 25 Mad., 84 (86); *Ramasami v. Ramasami*, I. L. R., 30 Mad., 255 (263); *Olavi Pulliah v. E. Varadarajulu*, 18 M.L.J., 469.

compel an execution.⁽¹⁾ Similarly the assignment for value of the expectancy of an heir-at-law,⁽²⁾ or of the donee under a will⁽³⁾ have been enforced, and in one case sale of the reversionary interest was upheld: "The so-called heir voluntarily sells his reversionary right on his succeeding to the property; if he does so, a court of equity will compel him to fulfil his contract."⁽⁴⁾ A mere *spes successionis* does not, however, fall within the covenant to settle after-acquired property.⁽⁵⁾ The rule observed in England until the passing of a Victorian Statute⁽⁶⁾ that specific performance of an agreement to sell a reversionary interest should not be decreed where the purchase-money was less than the market value of reversion is, however, held not to be the rule in India.⁽⁷⁾ Where a transfer of future property is void under the Act, it may still take effect as a contract of which the court would enforce specific performance. The subject has been already adequately dealt with before (§ 166), and to which reference may be made for fuller information.

202. A chance of succession is nothing more than a hope of succession *Spes Successionis*. (*spes successionis*) and cannot be transferred. This is based upon the assumption that the heir-apparent's or heir-presumptive's chance of succession is a mere contingency and not "property" within the meaning of the Act.⁽⁸⁾ The term "heir-apparent" in the clause is evidently borrowed from the English law according to which the maxim is *nemo est heres viventis*; ⁽⁹⁾ for in a country where coparcenary interests are rare no son can predicate of himself that he would surely succeed to his ancestor's estate. All that he could say is that he is the heir-apparent and might become the heir on the death of his ancestor if the latter has not, in the meantime, disposed of the estate by will or otherwise. Therefore, if an estate be made to *A* for life, and the remainder over to the heirs of *B*, and *A* dies before *B*, the remainder is at an end: for, during *B*'s life, he has no heir: but if *B* dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of *A*.⁽¹⁰⁾ It would thus be seen how clearly the two terms are contradistinguished in the English law of real property, though in the case of a will a greater laxity of interpretation is permitted, so that if there be sufficient on the will to show that by the word "heir" the testator meant heir-apparent, it is so construed; and in which case the popular sense prevails against the technical.⁽¹¹⁾ Hence, if a devise be made to *A* for life, remainder to the heirs of the body of *B*, so long as *B* shall live, an estate *pur autre vie* being given, and the ancestor being *cestui que vie*, the rule of law would plainly be excluded. In its normal legal sense, however, the term means a person whose right of inheritance is indefeasible, provided he outlives the ancestor; as the eldest son, who must by the course of the common law be the heir to his father on his death.⁽¹²⁾ The heir-apparent must be distinguished from

(1) *Hobson v. Trevor*, 2 P. Wms., 191; *Flower v. Buller*, L. R., 15 Ch. D., 665; *Hinde v. Blake*, 3 Beav., 234.

(2) *Hobson v. Trevor*, 2 P. Wms., 191; cf. *Ramchandra v. Dharmo*, 7 B. L. R., 345.

(3) *Hinde v. Blake*, 3 Beav., 235; *Flower v. Buller*, 15 Ch. D., 665.

(4) *Ramchandra v. Dharmo*, 7 B. L. R., 345, per Phear, J.

(5) *In re Simpson*, [1904] 1 Ch., 1 (10).

(6) Stat. 31 Vict., c. 4.

(7) *Gitabai v. Balaji*, 1 L. R., 17 Bom., 232.

(8) *Ramchandra v. Dharmo*, 7 B. L. R., 341, F. B.; *Pranputte v. Lalla Futtah Baha-*

door, 2 Hay., 608; *Carleton v. Leighton*, 3 Nev., 671; *In re Parsons*, 45 Ch. D., 51. In *Samsuddin v. Abdul*, 8 Bom. L. R., 781 (785), Jenkins, C. J., said with reference to this clause: "But this exception cannot be by reason of the future character of this chance; it must be because it was thought undesirable that it should be capable of transfer."

(9) Co. Litt. 8. "No one is the heir of a living person."

(10) *Doe v. Perratt*, 10 Bing., 207.

(11) *Doe v. Perratt*, 10 Bing., 207; *Egerton v. Earl Brownlow*, 4 H. L. C., 108.

(12) 3 Frest. Atest., 5.

the heir-presumptive, which means a person who would be the heir if the ancestor should die immediately, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or a nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son.⁽¹⁾

In Hindu Law, the term could only have but limited applications as denoting a person who would succeed to the self-acquired property of his father, or to an impartible estate; ⁽²⁾ for in the ancestral property he has a vested right by his very birth and he is a co-parcener thereof with his father to whom he is bound to succeed. But the term would be more appropriate to the Mahommedan law, where there is no distinction between ancestral and self-acquired property, the owner for the time being having absolute dominion over all property over which he exercises unfettered power of disposition during his lifetime; and it is only on his death that the right of heirship accrues.⁽³⁾ But the phrase as used here is unfortunate and can hardly be said to embrace all cases to which it evidently relates. And it was clearly misunderstood in a Calcutta case in which it was said that the term "is very rarely used except with regard to the heir of the throne," ⁽⁴⁾ which is undoubtedly incorrect.⁽⁵⁾

It will be noted that the clause is confined to limiting the alienable interest of the rights of an heir or successor, since the other possibility if prohibits the transfer must be of a "like nature" that is *ejusdem generis* with the chance of the heir-apparent and a legatee. In the latter case the legatee need not even be a relation of the testator, for that makes no difference to the case. What is intended is that law would not permit the transfer of an expectancy so remote, as in the two cases illustrated, as to be more a "chance" than a definable interest in property. Its transfer, if permitted, would be no more than hazardous gambling in an uncertainty of which neither the transferrer nor the transferee can know anything. Such a case would, for instance, arise where an agreement is made by an expectant heir with reference to property which he hopes to get after his adoption, and in which case the interest has been held to be too remote to amount to anything more than a "mere possibility" the transfer of which is repugnant both to Hindu Law and the clause under notice.⁽⁶⁾ But the expectancy of a Hindu ⁽⁷⁾ or Mahommedan ⁽⁸⁾ heir is neither so remote nor so contingent as of a person expecting to be adopted and then expecting to inherit a fortune. But it is nevertheless no more than a chance, but whether it amounts to a "mere possibility" within the meaning of the clause will be presently considered.

(1) *Brahmadeo v. Harjan Singh*, I. L. R., 25 Cal., 778.

(2) *Laliteshuvar Singh v. Rameshuvar Singh*, I.L.R., 36 Cal., 481.

(3) *Hasan Ali v. Nazo*, I. L. R., 11 All., 456; *Abdool v. Goolam*, I. L. R., 30 Bom., 904 (316, 317), (751). So the interest of the heir during the lifetime of his predecessor is a mere *spes successionis* and cannot be transferred; *Shamsuddin v. Abdul Hosein*, 8 Bom. L. R., 252 (256), O. A., I. L. R., 31 Bom. 165 (174).

(4) *Brahmadeo v. Harjan Singh*, I. L. R., 25 Cal., 778 (779, 780).

(5) *Per Maclean, C.J., and Banerji, J., in Nandkishore v. Banee Ram*, I.L.R., 29 Cal.,

355 (358); explaining *Brahmadeo v. Harjan Singh*, I. L. R., 25 Cal., 778, as overruled by *Sham Sunder v. Achan Kunwar*, I.L.R., 21 All., 71, P. C. The term *heir-apparent* is quite commonly used in the English law. See Will's R. P. (18th Ed.), 83.

(6) *Sita Ram v. Harihar*, 12 Bom. L. R., 910 (919, 920); *Sham Sunder Lal v. Achan Kunwar*, I.L.R., 21 All., 71, P.C.; *Shamsuddin v. Abdul Hosein*, I.L.R., 31 Bom. 165 (174).

(7) *Kanti Chandra v. Ali Nabi*, I. L. R., 33 All., 414.

(8) *Nasrul Haq v. Fyazul Rahman*, 8 A.L.J.R., 275.

203. The clause bears no analogy to the present law of England relating to the transferability of contingent remainders and executory interests. Before the Real Property Act,⁽¹⁾ however, such interests were regarded as a mere possibility and were

Reversionary Interest.

thus inalienable and could not be conveyed by deed, though they might have been released, but since 1845, they may now be disposed of by deed like any other disposable property. But even now a contingent remainder is no estate: it is merely an expectancy,⁽²⁾ although its alienation is permitted. But in this country the chance of an expectant heir are declared to be inalienable.⁽³⁾ And similarly the interest of Hindu reversioner expectant upon the death of a Hindu female cannot be validly mortgaged or otherwise transferred by the reversioner.⁽⁴⁾ In an earlier case, however, the contrary view was adopted by a divisional Bench of the Calcutta High Court, who observed: "It can scarcely be said that the right of a Hindu reversioner is a mere possibility. It is an interest contingent upon the reversioner surviving the widow, and also upon the non-intervention of a full-heir. This is a contingency dependent upon no man's will, but upon the happening of uncertain events. It is an interest which is capable of being protected by the court."⁽⁵⁾ But it cannot be denied that the interest is no more than only a *spes successionis*, an expectancy of succession by survivorship which is declared to be inalienable. The view of the divisional Bench is untenable and has been held to have been impliedly overruled by the Privy Council⁽⁶⁾ who have applied the rule to mortgages executed before the Act, and which extends its operation to transfers independently of the Act.⁽⁷⁾ Indeed, the principle embodied in the clause had long been recognized as the law applicable to Hindus.⁽⁸⁾ On the same principle an uncertain right in unascertained property cannot be transferred, as, for example, a life-interest in the residue of the real and personal property of a testator after payment of all the charges and after a full administration had taken place of the assets for the purpose of discharging the several dispositions.⁽⁹⁾ But in England possibilities and expectancies are all said to be assignable in equity for value,⁽¹⁰⁾ though they cannot be assigned without valuable consideration.⁽¹¹⁾ In this respect the rule here enacted is different, since Indian law recognizes no distinction between law and equity, and the transfer once prohibited cannot be legalized by any rule to equity or equitable considerations.⁽¹²⁾

(1) (1845), 8 & 9 Vict., C. 106, S. 6.

(2) Will's R. P. (18th Ed.), 344, 377.

(3) *Bahadur Singh v. Mohar Singh*, I. L. R., 24 All., 94 (107), P. C.; *Hargawan v. Baijnath*, 32 All., 88 (91); *Manicram v. Ramalinga*, 29 Mad., 120 (121); *Dhoojetti v. Venkaya*, 30 Mad., 201 (202); *Sooraparaju v. Veyabhadradu*, 30 Mad., 486 (492); *Srigobind v. Balbhaddar*, 10 O. C. 277; *Jagannath v. Dibbs*, 6 A.L.J., 49 (50); *Bhagan v. Mannu*, 13 I. C. 495 (497).

(4) *Sham Sundar v. Achan Kunwar*, I.L.R., 21 All., 71, P. C.; followed and explained in *Nundkishore v. Rane Ram*, I. L. R., 29 Cal., 355; *Anandi Bai v. Rajaram*, I. L. R., 22 Bom., 985; *Babu v. Ramoji*, I. L. R., 21 Bom., 319; *Shamsuddin v. Abdul Hosein*, I.L.R., 31 Bom., 165 (173, 174); *Narasimham v. Madavarayulu*, 13 M. L. J. R., 328; *Manicram v. Ramalinga*, I.L.R., 29 Mad., 120.

(5) *Brahmadeo v. Harjan Singh*, I. L. R., 25 Cal., 778 (780).

(6) *Nundkishore v. Rane Ram*, I. L. R.,

29 Cal., 355 (359); in which the contrary view of the P. C. in *Sham Sundar v. Achan Kunwar*, I.L.R., 21 All., 71, P. C., was followed.

(7) *Nundkishore v. Rane Ram*, I. L. R., 29 Cal., 355, explaining *Sham Sundar v. Achan Kunwar*, I. L. R., 21 All., 71, P. C. The same view was taken in *Ramchandra v. Dharmo*, 7 B.L. R., 341, F. B.; following *Bhoobun v. Taccor Dass*, 2 I. J. (N.S.), 277; *Koraj Kunwar v. Komal Kunwar*, 6 W. R., 334; overruling *Guarcari v. Radha*, 7 B.L.R., 43, note.

(8) *Achhan Kuar v. Thakur Das*, I.L. R., 17 All., 125 (134); *Rao Hiralal v. Gulab Singh*, 10 C. L. R., 1 (3).

(9) *Beete Tokai v. Beglar*, 6 M.I.A., 510 (523).

(10) *Tailby v. Official Receiver*, 13 App. Cas., 523 (543); followed in *In re Ellenborough*, [1903] 1 Ch., 697 (700).

(11) *In re Ellenborough*, [1903] 1 Ch., 697 (700).

(12) *Shamsuddin v. Abdul Hosein*, I.L.R., 31 Bom. 165 (173).

204. The question of validity of alienation of an undivided share by a co-parcener under the Mitakshara law is, in view of the saving clause enacted in section 2 (d) not a question for decision under this clause, but one which must be answered with reference to Hindu law, which contains the following text: "Even a single individual may conclude a donation, mortgage, or sale of immoveable property during a season of distress, for the sake of the family, and specially for pious purposes."⁽¹⁾ Literally construed, this text would confine the power only to the case of legal necessity. But the courts have been loath to restrict it within those narrow limits. They regarded the question from a different stand-point, distinguishing a voluntary from an involuntary alienation. As regards the latter it was felt to be inequitable that the creditor of a Hindu co-parcener should not have available for the satisfaction of his debt the interest of his debtor in the joint property, and consequently, on the principle that "equity would require redress to be afforded to the purchaser by enforcing partition of the whole or of a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share."⁽²⁾ This distinction was recognized by the Privy Council in the leading case which reviewed the leading authorities on the subject and held that an execution-creditor of an undivided co-parcener was entitled to seize the co-parcenary interest of his debtor which he could sell even after his debtor's death.⁽³⁾ But this left the question of the effect of a voluntary alienation still open, and upon it decisions of the courts are by no means unanimous or consistent. In Bengal, however, such a right has been always denied, and, according to the decisions of that court, it would be as true under Hindu law as under this clause that a co-parcenary interest in a Mitakshara family is a "mere possibility" and cannot therefore be alienated. It is conceded there that he may alienate his share if it has been partitioned⁽⁴⁾ or if the alienation is assented to by the other co-parceners.⁽⁵⁾ But has he equally a right to dispose of his undivided share in the joint family? On this question the current of decisions in Bengal is, as observed before, entirely in favour of the view that a member of a joint Hindu family has no authority, without the consent of his co-sharers, to transfer his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family.⁽⁶⁾ In support of this view it was said

(1) Mitakshara I, S. I. 27, 28.

(2) *Strange Hindu Law*, 349, 350, *Suraj Bansi v. Sheo Pershad*, I. L. R., 5 Cal., 148 (166), P. C.

(3) *Suraj Bansi v. Sheo Pershad*, I. L. R., 5 Cal., 148 (174), P. C.; *Deendyal v. Jugleep Narain*, I. L. R., 3 Cal., 198 (206, 207), P. C., citing *Nugender Chunder v. Srinutty Ramunee*, 11 M. I. A., 241; *Banjun v. Brij Bhookun*, I. L. R., 1 Cal., 133, P. C.; *Vira-svami v. Ayyasvami*, 1 M. H. C. R., 471; *Palanivelappa v. Mannaru*, 2 M. H. C. R., 416; *Gundo v. Rambhat*, 1 B. H. C. R., 39; *Damodhar v. Damodhar*, 1 B. H. C. R., 1823. To the same effect, *Jallidhar v. Ram Lall*, I. L. R., 4 Cal., 723; *Rai Narain v. Nownit Lal*, I. L. R., 4 Cal., 809; *Udaram v. Rance*, 11 B. H. C. R., 76; *Mahabalaya v. Tmaya*, 12 B. H. C. R., 138; *Girdharee v. Kantoo*, 22 W. R., 56; *Kalee v. Choirun*, 22 W. R., 214; *Syud Tuffuzzool Hossein v. Raghumatte*, 14 M. I. A., 40.

(4) *Jallidar v. Ram Lall*, I. L. R., 4 Cal., 723; actual partition is not necessary, a family arrangement is sufficient, *Madho Parshat v. Mehrban*, I. L. R., 18 Cal., 157, P. C.

(5) *Sadabart v. Foolbush*, 3 B. L. R., 31, F. B., explained in *Deendyal v. Jugdeep*, I. L. R., 3 Cal., 198 (206, 207), P. C.

(6) *Sadabart v. Foolbush*, 3 B. L. R., 31 F. B., following *Cosserat v. Sudabart*, 3 W. R., 210; *Nundram v. Kashee*, (1822) 3 Sel. Rep., 232; *Sheo Shuru v. Sheo Sahoy*, (1826) 4 Sel. Rep., 158; *Jewan Lall v. Ram Gobind*, 5 Sel. Rep., 163; *Sheo Shurn v. Junain Lall*, 6 Sel. Rep., 175; *Roopna v. Roy Reotee*, (1853) S. D. A., 344; *Joymarain v. Roskun*, 2 S. D. A. N. W. P., 162; *Mitak Ch I, S. I. v. 30*; *Appovier v. Rama*, 11 M. I. A., 57, in which the position of a co-parcener is explained. *Collector v. Hurdai Narain*, I. L. R., 5 Cal., 425; *Chunder v. Hurbuns*, I. L. R., 16 Cal., 137; *Madhov. Mehrban*, I. L. R., 18 Cal., 157, P. C.; *Parsidh Narain v. Jankising*, 7 C. L. J., 644.

that since no individual member of an undivided family can predicate of the joint and undivided property that he has a certain definite share, since the shares to which the members would be entitled on partition are constantly varying by births, deaths and marriages, he could not convey away his share without the consent of the other co-parceners. "If he could do so, he would have the power by his own will, without resorting to partition the only means known to the law for the purpose, to exclude from participation in the portion conveyed away those who, by subsequent birth, would become members of the joint family, and entitled to shares upon partition." (1) This view has been assented to in Allahabad, (2) Oudh (3) and the Punjab (4) though it has not been adopted in Madras, (5) Bombay (6) and the Central Provinces (7) where the right of one member to convey away his share in a joint estate without the concurrence of his co-parceners, if for a valuable consideration, has been affirmed. And in noticing the objection raised by the Bengal Court, the Madras Court observed that if it is contended that the co-parcener cannot convey away a *specific* share, the argument is, of course, valid. But "the person in whose favour a conveyance is made of a co-parcener's interest takes what may, on a partition, be found to be the interest of the co-parcener. What he so takes, at the moment of taking and until ascertained and severed, subject to the same fluctuations as it would be subject to, if it continued to subsist as the interest of the co-parcener." (8) The same view has been taken in Bombay, in which it was held that the transferee may maintain a suit for partition, and thus obtain the share which he has purchased. (9) The share of a co-parcener in

(1) *Per Peacock, C.J.*, in *Sadabant v. Foot-bash*, 3 B. L. R., 31 (44), F.B.

(2) *Balgobind Das v. Narain Lal*, I.L.R. 15 All., 399, P.C.; *Chandab Kishore v. Dampat*, I.L.R., 16 All., 369; *Jamma Prasad v. Jagdeo*, 1 I.C., 83; *Chanata Deo v. Matu Prasad*, I.L.R. 31 All., 176, F.B.; *Kali v. Nawab*, I.L.R., 31 All., 507; *Tulshu Ram v. Babu*, I.L.R., 33 All., 654; *Baran Deo v. Rup Narain*, 11 I. C., 654. But if one co-parcener has alienated, he could not object to alienation by another, *Gauraj v. Shrozar*, I. L. R., 2 All., 898.

(3) *Syed Iltifab v. Samraal Singh*, 10 O.C., 289; *Bagannah v. Chandi*, 14 O.C., 295.

(4) *Mt. Zahro v. Lallu*, (1879) P.R., No. 21; *Banke Rai v. Madho Ram*, (1883) P.R., No. 133, transfer not void but only voidable by the other co-parceners; *Kahn Chaml v. Surb Dial* (1888) P.R., No. 109; *Dharam Chand v. Mt. Karm Deri*, (1893) P.R., No. 6; *Nanak Chand v. Mt. Dagan* (1894) P.R., No. 103, *Piare v. Ram*, 11 I. C., 453.

(5) *Viravamu v. Ayyaswami*, 1 M. H. C. R., 471; *Palanivelappa v. Mannaru*, 2 M. H. C.R., 416; *Peddannuthulaty v. Timma*, 2 M. H.C.R., 270; *Rajacharlu v. Venkataramaniah*, 4 M.H.C.R., 60; *Peddappa v. Ramalingama*, I. L. R., 11 Mad., 406 (in which a co-sharer renounced his share in favour of another. But no such right of alienation exists under Malabar law which allows no partition; *Byari v. Puttanna*, I L.R., 14 Mad., 39.

(6) *Gunao v. Rambhat*, 1 B.H.C.R., 39; *Damodhar v. Damodhar*, *ib.*, 182; assumed

in *Doddappa v. Sonappa*, 8 Bom. L. R., 551.

(7) *Najho Nath v. Mohch*, (1881) Sel. C. No. 90; *Bina Pujari v. Biraj Mohan*, 3 C.P.L. R., 126; *Ram Pershad v. Deo Karan*, C.C.P. L.R., 60; *Mulund Ram v. Ram Ratan*, 2 N. L. R., 52.

(8) *Vitla v. Yamenamma*, 8 M.H.C.R., 6, F.B. The right of the execution-purchaser to partition is affirmed by the Privy Council in *Deendyal v. Jugdeep*, I.L.R., 3 Cal., 198 (209), P.C. *Peddannuthulaty v. N. Timma*, 2 M.H.C.R., 270; *Pahurvelappa v. Mannaru*, 2 M.H.C.R., 416; *Rajacharlu v. Venkataramaniah*, 4 M.H.C.R., 60; *Venkatashella v. Chennaiya*, 5 M.H.C.R., 166; *Vitla v. Yamenamma*, 8 M.H.C.R., 6, F.B.; *Krishnasami v. Rajagopala*, I.L.R., 18 Mad., 73 (84); *Narappa v. Rangasami*, I.L.R., 23 Mad., 89 (91); *Ayyagari v. Ayyagari*, I.L.R., 25 Mad., 690 F.B.; *Rottala v. Pulicat Ramasami*, I.L.R., 27 Mad., 162.

(9) *Vasudev v. Venkatesh*, 10 B. H. C. R., 139 (156), following *Sadasew v. Bapooji*, 4 Morris S. D. A. R. 145; *Jwan v. Gunmoo*, 9 Harr. S.D.A.R., 555; *Gundo v. Rambhat*, 1 B. H. C. R., 39; *Damodhar v. Damodhar*, *ib.*, 182; *Tukaram v. Ramchandra*, 6 B. H. C. R., 247; *Mocundass v. Gunpatrao*, Perry's Or. Ca., 143, and other cases cited by C. J., Westropp, at pp. 157-162; followed in *Pakirappa v. Chanapa*, 10 B. H. C. R., 162, F. B.; *Rangayana v. Ganapabhatta*, I. L. R., 15 Bom., 673. This view presents practical difficulties. The debtor may have mortgaged his share which at the time of the

an undivided Hindu family was in one case described by the Privy Council as property "specific, existing and definite,"⁽¹⁾ but in a later case when the conflict between the High Courts was more directly brought to the notice of the same Board, their Lordships reviewed the whole law on the subject, but held that, as the question before them was as regards execution-sale, they preferred not to pronounce their opinion on the question of the rights acquired by voluntary alienations,⁽²⁾ which, they remarked, stood on a different footing.⁽³⁾ The Bombay and Madras Courts are thus still in conflict with the Courts of Bengal and United Provinces.

205. But the divergence between the two views is, in view of the limitations admitted by the one and equities enforced by the

Difference how far material.

other, practically eliminated. For, in accordance with the view of which the Bombay Courts are the chief exponents, an undivided co-parcener can only alienate his share for valuable consideration. He cannot make a gift of it or dispose of it by will.⁽⁴⁾ And the Bengal Courts, while refusing the right of alienation admit that an alienee for valuable consideration has the right to compel his alienor to force a partition with a view to ascertain his share and to realize it for his benefit. "He obtained their (creditors') money by representing that he had a power to charge the joint family property, which he knew at the time he did not possess; he is therefore at least bound to make good to them that representation, so far as he can, by the exercise of such proprietary right over the same property as he individually possesses."⁽⁵⁾ But it is conceived that the rule would be inapplicable where the creditor had⁽⁶⁾ notice of the nature of the property he was taking, or where, on account of some disability, a partition-suit would be barred.⁽⁷⁾ The right to question an improper alienation is the personal right of a co-parcener which does not survive him.⁽⁸⁾

suit may have increased or decreased. What is then the creditor to take? If his share has decreased the creditor gets no more (*Rangasami v. Krishnayan*, I. L. R., 14 Mad., 409), but what will he get if his debtor's share has wholly lapsed by survivorship and partition has become impossible. See *Madho v. Meharban*, I. L. R., 18 Cal., 157, P. C., where the nephew succeeding to his uncle's estate was held not bound by an enforceable equity against the interest of the latter; cf. also *Suraj Bansi v. Sheo Pershad*, I. L. R., 5 Cal., 148, P. C.

(1) *Per James, L. J.*, in *Syed Tuffuzool v. Rughoonath*, 14 M.I.A., 40, cited per Westropp, C. J., in *Vasudev v. Venkatesh*, 15 B. H. C. R., 139 (154).

(2) *Deendyal v. Jugdeep*, I.L.R., 3 Cal., 198 (209), P.C.; citing *Sadabart v. Foolbush*, 3 B.L.R., 31, F.B., O.A. I.L.R., 1 Cal., 226, P.C., animadverting on *Mahabeer v. Ranyud*, 12 B. L. R., 90 (94), wherein it was assumed that a title acquired by means of an execution-sale stood on no higher ground than one founded on a voluntary alienation (*ib*), p. 209).

(3) "But, however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear

that the distinction may, and in some cases does, exist between them." It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership account taken in order to ascertain and realize its value"—*Deendyal v. Jugdeep*, I. L. R., 3 Cal., 198 (200), P. C.

(4) *Gangabar v. Romanna*, 3 B. H. C. R. 66; *Tukaram v. Ramachandra*, 6 B.H.C.R. 2499; *Vasudev v. Venkatesh*, 10 B. H. C. R. 139 (157); *Udaram v. Ramee*, 11 B.H.C.R. 76; *Trandavandas v. Jamuna*, 12 B.H.C.R. 229; *Kalu v. Basu*, I.L.R., 19 Bom., 803; cf. *Tukshman v. Ramachandra*, I. L. R., 5 Bom., 48, F. C.

(5) *Mahabeer v. Ranyad*, 12 B. L. R., 90 (97); *Jamuna v. Ganga*, I.L.R., 19 Cal., 401.

(6) *Ram Tuhul v. Biseswar*, 15 B. L. R., 208, P. C.

(7) *Ram Sahye v. Lalla Laljee*, I.L.R., 8 Cal., 149; *Ram Soonder v. Ram Sahye*, *ib.*, 919.

(8) *Padareth v. Raja Ram*, I. L. R., 4 All., 235.

The difference of opinion, then, counts for very little except in the application of the equitable doctrine, which would depend upon the view taken in each case.⁽¹⁾ Such a case arose where two Hindu brothers on the death of their third divided brother entered into an agreement as to the mode of division of their deceased brother's property on the death of his widow, and which was upheld on the ground that there was no transfer to pass any interest in the property and that the agreement could not be held to be void under this clause. ⁽²⁾ It was, indeed, a case of family arrangement which the Courts uphold as contracts necessary for the peace of families, and which were never intended to be affected by the rule.

206. Expectancy of Mahomedan Heir.—The general principles of Mahomedan law are in harmony with this clause. The right to inherit a person is not property according to Mahomedan law, and cannot therefore be validly transferred. ⁽³⁾ A mere *spes successionis* is unknown to and not recognized by the Mahomedan law.⁽⁴⁾ But such a possibility must be distinguished from an estate defined though defeasible upon the happening of a contingency. So where in a settlement by Mahomedan on his wife, by which he conveyed his lands to her on condition that if she had a child by him, the grant should be taken as *mukarari*, but that if he should have no child by her, his two sons by another wife should each have an estate therein, it was held that the sons took a definite interest, of the nature of what would be called in English law a vested remainder, subject to its being displaced by the event of there being a son by the wife named, and that such an interest was not a mere expectancy.⁽⁵⁾ So the creation of life-interest is allowed amongst Shi'ahs. Consequently, during the period of life interest the deferred interest may be alienated provided that there is no interference with the particular estate.⁽⁶⁾

207. In some cases the courts have drawn a line between transfers *in presenti* and agreements to transfer such a possibility, holding that while the former are void the latter are "not void because they happen to be made at a time when the interest of the executant is merely one in expectancy and the courts in England as well as in this country have enforced them on the ground that the executant is bound *in foro conscientie* to make good his promise when he obtains an estate in possession" ⁽⁷⁾ This appears to be the trend of thought of the court in another case.⁽⁸⁾ But as has been before observed, this is not the standpoint of the rules which is grounded on policy; moreover, it is difficult to see why a mere change in the form of conveyance should render a transaction legal though it is doubtlessly less obnoxious than an out and out transfer.

208. The chance of Legacy:—There can be no transfer of an expectant interest in property. As such, the bequest of a legacy is a mere chance

(1) *Deendyal v. Jugdeep*, I. L. R., 3 Cal., 198, P. C.

(2) *Sooraparajit v. Veerabhadralu*, 17 M. L.J.R., 505.

(3) *Shamsuddin v. Abdul*, I. L. R., 31 Bom., 165; *Abdul Husen v. Goolam*, 7 Bom. L. R., 742 (750); *Rehali Mohan v. Ahmed Khan*, 1 I.C., 590 (591); *Munshi Fyazul v. Muhammad*, 2 I.C., 865 (871); *Marangami v. Karuppi*, 24 M.L.J., 258.

(4) *Abdul Husen v. Goolam*, 7 Bom. L.R.,

742 (750).

(5) *Umes Chander v. Zubar Fatima*, I.L.R., 18 Cal., 164 (176, 177), P.C.

(6) *Banoo Begum v. Mir Abed Ali*, 9 Bom. L.R., 1152, following *Umes Chunder v. Mt. Zahoor Fatima*, I.L.R., 18 Cal., 164, P.C.

(7) *Gajadhar Singh v. Kaudhaya* (Oudh), 9 I.C., 243.

(8) *Sooraparaju v. Veerabhadralu*, 17 M. L.J.R., 505.

or a possibility which is from its very nature untransferable, for it may be defeated any moment by the testator, or lapse if the legatee does not survive the testator.⁽¹⁾ So where in pursuance of a family arrangement made with his nephew who was entitled to a moiety of his estate, the testator bequeathed all his property to him with full powers of transfer, but without any power to interfere with it during his lifetime, providing however that if the testator's wife survived him, the nephew should maintain and obey her, and if he failed to do so, she would retain all the property and the document would become null and void. On the same date the nephew executed and registered a deed by which in consideration of the will he agreed to make no claim to the testator's property and to obey him and his wife, and that if he failed to comply with this condition, he would have no right to the property.⁽²⁾

The interest so created in favour of the nephew was assigned by him to A and the testator subsequently transferred portions of the property to his other relations, who were all sued by A upon his assignment, but his suit was thrown out by two learned Judges one of whom treated the testator's possession as adverse to the nephew from the date of the will, while the other learned Judge held the assignment to A invalid under this clause. But it may be doubted whether the clause was enacted to invalidate a family settlement of that kind. And so it was held in Allahabad that a provision in a family settlement whereby certain Hindu brothers divided the family property belonging to them amongst themselves and agreed that upon the death of any one of them without male issue his share should pass to the surviving brothers was neither in contravention of Hindu law nor obnoxious to the provisions of this clause.⁽³⁾

209. Mere Possibility not transferable :—The foundation of the rule here enacted is that a mere possibility is not transferable. It may amount to an interest in property but its *quantum* is so uncertain, variable and limited as to pass out of the conception of law. As such the last clause may be regarded as laying down the general rule to which the two previous clauses furnish apt illustrations, since the chance of an heir, or a legatee in the cases assumed is no more than a "mere possibility liable to be defeated or destroyed any moment and which therefore has neither the stability of existence nor ascertainable value which are the main attributes of property. This appears to be the view taken by their Lordships of the Privy Council in a case decided as far back as 1856 in which the facts were as follows: A by four deeds conveyed certain lands and houses situate near Dacca to his mistress B, after which he executed a will appointing his illegitimate son C his executor and after satisfying certain charges thereby created, which would exhaust his whole estate, gave C a life-estate in the residue. At the time of A's death his creditors had sued him and on his death they continued their suit making C, A's legal representative and obtained a decree against C, without reference to his character as the legal representative of A. Execution being sued out the "right, title and interest" of C was sold to D for a nominal sum, and which interest having become vested in D, the latter sued to eject both C and the testator's mistress B, and whereupon the character of the interest possessed by C, under A's will came up for adjudication and their Lordships said: "Now, was that an interest which could be sold under an execution issued in the Supreme Court against the property of the testator?.... For, what is the effect of it? The

(1) S. 92, Indian Succession Act (Act X of 1865).

55.

(2) *Prag Dat v. Chote Singh*, (1906) 9 O C.

(3) *Kanti Chandra v. Al-i-Nabi*, I.L.R., 33 All., 414 (418).

effect of it is merely this: that there being some uncertain rights in some uncertain property in the district or city of Dacca, at a distance from Calcutta, it being uncertain whether the property was worth Rs. 1,00,000, or whether the interest of the debtor is worth anything; that property is put up for sale....and I think it appears here to have been bought for mere nominal sums, it being utterly impossible that there could be any satisfactory means of determining the value, or procuring a fair price by the competition of purchasers acquainted with the value, or capable even of ascertaining the value of the property".⁽¹⁾

210. But this clause merely prohibits a transfer of a mere possibility.

Transfer not Contract prohibited.

It does not prohibit a contract for its transfer in future. And in which case a deed intended to operate as a transfer *in presenti* may still be used as an executory contract, ⁽²⁾ of which specific performance might be enforced in a properly constituted suit and subject to the law governing it. Generally speaking, such agreements are not void merely because they happen to be made at a time when the interest of the executant is merely one in expectancy, and the Courts in England, as well as in this country, have enforced them on the ground that the executant is bound *in foro conscientie* to make good his promise when he obtains an estate in possession.⁽³⁾

211. It has been stated before that the transfer by the Hindu reversioner of his reversionary interest expectant on the determination of the life estate is no more than a mere chance of succession, the transfer of which is prohibited by law. But there is nothing in the clause to prohibit release by the reversioner of his interest in favour of the Hindu widow and in which case the transaction would be upheld. So where a Hindu widow sued her reversioner for a declaration of her absolute ownership under the terms of her husband's will, but the suit was compromised by the reversioner having executed a deed releasing his claim if any in favour of the widow whereupon the latter withdrew from the suit it was held that the transaction was not a transfer within the meaning of this clause and that it could not be condemned on that account.⁽⁴⁾

212. Right of Re-entry.—This clause refers to a right which as

Clause (b)

between landlord and tenant the former possesses against the latter. A right of re-entry may arise in any of the cases enumerated in section 111 in addition to which a covenant for re-entry may be for non-payment of rent⁽⁵⁾ or rates, or for committing waste, or for subletting in breach of the covenant or for any other conditions annexed to the term. They are to be construed, like other contracts, according to the real intention of the parties and invariably in accordance with their liberal construction. On breach of the covenant the lessor, and not the lessee has the option to determine the lease. It has been in some cases laid down that the proviso for re-entry applies only to the breach of an affirmative and not to the breach of a negative covenant.⁽⁶⁾ But the same covenant may be expressed in the affirma-

(1) *Beebe Tokai v. Davod Mullick*, 6 M. I.A., 510 (523, 524).

(2) *Rajah Sahib Pershad v. Durga Persaud*, 12 M.I.A., 286; *Ranee Bhobo Soondree v. Issur Chunder*, 11 B.L.R., 36, P.C.; *Kali Das v. Kanhaiya*, I.L.R. 11 Cal., 121, P.C.; *Mohendra Nath v. Kali Proshad*, I.L.R., 30 Cal., 265 (274, 275).

(3) *Gur Das v. Garul Dhuj*, 9 I.C., 241 (244).

(4) *Olati Pulliah v. E. Varadarajulu*, 18 M.L.J., 469.

(5) *Vaguram v. Rangayyanganar*, I.L.R., 15 Mad., 125.

(6) *Per Channel, B.*, in *West v. Dobb*, 39 L. J. (Q.B.), 190; *Doe d. Palk v. Marchetti*, 1 B. & Ad., 715.

tive as well as in the negative, and the rule is therefore manifestly misleading. As Blackburn, J., said: "Where the proviso for re-entry uses apt words, I think the power of re-entry may be just as well reserved for breaking a negative covenant as for not performing a positive covenant."⁽¹⁾ A right of re-entry always supposes an estate; for a right of entry is nothing without a right to hold and receive the profits; and if an estate be granted to a man, reserving rent, and, in default of payment a right of entry be granted to a stranger, it is void.⁽²⁾ The right of re-entry is not the right of ownership or reversion which can be separately transferred, although the latter upon transfer will carry the right.⁽³⁾ It is a right for the personal benefit of the party and cannot exist for the benefit of a person who has no personal interest in the land.⁽⁴⁾ This clause refers to an usual covenant made in a lease and which may occasion its forfeiture. Conditions are either precedent or subsequent: where the commencement of the lease depends upon the performance of the condition, it is called a "condition precedent," but where the effect of the condition is to enlarge or defeat an estate already created, it is then called a "condition subsequent." The breach of the condition precedent prevents the lease from taking effect, and the lessor is entitled to assign his right, for the assignee may at once sue the intending lessee in ejectment. "The lessor having the *jus disponendi*⁽⁵⁾ may annex whatever conditions he pleases to his grant, provided they be not illegal or repugnant to the grant itself; and upon the breach of any of these conditions may, subject to special statutory provisions for relief against forfeiture, avoid the lease."⁽⁶⁾ Conditions precedent affect the freehold, and they are therefore exempted from the operation of the clause. And where the reversion is assigned the assignee is entitled to enforce all the conditions, whether precedent or subsequent against the lessee. But the clause prohibits the assignment of the *mere* right of re-entry, which is a right reserved by the lessor for breach of any covenant or condition, and which is subject to the equities, the enforcement of which depends upon the right vesting in the landlord. Indeed, at common law, no one but the grantor had the right of re-entry, and no grantee or assignee of the reversion was allowed to enforce the condition for re-entry,⁽⁷⁾ but by a statute passed in 1540 A. D. ⁽⁸⁾ the right of re-entry, "for non-payment of rent, or for doing waste or other forfeiture" was extended also to the assignees. Hence, as the law now stands, no one is entitled to determine the lease unless he has an interest in the land. Being an incident thereof, it cannot be severed therefrom for the benefit of another person unconcerned with the reversion.

213. A provision for re-entry vacates a lease, and it has accordingly been held that no man shall be permitted to re-enter for a forfeiture but the person then legally entitled to the rent or to the reversion.⁽⁹⁾ In England "it was held before the Judicature Act that a right of re-entry could not be effectually reserved to a stranger to the legal estate, although he joined in the demise and had some equitable or beneficial estate or interest in the property."⁽¹⁰⁾ Thus, where by a lease a mortgagee demised, and the executrix, of the mortgagor

(1) *Wadham v. Postmaster-General*, L R, Q. B., 644 (648).

(2) *Smith v. Pakhurst*, 9 A.C.R., 189.

(3) *Semble in Vaguram v. Rangayyanar*, L.R., 15 Mad., 125.

(4) *In re Davis & Co.*, 22 Q.B.D., 194.

(5) "The right of disposition."

(6) *Baylis v. Se Gros*, 4 O.B. (N.S.), 537

(539); *Wood, L. & T.*, (16th Ed.), 329.

(7) *Co. Litt.* 214.

(8) 32 Henry VIII, C 34.

(9) *Holley v. Scot, Loft*, 319; *Doe d. Barney v. Adams*, 2 C. & J., 232; *Doe d. Barker v. Goldsmith*, 2 C. & J., 674.

(10) *Doe d. Barber v. Lawrence*, 4 Taunt., 23 Litt., S. 347, *Co. Litt.*, 214b.

demised and confirmed, and a power of a re-entry for breach of covenants was reserved to them or either of them, it was held that the deed operated as a demise by the mortgagee, and a confirmation by the executrix, and that the proviso for re-entry enured only to the mortgagee, and not to both.⁽¹⁾ The same rule was applied where trustees and *cestui que trust* joined in a lease reserving rent to the *cestui que trust* with proviso for re-entry for non-payment,⁽²⁾ and where the tenant for life and the reversioner joined in a demise.⁽³⁾ The effect of the Judicature Act is to allow beneficiaries to avail themselves of a forfeiture,⁽⁴⁾ but in practice they will generally be represented by their trustees.⁽⁵⁾ Since the covenant for re-entry is indivisible, it must be exercised by all the co-parceners conjointly, and not by one or some of them without the others.⁽⁶⁾

214. The principle is perhaps susceptible of extension to other cases. Thus, where a person lent on hire certain specified articles of furniture on the hire-purchase system, whereby the hirer was to pay a certain sum in a fixed number of periodical instalments, and it was provided that if default were made in the punctual payment of the amounts due, the lender might immediately enter upon the dwelling-house of the hirer and take possession of his furniture. During the currency of the agreement the lender assigned all his right and interest under the agreement to his creditor by way of security, authorizing him to re-enter and take possession of the said furniture in case of default which he sued to enforce, but it was held that the covenant gave only a personal licence which could not be assigned.⁽⁷⁾

A right of re-entry is distinguishable from a right of entry possessed by a person, as for instance, a Hindu whose estate is in possession of a trespasser or a mortgagee, in which case it is perfectly lawful for him to sell his right of entry or his equity of redemption as such, and the purchaser may thereupon sue to eject the trespasser or to redeem the mortgage. This he may do even where the vendor purports to convey the estate itself.⁽⁸⁾ These cases were however, decided by the Bombay High Court before this Act was extended to that Presidency, and under Hindu law by which the transfer of possession actual or constructive was essential to constitute a sale, but since this rule has been abrogated by the enactment of section 54⁽⁹⁾ the cases now merely adorn a principle which underlies this and similar clauses of the section.

215. Easement cannot be transferred.—An easement which may be transferred apart from the dominant heritage would be an easement *in gross*, the transfer of which is recognized neither in this country⁽¹⁰⁾ nor in England.⁽¹¹⁾ for an easement or servitude is not a

(1) *Doe d. Barney v. Adams*, 2 C & J., 232; *Moore v. Earl of Plymouth*, 3 B. & A., 66.

(2) *Doe d. Barber v. Goldsmith*, 2 C. & J., 674.

(3) *Treppel's case*, 6 Co. R., 16 Colo. Eject, 404.

(4) S. 21, Judicature Act, 1873.

(5) *R. S. C.*, Order XVI, v. 8, *Woodfall's*, L. & T. (16th Ed.), 335, 336.

(6) *Doe d. Reetzen v. Lewis*, 5 A. & E., 277.

(7) *In re Davis & Co.; Ex parte Rawlings*, L.R., 22 Q. B. D. 193 (197); following *Brown v. Metropolitan, &c., Society*, 28 L.J. (Q.B.), 236.

(8) *Vasudev v. Tutia*, I.L.R., 6 Bom. 387,

F.B.; *Bai Suraj v. Dalpatram*, I. L. R., 6 Bom. 380, F.B.

(9) See S. 54 post. Comm. "Analogous law."

(10) *Municipal Board of Cawnpet v. Lallu*, I.L.R., 20 All., 200 (203).

(11) *Goddard's Easement* (3rd ed.), 8, 9, *Gael's Easements* (6th ed.), 11. The term has been rather loosely applied in England to cases to which it is clearly inapplicable. Thus the right to a pew in church has been designated an easement (*Brumfit v. Roberts*, L. R., 5 C. P., 224) and it was extended to include right of common (*per Bayley, B.*, in *Barlow v. Rhodes*, 1 C. & U., 439 (1818)).

separable right of property from the dominant heritage. The right is parasitical and cannot be detached from the dominant heritage.⁽¹⁾ It goes with it,⁽²⁾ as is indeed expressly so provided in the Indian Easement Act.⁽³⁾ An easement as such may be transferred within limits. For instance, the dominant owner may release it expressly or impliedly to the servient owner, and when it is expressly released it amounts to an alienation.⁽⁴⁾

216. In England an easement in gross may, it is sometimes said, be enjoyed independently of the possession of any tenement by the grantee. But such rights as for instance, rights of way though valid between the contracting parties, do not possess the incidents of an easement, and in case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only.⁽⁵⁾ And so Lord Cairns, L.J., observed: "There can be no easement property so called, unless there be both a servient and a dominant tenement. . . . There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement. It is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that it is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement."⁽⁶⁾ Easements must then be connected with the dominant tenement, but a license in gross may exist wholly unconnected with any estate and when it is coupled with a grant it is assignable. Thus a license to hunt in a man's park and to carry away the deer killed, or to cut down a tree in a man's ground and to carry away the wood is a license as to the acts of hunting and felling the tree, but as to the carrying away of the deer killed and the tree cut down it is a grant.⁽⁷⁾ An easement is then a right ancillary to the enjoyment of land and cannot be dis-annexed from it.⁽⁸⁾ And it therefore follows that an easement appurtenant to land cannot by assignment be converted into an easement in gross, and that if a man has by grant a personal right in the nature of an easement, not appurtenant to any dominant tenement, he cannot assign such a right to another person.⁽⁹⁾ This must be now regarded as the established law in this country, but in England the doctrine itself has not been free from attacks, for it has been said that if a man is entitled to land he may grant leases or he may grant the exclusive herbage, a right of way, depasture or fishing. If, therefore, a man has a right to take water from a stream as it flows by his lands, why may he not grant that right to another person?⁽¹⁰⁾ Such a right would be

(1) Gale's Easements (6th ed.), p. 8.

(2) Gale's Easements (6th ed.), pp. 65 and 492; Goddard on Easements, p. 11; *Ackroyd v. Smith*, 10 C.B., 161; 19 L.J.C., p. 315; *Amutool v. Jemuch Singh*, 24 W.R., 345.

(3) S. 19, Act V of 1892. Mayne's Hindu Law, 5th ed., para. 312. *Leelanund Singh v. The Government of Bengal*, 6 M.L.A., 101; *Anund Lal v. Maharaja Gurod*, 5 M.L.A., 82; *Raja Nilmani v. Bikanath*, I.L.R., 9 Cal., 187; *Jagjivan v. Indad*, I.L.R., 6 Bom., 211; *Anundo v. Kali Prasad*, I.L.R., 10 Cal., 677; *Muppidi v. Ramana*, I.L.R., 7 Mad., 85. See as to the result of an abolition of the services, *Radhabhai v. Anunt*

Rao, I.L.R., 9 Bom., 198; *Appaji v. Keshao*, I.L.R., 15 Bom., 13.

(4) *Kristadhane v. Nandarani*, I.L.R., 35 Cal., 889 (894).

(5) Gale's Easements (6th ed.), p. 11; Goddard's Easements (3rd ed.), pp. 8, 9.

(6) *Ranqueley v. Midland Railway Co.*, L.R., 3 Ch., 310.

(7) *Thomas v. Sorrell*, Vaugh., 351, cited by Tindal, C.J., in *Muskett v. Hill*, 5 Bing., N.C., 694.

(8) *Hill v. Tupper*, 32 L.J., Exch., 217.

(9) *Ackroyd v. Smith*, 19 L.J.C.P., 315.

(10) *Per Bramwell, B.*, in *Nutall v. Bracewell*, L.R., 2 Ex., 1 (11).

an easement in gross. And an easement is not property, but a right in somebody-else's property, or, in the case of a stream, a right in flowing water which, while flowing, is not a subject of property and cannot be made the subject of an assignment. But under the Settled Land Act such an easement may be exchanged apart from any exchange or partition of land.⁽¹⁾

217. The definition of the term "easement" is somewhat wider in the Indian Act,⁽²⁾ including as it does, besides the rights to which the term is applied in English law, also those rights which in that law are known as *profits a prendre*,⁽³⁾ such as the right of common, including common of turbary or a right of cutting turf in another person's land, common of piscatory or a right of fishing in another's water, and common of pasture, being the right of depasturing cattle on the land of another. Other instances of the same rights are the right to take stones, or sand, or reform the property of another. All these rights are now declared to be inalienable apart from the dominant heritage for the beneficial enjoyment of which they exist. In a case decided before the Act it was held that a prescriptive right of fishery may be claimed as an easement by anyone who can prove a "user" of it for twenty years, although he may have proved no right to any dominant tenement, but the clause does not recognize such an easement *in gross* and it cannot be transferred.⁽⁴⁾ And so an easement of a way for driving cattle must be *appurtenant* to some property.⁽⁵⁾ A mere license to walk over another's property or to use it for a certain purpose is not an easement.⁽⁶⁾ And even where certain customary rights in gross are recognized, as for example, the right of certain villagers to bathe in another's land,⁽⁷⁾ or to use it for village-fairs,⁽⁸⁾ market or horse-races,⁽⁹⁾ or to place *tazias* during *Moharrum*,⁽¹⁰⁾ or to pasture their cattle thereon,⁽¹¹⁾ it does not follow that they can be transferred.⁽¹²⁾ Indeed such rights when unconnected with the enjoyment of a particular heritage are servitudes in gross, personal rights which by assignment could not confer on the assignee a *profit a prendre in alieno solo*.⁽¹³⁾ But such rights are nevertheless under the protection of Law and may be enforced against a person setting up a counter servitude. Thus where a land was used by the Hindus for the purpose of burning Holi and celebrating the ceremonies incident thereto, and the Mahomedans used it for the erection of *tazias*, but neither the Hindus nor the Mahomedans had any proprietary right in the land, which belonged to a zemindar, who did not object to its use by the Mahomedans, whereas the Hindus had been using it for a period of twenty years, it was held that the Hindus' right could not be regarded as an easement, as no right had been set up in respect of any dominant tenement to which it

(1) The Settled Land Act, 1890 (53 & 54 Vict., c. 59, S. 5). In *re Blacken's Settlement*, [1903] 1 Ch., 265.

(2) *Chundee v. Shib Chunder*, I. L. R., 5 Cal., 945. But there is no such thing known to law as an inchoate easement. *Greenlanagh v. Brindley*, [1901] 2 Ch., 324.

(3) "Right to enjoy profit out of the land of another."

(4) *Chundee v. Shib Chunder*, I. L. R., 5 Cal., 945; cf. *Parbutty v. Madho*, I. L. R., 3 Cal., 276; *Scholes v. Hargreaves*, 2 R. R., 532; *Benson v. Chester*, 4 R.R., 708.

(5) *Hira v. Khushalgi*, 2 C. P. L. R., 34; *Anderson v. Jugadamba*, 6 C. L. R., 282.

(6) *Prosonno v. Ram Coomar*, I. L. R., 16 Cal., 640.

(7) *Channanum v. Manu*, 1 M.L.J.R., 47.

(8) *Aslraff v. Jagannath*, I. L. R., 6 All., 497; *Abbot v. Weekly*, 1 *Livinge*, 176.

(9) *Mounsey v. Ismay*, 34 L. J. Ex., 52.

(10) *Mammnan v. Kuar Sen*, I. L. R., 16 All., 178; *Aslraf v. Jagannath*, (1884) A. W. N., 186.

(11) *Matilda v. Pinto*, 15 I. C. 278 (279).

(12) *Ackroyd v. Smith*, 10 C.B. 164; *Bailey v. Stevens*, 31 L. J. C. P., 226.

(13) *Neill v. Duke of Devonshire* L.R., 8 App. Cas., 135 (153).

was appurtenant, but that it was a right which partook of the nature of a servitude which, if interfered with, would be protected.⁽¹⁾ And similarly in another case, where a certain sect of Mahomedans had been for many years in the habit of burying their dead near a shrine in the land of another, who sued them for an injunction, it was laid down that the right was not an easement but a customary right which being confined to a limited class of persons, and a limited area of land, was sufficiently certain and reasonable to be recognized as a valid local custom.⁽²⁾ Upon a similar principle a right to use a bathing-ghat might be supported.⁽³⁾ But where a place has been dedicated to the public none of its members can by prescriptive use acquire any private right therein. No Gangaputra may, for example, claim exclusive right to occupy a defined spot upon the public ghat.⁽⁴⁾ On the same principle no right can by occupation or use be acquired over any part of a public road.⁽⁵⁾

218. Interest restricted to personal enjoyment.—The object of

Clause (d).

this clause is self-evident. An interest restricted to personal enjoyment cannot be transferred, inasmuch as if its transfer were allowed, it might defeat the object underlying the restriction, and it would be manifestly inconsistent with the presumed intention of its founder.⁽⁶⁾ Property may be restricted to personal enjoyment by either law or custom, or the conditions of grant. In some cases property is vested in its holder only for life, or during good behaviour, as remuneration for services to be rendered from time to time to the Government, the village, or the like; for instance, lands held on *ghatwali* tenure in Bengal, or on *vatan* tenure in Bombay, or by *karnams* in Madras, where, from the nature of the tenure, the land is neither alienable by the holder, nor capable of being seized in execution of a decree against him.⁽⁷⁾

Restrictions on the right of alienation of certain tenancy rights are now provided by most local land laws. Impartible estates are also inalienable and rendered as such either by enactments or immemorial custom⁽⁸⁾ recognized by law. For instance, the erection of houses by tenants in the *abadi* of their village does not by custom confer any greater right than that of personal enjoyment so that neither the site nor the right of residence in the house constructed thereon is transferable to an outsider without the consent of the landlord.⁽⁹⁾ *Patni* right over a specific area lying within a *patni taluk* is transferable.⁽¹⁰⁾ The effect of this provision is that any kind of property is *prima facie*

(1) *Ashraf Ali v. Jagannath*, I.L.R., 6 All., 497; following *Mounsey v. Ismay*, 34 L.J., Ex., 52; *Abbot v. Weekly*, 1 Lev., 176.

(2) *Mohidin v. Shrinlingappa*, I. L. R., 23 Bom., 666.

(3) *Shah Muhammad v. Kashi*, I. L. R., 7 All., 199.

(4) *Municipal Board v. Tallu*, I. L. R., 20 All., 200; following *Husain Ali v. Matukman*, I. L. R., 6 All., 39.

(5) *Turner v. Ringwood Highway Board*, L. R., 9 Eq., 418; followed in *Municipal Board v. Tallu*, I. L. R., 20 All., 200 (205). In *Tyron v. Smith*, G. A. & E., 406, the public had claimed a right to erect booths upon the manor during a public fair.

(6) *Juggurnath v. Kishen*, 7 W. R., 266;

Kalicharan v. Mohan, 6 B. L. R., 727; *Duleo v. Srinibas*, 5 B. L. R. 617; *Valia v. Kunhi*, I. L. R. 1 Mad., 235.

(7) *Divali v. Apaji*, I. L. R., 10 Bom., 342.

(8) *Madhab Ram v. Doyal Chand Ghose*, I. L. R., 25 Cal., 445.

(9) *Muhammad Usman v. Babu*, 8 A.L.J. R., 61; *Hanwant Singh v. Kamta*, 11 I. C., 285; *Trimbuk v. Astaram*, (1877) C. P. O. D., No. 185; *Nihal Singh v. Sardar Singh*, 3 C. P. L. R., 7; *Laxman Rao v. Ganpat Rao*, 3 C.P.L.R., 123; *Amrit Rao v. Ramchandra*, 4 C. P. L. R., 109; *Moti Ram v. Rup Khan*, 4 N. L. R., 155.

(10) *Meher Ali v. Tajudin*, I. L. R., 13 Bom. 156 (159).

alienable unless any other law prohibits its alienation, in which case the latter will apply.

219. Res Extra Commercium.—Besides the instances before given, there are certain sacerdotal offices which are from their very nature untransferable. Such rights belong to the *purohits* of a particular place,⁽¹⁾ temple,⁽²⁾ or family,⁽³⁾ or to a Maha Brahmin⁽⁴⁾ who officiates at funeral ceremonies. And similarly a right to receive votive offerings from pilgrims resorting to a temple or a shrine is inalienable and no suit can be maintained for the recovery of *wasilat* in respect of profits derived from a turn of worship, which are in their nature uncertain and voluntary.⁽⁵⁾ Indeed, no man can compel another to make him a voluntary offering of what he may have been accustomed to make to another person. Votive offerings are according to their true significance made to the deity of which the image is its visual symbol and its appropriation by the officiating *priest* is not a right in which he is entitled to traffic.⁽⁶⁾ For the fact that there is a disposing power in the idol as represented by the priest, over the offerings when once received, does not, necessarily imply a disposing power over the right of receiving them. But the offerings when once received do not share the same characteristic since they constitute property which is not distinguishable from any other kind of property.⁽⁷⁾ It was accordingly laid down that where an intruder had received gratuities from persons who had been in the habit of paying them to the hereditary holder of the office of *chalvadi* or bearer, on public occasions of the insignia or symbols of the Lingayet caste at Bagalkot, the latter could not sue to recover them from his rival.⁽⁸⁾ And on the same principle the exclusive right to the office of Chowdhury of boats was negatived on the ground that the payments to the incumbent being voluntary the court could not restrain the rival claimant from receiving them.⁽⁹⁾ But where the emoluments of an office are fixed, or where the person fills the position of trust as a *shebait*, which may subject him to expenditure out of his own pocket,⁽¹⁰⁾ or where a right may be presumed by immemorial usage, as in the absence of a documentary title would suffice to establish a prescriptive right, a suit for declaration of the right would be sustainable,⁽¹¹⁾ and such suit usually carries with it the right to nominate and appoint a successor.

(1) *Damoodur v. Roodurmar*, Marsh., 161; *Vithal v. Anant*, 11 B. H. C. R., 6 (intruder may be sued for damages); *Ganasambanda v. Velu*, 1. L. R., 23 Mad., 271, P. C.

(2) *Pianshankar v. Prannath*, 1 B. H. C. R., 12; *Rajaram v. Ganesli*, 1. L. R., 23 Bom., 131; *Ganasambanda v. Velu*, 1. L. R., 23 Mad., 271, P. C.; *Rajah Vurmah v. Ravi Vurmah*, 1. L. R., 12 Mad., 483; *Lakshmanaswami v. Rangamma*, 1. L. R., 26 Mad., 31. The Court may refuse to execute a compromise—Decree passed for the sale of such an office—*ib.*, p. 33 following *Nayappa v. Vankot Rao*, 1. L. R., 24 Mad., 265 (in which held that a compromise-decree is subject to all the incidents of the compromise).

(3) *Waman v. Balaji*, 1. L. R., 14 Bom. 167.

(4) *Thummun v. Dinonath*, 16 W. R., 171.

(5) *Kashi v. Karlash*, 1. L. R., 26 Cal., 358; following *Ramesur v. Ishanchunder*, 10 W. R., 457.

(6) *Jowahar v. Bhagoo*, 13 S. D. A., (Pt. 1),

362, *Dinonath v. Protap Chandra*, 1. L. R., 27 Cal., 30 (32); *Bheema v. Ramanuja*, 17 M. L. J. R., 493.

(7) *Shorlojanund v. Peary Charan*, 1. L. R., 29 Cal., 470; cf. *Debee Tokai v. Beglar*, 6 M. I. A., 510 (523); *Malika v. Ratanmani*, 1 C. W. N., 493.

(8) *Shankara v. Hanma*, 1. L. R., 2 Bom., 470; following *Boyle v. Dodsworth*, 6 T. R., 681; *Muhammad v. Sayad Ahmed*, 1 B. H. C. R., App. xviii.; *Vithal v. Anant*, 11 B. H. C. R., 6.

(9) *Ram Deehul v. Chukhoo*, 1 N. W. P. H. C. R., 208.

(10) *Mamat Ram v. Bapu Ram*, 1. L. R., 15 Cal., 159 (161); followed in *Syed Hashim v. Huseinsha*, 1. L. R., 13 Bom., 429.

(11) In *Yellappa v. Manika*, 8 B. H. C. R., 27, Mahat was allowed to sue the other Mahats of the village to establish his rights to the perquisites, such as the carcasses of dead animals, &c.

220. The law on the subject was clearly explained by Scotland, C.J., who said: "There is no doubt that the Civil Courts will recognize and enforce the rights of persons holding offices connected with the management and regulation of pagodas; and if the holder of such an office was entitled to remuneration for his services in the way of salary or otherwise, he would have a civil right entitling him to maintain a suit if that remuneration were improperly withheld. So, too, suits are commonly entertained for the purpose of trying and deciding who are fit and proper persons, and of right entitled to be appointed *dharmakartas* of a pagoda. In such cases it will be found that the offices have a secular character, and are so dealt with, though religious duties are attached to them—the occupants being employed to exercise business functions, either as trustees and managers of the property and funds of the pagoda, or as overseers in the regulation of its affairs generally, and having necessarily civil rights and liabilities which may properly be made the subject of a civil suit."⁽¹⁾ In a case which went up to the Privy Council the right of administering *purohitum* to pilgrims resorting to the temple of Rameswaram was admitted to be capable of alienation or delegation, and it was then regarded as no longer the subject of religious sentiment, but a mere proprietary right.⁽²⁾ The sale of *Jajmani Bahis* containing a record of the pilgrims belonging to the assignor is not prohibited, though the assignment would confer on the assignee no right to the pilgrims. Such a sale in fact is not a sale of the assignor's right to act as the hereditary priest of the pilgrims, but only of the books as such.⁽³⁾ Sometimes even alienation of the priestly office is allowed to a person belonging to the founder's family, and standing in the line of succession to him⁽⁴⁾ or to the priest,⁽⁵⁾ or where the transferrer is the *shebait* to another member of his family, but merely for the purpose of carrying on the worship.⁽⁶⁾ And as between the rival family claimants it has been frequently conceded, upon what must be admitted to be a cogent reasoning, that if a worshipper in the exercise of the liberty allowed to him, pays a sum of money as fees to an individual, so as to show that it was intended for the individual, no claim to participation can be made by the other members though they may be joint-heirs in the family priesthood; but, if on the other hand, the fees be paid to a person as a member of the collective body of which he is a unit, the claim to a share therein is admissible and should be disposed of in accordance with the rules regulating the division of other property.⁽⁷⁾ And the courts will also give effect to private agreements between the several priests binding them to divide their earnings.⁽⁸⁾ A priestly partnership bound by a contract, express or implied, giving the members a certain share in a joint income, would again let in the same right which may be enforced like any other right to secular property.⁽⁹⁾ Where estates or emoluments are attached to a hereditary office, such as *Joshipan* in Berar, and represent the remuneration to be enjoyed by the

(1) *Striman v. Kristna*, 1 M. H. C. R., 301 (307, 308).

(2) *Ramaswamy v. Venkata*, 9 M.I.A., 344.

(3) *Gopi Nath v. Jhandu*, 4 A.L.J.R., 712.

(4) *Situmambhat v. Sitaram*, 6 B. H. C. R., 250.

(5) *Mancharam v. Pranshankar*, I. L. R., 6 Bom., 298; *Baroda Charan Dutt v. Hemlata* 13 C.W.N., 242.

(6) *Khatler Chunder Ghose v. Hari Das*, I.L.R., 17 Cal., 557; *Baroda Charan Dutt v. Hemlata*, 13 C.W.N., 242.

(7) *Jowahir v. Bhagu*, (1857) C.S. D. A., 362; *Ram Ittun v. Gori*, (1872) P. R., No. 38; *Gobund v. Sadda*, (1877) P.R., No. 7, 1st B.; *Doorga v. Budri*, 6 N. W. P. H. C. R., 189 (an award as to the shares of the partners legally enforceable); *Krishnasami v. Krishnama*, I. L. R., 5 Mad., 313.

(8) *Becharam v. Thakoormonee*, 8 B. L. R., 53, note; *Mugjoo v. Ram Dyal*, 8 B.L.R., 50.

(9) Cf. *Mugjoo v. Ram Dyal*, 8 B.L.R., 50 (57).

office-holder for the time, they are inseparable from such office. If an alienation is made, it could only hold good during the transferrer's incumbency in office.⁽¹⁾

221. In cases in which the law prohibits alienation, it also protects a person in possession. An intruder may thus be sued for disturbance and for consequential damages,⁽²⁾ or a person in possession may obtain a declaration of his right to officiate as a priest and receive offerings.⁽³⁾

The right of worshipping a deity is inalienable,⁽⁴⁾ and similarly jewels and the other paraphernalia of worship are too sacred to be huckstered and sold.⁽⁵⁾ But the family idol is property and has to be accounted for on partition.⁽⁶⁾

222. Right of Pre-emption.—The right of pre-emption is a purely personal right and cannot be made the subject of sale or bargain of any kind.⁽⁷⁾ Indeed, according to the law of pre-emption, the very object and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to pre-emptive co-sharers. The right is essentially based upon the inquiry which such inconvenience is supposed to cause. From its very origin and nature, the right is not one which is to be enforced merely as an instrument of capricious power of vindictiveness. In its very conception and nature it is a transient right, and being a personal privilege of the pre-emptor, it cannot be made the subject of alienation. "Any attempt on the part of the pre-emptor to bargain with it, is taken to indicate conclusively that the injury of which the pre-emptor complains in suing to enforce pre-emption is unreal, and that the claim is not dictated by *bona fide* motives."⁽⁸⁾ But where the right has been established by a decree, it would appear that there should then be no objection to its mortgage,⁽⁹⁾ *a fortiori* if he has actually obtained possession from the vendee.⁽¹⁰⁾ But where a pre-emptor had obtained a decree for pre-emption, and he then transferred the *property* and not the *decree* to a stranger it was held that the assignee could not sue or take out execution of the decree, but which, however, the original decree-holder might still execute.⁽¹¹⁾

223. Maintenance Grants.—Maintenance grants are as a rule inalienable. But in construing them regard must be had not only to the deed of grant

(1) *Raja Ram v. Waman*, 5 N.L.R., 15 (16).

(2) *Vithal v. Anant*, 11 B. H. C. R., 6; *Chinna v. Tegarai*, I. L. R., 1 Mad., 168; *Kamalam v. Sadagopa*, *ib.*, 356; *Krishnama v. Krishnasami*, I. L. R., 2 Mad., 62, P. C., but no suit will lie where the claim is confined to rights in religious ceremonies without a claim to any office or emolument; *Subbaraya v. Vedantachariar*, I. L. R., 28 Mad., 23.

(3) *Limba v. Rama*, I. L. R., 13 Bom., 348; *Kali v. Gour*, I. L. R., 17 Cal., 906; distinguishing *Narayan v. Krishnaji*, I. L. R., 10 Bom. 233; *Dinonath v. Pratap Chandra*, I. L. R., 27 Cal., 30.

(4) *Venkatrayam v. Shrinivas*, 7 M. H. C. R., 32; *Raja of Cherakal v. Mootha*, *ib.*, 210, *contra* in *Mancharam v. Pranshanker*, I. L. R., 6 Bom., 298.

(5) *Maharani Shibesuree Debi v. Motluranath*, 13 M. I. A., 270.

(6) *Subbaraya v. Chellappa*, I. L. R., 4 Mad., 315; *Dwarkanath v. Jannabee*, 4 W. R., 79; *Damodar v. Uttamram*, I. L. R., 17 Bom., 271.

(7) *Rajjo v. Lalman*, I. L. R., 5 All., 180; explained in *Bela Bibi v. Akbar Ali*, I. L. R., 24 All., 119 (125); *Jasuatn v. Sakhamam*, 13 Bom. L. R., 1042 (1046).

(8) *Rajjo v. Lalman*, I. L. R., 5 All., 180 (183); followed in *Bela Bibi v. Akbar Ali*, I. L. R., 24 All., 119.

(9) *Bela Bibi v. Akbar Ali*, I. L. R., 24 All., 119 (126).

(10) *Ram Gopal v. Peare Lal*, (1899) A.W. N., 163; *Bela Bibi v. Akbar Ali*, I. L. R., 24 All., 107 (125).

(11) *Ram Sahai v. Gaya*, I. L. R., 7 All., 107 (109), distinguishing *Sarju v. Jamna*, unrep: *Rajjo v. Lalman*, I. L. R., 5-All., 180. [The case is no authority for holding that a pre-emption decree cannot be assigned.]

but also to the attendant circumstances. Where a grant was ostensibly made by the grantor, but in reality it was a grant by the Government on the motion of the grantor, it was held that it must be treated as a permanent grant.⁽¹⁾ Maintenance grants carved out of an impartible estate are resumable on the death of the grantor by the successor.⁽²⁾ In certain cases these grants acquire by custom the incident of alienability. Such is, for instance, the *Babuana* property granted in accordance with the family custom (or *Kulachar*) of the Darbhanga Raj to the junior male members of the family to be enjoyed by them in lieu of money-maintenance, subject to the proprietary rights of the grantor, and his ultimate claim as reversioner on the extinction of the grantee's descendants in the male line. In these grants the grantor remains responsible for payment of the Government revenue and retains his position as the recorded proprietor of the property assigned, but the grantee has the right to alienate the property subject only to the contingent interest of the grantor.⁽³⁾ The right of a Hindu widow to maintenance and residence is a personal right, and is, as such, from its very nature untransferable,⁽⁴⁾ for the husband's duty of maintaining his wife is one which he cannot owe to another.⁽⁵⁾ Even a widow's right to maintenance against the heirs is incapable of assignment.⁽⁶⁾ But where in discharge of the obligation a maintenance grant is made to the widow, there is then no reason against its transferability, and indeed there is a good reason for allowing it. For the transferee of property is *per se* armed with the power of alienation at his pleasure, and the reason that a transfer has been made in discharge of an obligation can be no exception to the rule. But, of course, the question assumes a different aspect if the transfer is restricted by a condition against alienation on the part of the transferee in which case it may be a question as to how far the transferee is bound by the condition. It appears to be clear that if the condition has the effect of absolutely restraining alienation, it would be void as opposed to the provisions of section 10.⁽⁷⁾ A maintenance grant has been held to be exempt from attachment at Allahabad,⁽⁸⁾ but the contrary has been affirmed in the Central Provinces.⁽⁹⁾ In a Bombay Case,⁽¹⁰⁾ where only the usufruct of certain land was assigned to a Hindu widow for her maintenance, it being expressly stipulated that the land was not to be in any way alienated, the attachment of the latter in execution of a money-decree against the widow was set aside, but this decision is an authority for no more than the obvious proposition that the creditor could not legally attach what did not belong to his judgment-debtor. In a case, but not of a Hindu widow, the sale by the widow

(1) *Rajaji v. Parthasaradhi*, I. L. R., 26 Mad., 202 (211), P. C.

(2) *Anund Lal v. Gurrood*, 5 M. I. A., 82; *Woodoyaditto v. Mukoond*, 22 W. R., 225; *Uddoy v. Jadub*, I. L. R., 5 Cal., 113; *Agin Bindh v. Mohan*, I. L. R., 30 Cal., 20 (33); *Bhaya Dirgu v. Fateh Bahadur*, 3 C. L. J., 521 (527).

(3) *Rameshwar Singh v. Jibendar Singh*, I. L. R., 32 Cal., 683; *Ramachandra v. Mudeswar Singh*, 10 C. W. N., 978.

(4) *Vyavastha Darpan*, 1059, *Bhyrub Chunder v. Nubo Chunder*, 5 W. R., 111; *Nanak Chand v. Kislan Chand*, 1 P. L. R., 209, and see cases post; *Tara Sundari v. Sarada Charan*, 12 C. L. J., 146 (152); *Salakshi v. Lakshmayee*, 4 M. L. T., 495.

(5) *Narbada v. Mahadeo*, I. L. R., 5 Bom., 99 (103, 104).

(6) *Bhyrub Chunder v. Nubo Chunder*, 5 W. R., 111; *Narbada v. Mahadeo*, I. L. R., 5 Bom., 99 (104).

(7) *Singai v. Baji Rao*, 14 C. P. L. R., 114 (116).

(8) *Gulab Kuar v. Bansidhar*, I. L. R., 15 All., 317; *O. A. Bansidhar v. Gulab Kuar*, I. L. R., 16 All., 443; in which, however, the judgment was confirmed on the sole ground that no appeal lay, but it was thrown out that the question as to the liability of the grant to attachment was one "of importance requiring careful consideration," *ib.*, p. 449.

(9) *Singai v. Baji Rao*, 14 C. P. L. R., 114 (117).

(10) *Diwali v. Apaji*, I. L. R., 10 Bom., 342; explained in *Golak Nath v. Mathura Nath*, I. L. R., 20 Cal., 273; *Singai v. Baji Rao*, 14 C. P. L. R., 114.

of her monthly allowance was upheld by the Privy Council,⁽¹⁾ but no objection as to its inalienability was taken or discussed at any stage of the suit.⁽²⁾ A Mahomedan widow in possession of immovable property of her deceased husband in lieu of her dower has only a lien on the property to secure payment of the dower debt. She has no transferable interest therein.⁽³⁾

But since the right to future maintenance is neither property nor even an interest therein, the Act neither deals with such right nor does this clause interdict its transfer.⁽⁴⁾

224. The law applicable to personal and service grants has been already discussed (§§ 218—223). It would suffice here only to mention that future rents and profits payable to a Ghatwal cannot be sequestered in execution of a decree against him, but a receiver may be appointed to receive them and to pay them over to the decree-holder in satisfaction of his decree⁽⁵⁾ and from which it follows that a voluntary alienation by a Ghatwal of his future rents and profits is equally prohibited; the reason being that if the Ghatwal's future income is assigned away in anticipation, he would not be in a position to pay the wages of Chowkidars, and to perform the duty which devolves upon him as Ghatwal.⁽⁶⁾ But there could be no similar objection to the assignment of the rents and profits which have already accrued due, and which may both be attached and transferred. The case of vatandars stands upon a similar footing. So it has been held in Madras that the enfranchisement or grant of title-deed in respect of personal inams does not in any way affect the right of parties entitled thereto.⁽⁷⁾ Hence where the inam was conferred on the widow of the previous holder, it could not constitute her absolute property so as to be free from the rights of the reversioner.⁽⁸⁾ *Babuana* grants made to the junior male members of the holder of an impartible Raj, and enjoyed by them in lieu of maintenance are not necessarily inalienable. Indeed such grants may be alienated subject to the proprietary right of the grantor and to his ultimate claim as reversioner on extinction of the grantee's descendants in the male line.⁽⁹⁾ The proprietary interest of the owner for the time being of an impartible estate is, unlike ordinary ancestral property subject to the Mitakshara law, absolute and the son has no co-parcenary interest by birth as he would have had in the property if it had not been impartible.⁽¹⁰⁾ But an impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal

(1) *Harris v. Brown*, I.L.R., 28 Cal. 621 (636), P.C.

(2) *Ib.*, pp. 633, 636.

(3) *Mr. Bebee Bachum v. Shaikh Hamid*, 14 M. I. A., 377; *Hadi Ali v. Akbar Ali*, I.L.R., 20 All., 262; *Muzaffar Ali v. Parbati*, I.L.R., 29 All., 640 (646), O A. *Parbati v. Muzaffar Ali*, I.L.R., 34 All., 289 (293), P.C.

(4) *Rani Annapuram v. Swaminathan*, 6 I. C., 439.

(5) *Uday Kumari v. Hari Ram*, I. L. R., 28 Cal., 483 (485).

(6) *Uday Kumari v. Hari Ram*, I. L. R., 29 Cal., 483 (485); following *Rajkishwar v. Bunsidhar*, I. L. R., 23 Cal., 873; *Haridas v. Baroda Kishore*, I. L. R., 27 Cal., 38. To the same effect *Kustoor v. Benoderam*, 4 W.R. (Mis.), 5, but see *Bally Dobey v. Ganei*,

I.L.R., 9 Cal., 388; distinguished in *Raj Kishwar v. Bunsidhar*, I. L. R., 23 Cal., 873 (875).

(7) *Cherukuri v. Mantraratti*, 2 M. H. C. R., 327; *Vangala v. Vangala*, I. L. R., 28 Mad., 13.

(8) *Vangala v. Vangala*, I.L.R., 28 Mad., 13.

(9) *Rameshwar Singh v. Jibendar*, I L.R., 32 Cal., 683; *Ramachandra v. Mudeshwar*, I. L. R., 33 Cal., 1158; *Ganesh Dutt v. Maheshwar*, 6 M. I. A., 164.

(10) *Sarataj Kuari v. Deoraj*, I. L. R., 10 All., 272. P. C.; *Sri Raja Rao Venkata v. The Court of Wards*, I. L. R., 22 Mad., 383, P. C.; *Veera Soorappa v. Errappa*, I. L.R., 29 Mad., 484 (489).

purposes, and may be attached and sold in execution of a decree for such debts.⁽¹⁾

225. Impartible Estate.—An estate may be impartible, but not inalienable,⁽²⁾ while others are both impartible and inalienable, but inalienability is not necessarily an incident of an impartible estate; nor is impartibility to be inferred from inalienability. The incidents of impartibility or inalienability may be either the creatures of law, or they may be acquired by custom. But an impartible Raj, which is inalienable by custom, may be alienated for legal necessity; and the successor to the Raj by right of survivorship is, under the Mitakshara law, liable for the debts proved to have been contracted for legal necessity.⁽³⁾ The fact that an estate is impartible does not prevent the holder for the time being from making grants of the land in perpetuity.⁽⁴⁾ But in the case of a religious endowment its trustee cannot, except on special grounds, create a perpetual tenure binding on his successors in office.⁽⁵⁾ The person entitled to succeed to an impartible estate is not a co-parcener or joint tenant with the *de facto* holder for the time being, for there is no unity of possession, of enjoyment, or of interest.⁽⁶⁾ But the rule of succession is not thereby altered, but rather follows that applicable to partible estates. "The rule of succession is an anomalous rule in the sense that it is not supported by any existing right, which the law can regard as a natural, reasonable, and sufficient foundation for it. It is a survival, a superstructure of which the foundation has perished in the course of ages, and which stands now only because it is buttressed by a series of decisions of the Privy Council, and underpinned perhaps by considerations based on the expediency of preserving an estate in the nature of a Raj in the hands of a man rather than of a woman, and perhaps also by that conservative adherence to custom which is nowhere stronger than in matters relating to succession and inheritance."⁽⁷⁾

A *saranjam* or *jagir* is *prima facie* a grant of the royal share of the revenue only and not of the soil, for life, only resumable at the pleasure of Government, and it is ordinarily both impartible and inalienable. But it may be expressed to confer an absolute estate, and the meaning and effect of the grant is to be gathered from the surrounding circumstances and the object with which the sanad was granted.⁽⁸⁾ Though the holder of inalienable property may not transfer it, he may lose his right thereto by the operation of limitation.⁽⁹⁾ Neither impartibility nor the inalienability of a tenure precludes the holder from creating subordinate interests not operating on the enjoyment of the estate. The holder of an impartible and an inalienable estate may, for instance, grant farming leases of villages comprised in his *zemindari*, and these may be perpetual.

(1) *Muttayan v. Sangili*, I. L. R., 6 Mad., 1, P. C.; *Veera Soorappa v. Hirappa*, I. L. R., 29 Mad., 484 (490).

(2) *Sartaj Kuari v. Deoraj*, I. L. R., 10 All., 272 P. C.; *Venkata (Sri Raja Rao) v. Court of Wards*, I. L. R., 22 Mad., 383, P. C.

(3) *Gopal v. Raghunath*, I. L. R., 32 Cal., 158.

(4) *Narain v. Lokenath*, I. L. R., 7 Cal., 461.

(5) *Narasimha v. Gopala*, I. L. R., 28 Mad., 391; *Mayandi v. Chokalingam*, I. L. R., 27 Mad., 295; *Vidyapurna v. Vidyaniidhi*, ib.,

435.

(6) *Jogendro v. Nityanand*, I. L. R., 19 Cal., 151 P. C.

(7) *Kalahasti (Raja of) v. Achigadu*, I. L. R., 30 Mad., 454.

(8) *Ramkrishnarao v. Nanarao*, 5 Bom. L. R. 983.

(9) *Dattagiri v. Dattatraya*, I. L. R., 27 Bom., 363 (368) following *President etc. of the College of St. Mary Magdalen v. The Attorney General*, 6 H. L. C., 189; *Robett v. The South-Eastern Ry. Co.*, 9 Q. B. D., 424.

226. Mere Right to sue.—This clause has been amended.⁽¹⁾ By striking out the words "for compensation for a fraud or for harm illegally caused" it has made the rule one of general application. The language of the clause is borrowed from the judgment of an English precedent.⁽²⁾ To "sue" means to make a legal claim or to take legal proceedings against any person. It does not necessarily imply institution of a suit by means of a plaint such as is referred to in the Code of Civil Procedure. It rather implies the taking of any legal proceedings in matters of any kind.⁽³⁾

With this clause may be compared section 60 (e) of the Civil Procedure Code⁽⁴⁾ which prohibits the attachment or sale in execution of a "mere right to sue for damages" and under which it has been held that the right to bring a suit or prefer an appeal, is not transferable.⁽⁵⁾ But the right to claim specific performance of an agreement to transfer land is, being property, held under the Code to be attachable.⁽⁶⁾

227. The clause now enacts that a right to sue, as such, cannot be dis-annexed from property of which it is merely an incident so as to be the subject of a separate contract. The right of suit is a personal right annexed to the ownership of property and cannot be severed from it. And even where the property consists of nothing else but only the right of action, as in the case of a personal wrong, the right cannot be transferred but must be enforced, if at all, by the party wronged. The word "mere" means by itself and implies that the transferee acquires no interest in the subject of transfer other than the right to sue as an ostensible owner of the property claimed, of which, it may be, the real owner is somebody else. This does not mean that the transferrer may not empower any one by a duly executed power-of-attorney to bring a suit, for delegation of this power creates only an agency and not a transfer of the right, but in such a case the suit will have to be instituted in the name of the owner who will be the plaintiff in the suit. The restrictive provisions of the clause are said to be directed against "the multiplying of contentious suits,"⁽⁷⁾ or in one word maintenance, it being the policy of the law to repress speculative gambling in litigation which had been the tendency before restrictive statutes were passed in England against maintenance and champerty. These statutes, originally prohibited transfers of all *choses in action*. Thus "if a man owe me money on an obligation or the like, I cannot grant this debt to another, but I may grant a letter of attorney to another man to sue for it and realize it, or I may grant the writing itself to another, and he may cancel it or give it to the obligor."⁽⁸⁾ The reason given being that the obligation imposed on a man by his contract, was to perform what he had undertaken with or for the benefit of the person with whom he had contracted, and no other, and that the right to sue and the liability for damages for a wrong were personal to the injured party and wrong-doer respectively.⁽⁹⁾ But the original rigor of this ancient view of

(1) S. 3, Transfer of Property Amendment Act (II of 1900).

(2) *Prosser v Edmonds*, 1 G. & C., Ex., 481.

(3) *Vajeram v. Purshotumdass*, 7 Bom. L.R., 138 (141).

(4) Act V of 1908, S. 266 (e) Code of Civil Procedure 1862 (Act XIV of 1882).

(5) *Bipro Protap v. Deo Narayan*, 3 W. R., Mis., 16; *Tuffuzul Husain v. Raghunath*, 7 B.L.R., 186; *Shyamchand v. Land Mortgage Company*, I. L. R., 9 Cal. 695.

(6) *Rudra Perakash v. Krishna Mohun*, I L. R., 14 Cal., 241.

(7) 10 Rep., 48a.

(8) *Vin. Abr. Assignment* (B) (D), *Brosle. Chose in action*; Co., Litt., 265a.

(9) Will's P. P. (15th ed.), 29, 30. Harv. Law Rev. iii, 337, 339; cf. *Bluekare Singh v. Mubossein*, 1 Hay., 482; *Gopala Iyer v. Ramasami*, 6 I.C., 290; *Ali Muhammad v. S. C. Chander*, I.L.R., 36 Cal., 345 (351).

contract could not but pass away and as commerce increased, the assignment of choses in action became as much an object of solicitude on the part of the courts of equity as the assignment of a chose in possession had previously been of the courts of law.⁽¹⁾ And now since the passing of the Judicature Act, 1873,⁽²⁾ choses in action are legally assignable, and the assignee is competent to sue in his own name without incurring the taint of maintenance. And this is also the law of India as will be seen, hereafter,⁽³⁾ and according to which all choses in action are assignable, subject only to the exceptions mentioned in this section.

228. The object of this clause is to prevent the abuse resulting from trafficking in litigation and speculation. "The real test," says Sargent, C. J., "in cases of this nature is whether the transaction was a *bona fide* purchase of the matter in dispute or one for the purpose of maintaining or proceeding with litigation and where such is the case, Courts of law and equity will treat the transaction as an infringement of the law against champerty and maintenance, and as having neither validity between the parties thereto, nor conferring any right of action against third persons."⁽⁴⁾ So if an assignment is made with a view to litigation which would not have been otherwise embarked upon, it cannot be sued upon.⁽⁵⁾ Similarly the Courts have declined to enforce an assignment of a right to sue for compensation for the wrongful attachment of moveable property in execution of a decree,⁽⁶⁾ or of a claim for mesne profits⁽⁷⁾ being in the nature of a suit for recovery of damages (§233). The Judges in the last-named case have held that the term "harm illegally caused" should not be restricted to apply only to a personal harm or injury.

229. This clause was, as stated before, held to forbid agreements of champertous character. But, in a number of cases,⁽⁸⁾ it has been held that the English law against champerty and maintenance is not applicable to India. But such agreements when unconscionable, extortionate or inequitable should not receive effect. In agreements of this kind, then the questions are, whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower, or whether the agreement has been made, not with the *bona fide* object of assisting a claim believed to be just, and of obtaining reasonable compensation therefor, but for improper objects as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases effect is not to be given to the agreement.⁽⁹⁾

(1) Add. Contd. p. 75, Co. Litt. 232b, n. 1; *Tyson v. Jackson*, 30 Beav.; 384; *Hare v. London and N. W. Ry. Co.*, Johns., 722.

(2) S. 25 (6).

(3) See Ch. VIII.

(4) *Gokuldas v. Lakshmidas*, I. L. R., 3 Bom., 402; *James v. Kerr*, Ch. D., 449.

(5) *Moreswar v. Kushaba*, I. L. R., 2 Bom., 248; *Tara Soondaree v. Collector of Mymensingh*, 13 B. L. R., 495; *Tarachand v. Sukhlal*, I. L. R., 12 Bom., 554.

(6) *Pragi Lal v. Fatehchand*, I. L. R., 5 All., 207.

(7) *Durga Chandra Roy v. Koilash Chandra Roy*, 2 C.W.N., p. 43; *Pragi Lal v. Fatehchand*, I. L. R., 5 All., 207; *Shyamchand Kundu v. The Land Mortgage Bank of India*, I. L. R., 9 Cal., 695.

(8) *Chunni Kuar v. Rup Singh*, I. L. R.,

11 All., 57; *Husein Bux v. Rahmat Husein*, I. L. R., 11 All., 128; *Loke Indar Singh v. Rup Singh*, I. L. R., 11 All., 118; *Lal Achal Ram v. Raja Kazim Husein*, I. L. R., 27 All., 271 (P.O.); *Ram Coomar v. Chunder Canto*, I. L. R., 2 Cal., 233 (P.C.); *Raghunath v. Nilkanth*, I. L. R., 20 Cal., 843 (P.C.); *Debi Dyal v. Dhan Pertap*, I. L. R., 31 Cal., 433, reversed O.A. on a different point *Bhagwab Dayal v. Debi Dayal*, I. L. R., 35 Cal., 420 (426) (P.C.); *Gossain Ramdhan v. Gossain Dalmir*, 14 O. W. N., 191; *Ahmedbhoy Hubibhoy v. Vulleebhoy Casseembhoy*, I. L. R., 8 Bom., 323; *Ram Kumar Coondoo v. Chunder Canto Mukerji*, I. L. R., 2 Cal., 233 (P.C.); *Mayor of Lyons v. East India Company*, 1 M. I. A., 17; *Fischer v. Kamala*, 8 M. I. A., 170.

(9) *Raja Mohkan Singh v. Raja Rup Singh*, I. L. R., 15 All., 352 (P.C.).

So on a similar principle in one case an assignment made with a view to litigation was not given effect to.⁽¹⁾

230. Maintenance and Champerty.—The foundation of this clause is then the rule against maintenance, which, says Lord Coke, "signifieth in law a taking in hand, bearing up, or upholding of a quarrel or side, to the disturbance or hindrance of common right."⁽²⁾ Similarly Blackstone calls it "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it."⁽³⁾ And so Chancellor Kent says that it is "a principle common to the laws of all well-governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce."⁽⁴⁾ But there may be cases when one man may naturally be interested to assist another in enforcing his just rights. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow-commoner defending rights of common, a landlord defending his tenant, a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose—in all these and similar cases the transaction does not bear the taint of maintenance, for in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor gives to the man who aids him, or the interest arising from the connection of the parties, *e.g.*, master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them.⁽⁵⁾ All these considerations would, however, scarcely arise in a transfer within the contemplation of the clause, which, irrespective of the intention actuating the transfer, makes all transfers of a mere right to litigate void. Such a right should be distinguished from the transfer of property which cannot be got at without suit, as, for example, the transfer of property by a vendor who had previously conveyed the same property by a deed voidable in law.⁽⁶⁾

231. Now as a transfer made in violation of the provisions of this clause would be opposed to public policy, there can be no doubt **Parol evidence.** but that extrinsic parol evidence would be admissible to show the true nature of the transaction, as, for example to show that a transfer of property was in effect no more than a transfer of a right to sue and thereby invalidated the whole document. Damages for personal injuries as for defamation, trespass, and the like are personal to the party aggrieved and cannot be transferred.

232. What amounts to a bare right to sue.—In order to distinguish the case in which law recognizes the policy of permitting the transfer of the right of suit from those which it prohibits, the principle underlying the legislation will have to be clearly grasped. In the first place, it is to be observed that though the clause is inspired by the same principle which underlies the law

(1) *Gokuldas v. Lukmidas*, 1 L. R., 3 Bom., 402.

(2) Co. Litt., 368b.

(3) 4 Black, Comm., 134.

(4) Cited by Lord Coleridge, C. J., in *Bradlaugh v. Newdegate*, 17 Q. B. D., 1 (6).

(5) *Wallis v. Duke of Portland*, 3 Ves., 494;

Bradlaugh v. Newdegate, 11 Q. B. D., 1 (11); *Huntley v. Huntley*, L. R., 8 Q. B., 112; *Prosser v. Edmonds*, 1 Y. & C., 481; *Shackell v. Rosier*, 2 Bing. N. C.; 634; *Pechell v. Watson*, 8 M. & W., 691; see per Fry, L. J., in *Harris v. Brisco*, 504 (512, 513).

(6) *Dickinson v. Barrell*, L. R., 1 Eq., 397.

against maintenance and champerty,⁽¹⁾ neither in this clause nor anywhere else in the Act is the English law against maintenance and champerty as such re-enacted, though in some cases ⁽²⁾ decided before the present enactment the transaction was viewed from that standpoint. But in more recent cases it has been definitely laid down that it would be wholly fallacious to view such transactions from the standpoint of English law.⁽³⁾ In England it is a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller does not think it worth his while to do, and on that consideration sells his pretensions at an under-value. It is immaterial whether the title so sold be a good or a bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. All these practices tend to oppression by giving opportunities to rich men to purchase the disputed titles of others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they may successfully enough maintain against their proper adversaries.⁽⁴⁾ But in this country a transfer made for that purpose or having that effect would not be necessarily void. As their Lordships of the Privy Council observed: "A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable so as to be inequitable against the party: or to be made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."⁽⁵⁾

233. In another case their Lordships repelled the contention advanced before their Board that although the English Law as to maintenance and champerty was not, as such, applicable to India, yet on other grounds, what was substantially the same law was there in force.⁽⁶⁾ In this case an assignment of property said to be worth three lakhs, was made by two plaintiffs claiming to be the next reversioners on the death of a female owner for a

(1) "Maintenance" is the prosecution of a suit of another in which one is in nowise interested. "Champerty" is the maintenance of a suit for a share of the proceeds. The law will be found exhaustively explained by Chitty, J., in *Guly v. Churchill*, 40 Ch. D., 481 (488, 489).

(2) *Fisher v. Kamala*, 8 M. I. A., 170. (The law of the two countries is analogous), see the question discussed in *Gokuldas v. Lakshmidas*, I. L. R., 3 Bom., 402 (409-414); but more recently it has been held that the law relating to maintenance and champerty as such has no application here. *Ram Coomar v. Chunder Canto*, I. L. R., 2 Cal., 233; *Kunwar Ram Lal v. Nil Kanth*, I. L. R., 20 Cal., 843 (P. C.); *Bhagwab Dayal Singh v. Debi*

Dayal, I. L. R., 35 Cal., 420 (426) (P. C.).

(3) *Ram Coomar v. Chunder Canto*, I. L. R., 2 Cal., 233 (P. C.); *Kunwar Ram Lal v. Nil Kanth*, I. L. R., 20 Cal., 843 (P. C.); *Bhagwab Dayal Singh v. Debi Dayal*, I. L. R., 35 Cal., 420 (426) (P. C.); *Baldeo Sahai v. Harbans*, I. L. R., 33 All., 626.

(4) *Hawkin's Pleas of the Crown* I., 470, cited in *Tara Soondaree v. The Collector*, 13 B. L. R., 495 (505).

(5) *Ram Coomar v. Chunder Canto*, I. L. R., 2 Cal., 233 (P. C.); *Raja Mohkan Singh v. Raja Rup Singh*, I. L. R., 15 All., 352 (357) (P. C.).

(6) *Bhagwat Dayal Singh v. Debi Dayal*, I. L. R., 35 Cal., 420 (426) (P. C.).

consideration of Rs. 52,600, of which sum Rs. 600 was paid to the vendors, the balance being only payable in the event of the first plaintiff vendee's success in recovering the property by suit, and whereupon both the vendor and vendees sued to recover possession of the property from the defendant who had purchased it from the widow. Rampini and Pargiter, JJ., threw out the suit holding that the defendant's sale was supported by legal necessity, that plaintiff No. 1 having transferred his right to plaintiffs Nos. 2 and 3 the former had no *locus standi* and the latter's assignment was void being clearly an unconscionable and speculative agreement and one opposed to public policy as fostering and promoting gambling in litigation.⁽¹⁾ But on appeal to the Privy Council Sir Arthur Wilson delivering the judgment of their Lordships held that there was no ground for the contention that the case was to be approached from the standpoint of a rule analogous to the English doctrine of maintenance and champerty, nor was it competent to the defendant to attack the plaintiffs' assignment as an unfair and unconscionable bargain for an inadequate price which was a question between assignor and assignee: "It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present action. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as these indicated must fail."⁽⁵⁾ Their Lordships eventually decreed the claim subject to the plaintiffs' paying to the defendant the portion of the price supported by legal necessity. Of course, in view of the finding that the title to the property in suit was either with the assignor or the assignee both of whom were the plaintiffs, it was not necessary to consider the effect of the assignment if the assignor had not been a co-plaintiff. In another case where the plaintiff had been promised a share of a village in lieu of his services and expenses incurred by him in recovering it and other property for the defendant, their Lordships held that such agreements were not in themselves opposed to public policy "but such documents should be jealously scanned and when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them." Their Lordships then passed in review the expenses incurred by the plaintiff and affirmed the decree for Rs. 1,000 which the Court below had awarded him "as compensation for any expenses legitimately incurred by him."⁽²⁾

234. These cases may be then taken to establish the following propositions: (a) That there may be a valid transfer of property

Result stated. for the purpose of financing a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferrer and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose (3); " (b) That in a case where both the assignor and assignee support the assignment it is not competent to a stranger to plead its invalidity upon any of the grounds upon which the assignor could have successfully

(1) *Debi Dayal v. Bhan Pertap Singh*, I.L.R., 31 Cal., 433 (439) O.A., *Bhagwab Dayal v. Debi Dayal*, I.L.R., 35 Cal., 420 (427), P.O.

(2) *Raghunath v. Nil Kanth*, I.L.R., 23 Cal., 843 (847), P.O.

(3) *Baldeo Sahai v. Harbans*, I.L.R., 30 All. 626 (628).

impeached his assignment: (c) That the fact that the assignment is in favour of an officious intermeddler, and is made with the immediate object of instituting the suit which but for that assistance, would never have been instituted are all *directly* immaterial and insufficient to invalidate the transfer but they are nevertheless indirectly material inasmuch as they have a distinct bearing upon the points relevant in such cases and which are—(a) that the intermeddling was in the nature of gambling (b) or intended to injure or oppress one's adversary (c) or that the transfer was intended to encourage an unrighteous suit so as to be contrary to public policy. It is to be regretted that the Indian rule does not condemn maintenance and champerty as such, against which provision will be found to exist in the lands of all civilized countries; (§. 230) and the enactment of this rule, which curiously was not even referred to in the cases last cited, if it marks a departure from the standard law on the subject, does not go much beyond the provisions of Section 23 of the Indian Contract Act (1) in that it sanctions all transfers not shown to be involuntary or oppressive. But the real test in cases of this nature should be whether the transaction was a *bona fide* purchase of the matter in dispute, or one for the purpose of maintaining or proceeding with litigation, and where such is the case the courts should treat the transaction as having neither validity between the parties thereto, nor conferring any right of action against third persons. (2) The prohibition is directed against speculations in law suits, and any transfer which encourages such speculations is absolutely void. But the rule does not prevent persons from charging the subject-matter of the suit, in order to obtain the means of prosecuting it. (3)

235. Nor does it extend to the assignment of a chose in action if it includes any substantial interest beyond a mere right to litigate. (4) Indeed, it is in dealing with the transfer of an actionable claim that the question often assumes the greatest prominence, for strictly speaking such a transfer falls within the mischief of the rule inasmuch as an actionable claim is not a corporeal thing which may change hand by delivery, but being a right to the performance of a duty by another person, a means of enforcing an obligation imposed on another to make reparation for a breach of contract or a wrong, it is as such incapable of assignment, for the duty of one to a *specific* person can never be transferred. To make an assignment of a chose in action is therefore really to substitute a new duty to the assignee for the duty originally incurred. (5) And so, originally choses in action were untransferable, and it is only by slow degrees that their assignability became recognized. Before their direct assignment, the same result could however be achieved by novation of the contract by a triangular agreement to which the debtor was a party, (6) or by means of the power of attorney which enabled the assignee to sue in the name of the assignor for his own purpose. (7) Its direct transfer was only recognized by the rules of modern equity formulated in the

(1) Act IX of 1872.

(2) *Gokuldas v. Lakshmidas*, I. L. R., 3 Bom., 402; *James v. Kerr*, 40 Ch. D., 449.

(3) *Anderson v. Radcliffe*, 29 L. J., (Q.B.), 12; *Scott v. Miller*, 28 L. J., Ch., 584; *Bhagwah Dyal (Rajah Rai) v. Debi Dayal*, 12 O.W.N. 393, P.C., I.L.R. 35 Cal. 420, P.C.

(4) *Prosser v. Edmonds*, 1 Y. and C., 499.

(5) Ames, 3 Harvard Law Review, 397, 399, *et seq.*

(6) Novation may take place thus: A originally agreed to pay money to B. Then

with the consent of B, A agrees to pay the same money to C, or where a duty of A to B is by consent of all parties replaced by a duty of C to B. (For ancient Law, see Gains II, S. 38; III., Ss. 176, 177. Inst., III, 29, S. 3 Bracton fo. 101 (a).)

(7) This method seems to have been in vogue from very early times. It was known in A. D. 1309. Ames, Harvard Law Review III, 340, note, 2 Pollock and Maitland's Hist. Eng. Law., 223-225.

seventeenth century.⁽¹⁾ When the ecclesiastical chancellor was replaced by a lawyer,⁽²⁾ and which at first allowed the assignee to sue in the assignor's name, the latter being, if necessary, restrained from obstructing the exercise of this right⁽³⁾ The growth of commerce however, led to further changes in the law which may be now regarded as the present stage in its history.

236. Leaving aside for the present the subject of choses in action which
 (1) **Right of action** will have to be more fully dealt with later on,⁽⁴⁾ it may be
 in tort unassign- here stated that the cases falling within the prohibition
 able. are mainly those arising out of tort, although some obligations
ex contractu are also unassignable. Of these the former are wholly untrans-
 ferable, while the latter are for the most part transferable except where they
 offend against the rules already discussed. So the right to sue for damages
 caused to another on account of fraud of the person sued against is not enforce-
 able in law. "I do not hesitate to say," says Turner, L. J., "that in my
 opinion, the right to complain of a fraud is not a marketable commodity, and
 that if it appears that an agreement for purchase has been entered into for the
 purpose of acquiring such a right, the purchaser cannot call upon this Court to
 enforce specific performance of the agreement. Such a transaction, if not in
 strictness amounting to *maintenance*, savours of it too much for this Court to
 give its aid to enforce the agreements."⁽⁵⁾ Thus it has been held that the right
 to sue for compensation for the wrongful attachment of moveable property in
 execution of a decree,⁽⁶⁾ or for mesne profits⁽⁷⁾ which is no more than a right
 to sue for damages⁽⁸⁾ are untransferable. It has been said that a right
 of action for wrongfully withholding goods, where the measure of damages in
 England is, as a rule, the value of the goods may be lawfully assigned over⁽⁹⁾
 but the authority cited for the statement⁽¹⁰⁾ does not support it, and it is sub-
 mitted that the case is no exception to the general principle before enuncia-
 ted.⁽¹¹⁾ An assignment to a person after contract of the right to recover damages
 falls into the same category.⁽¹²⁾ Similarly, the right of action for assault or
 trespass, wrongful conversion or injuries to the person and reputation are from
 their very nature incapable of assignment. And the law is the same whether
 the tort complained of relate to moveable or immoveable property. But in Eng-
 land an exception is made in the case of an assignment of a right of action in
 tort to a solicitor, provided it is not absolute but is only by way of mortgage or
 security for the loan. But having regard to the provisions of section 136 it
 may be gravely doubted if the exception would hold good in this country.

(1) *Fry v. Porter*, 1 Mad., 307.

(2) Sec. 3, Black Comm., 53; Will's R. P. (18th ed.), 161

(3) *Hammond v. Messenger*, 9 Sim., 327. (332); *Mangles v. Duon*, 3 H.L.C., 702 (726).

(4) Chap. VIII.

(5) *Praglal v. Futehchand*, I. L. R., 5 All., 207.

(6) *De Hoghton v. Money*, L. R., 2 Ch., 164 (169).

(7) *Praglal v. Futehchand*, I. L. R., 5 All., 207.

(8) *Shyam Chand v. The Land Mortgage Bank*, I. L. R., 9 Cal., 695; *Durgachandra v. Koylash*, 2 C. W. N., 43.

(9) Wills, P. P. (15th ed.), 149.

(10) *Cohen v. Mitchell*, 25 Q. B. D., 262.

A careful perusal of this case would show that the point was nowhere raised nor was it decided by Lord Esher, M. R., Fry, L. J., and Lopes, L. J.; the sole point raised and decided there being that transactions entered into with an undischarged bankrupt binds the trustee as against a *bona fide* transferee for value, the notice of bankruptcy being immaterial. The bankrupt in the case had no doubt assigned away his right of action for wrongful conversion, but the validity of the assignment was not questioned.

(11) *Simpson v. Lamb*, 7 E. & B., 84; *Anderson v. Radcliffe*, E. B. & E., 806.

(12) *Torlington v. Mayee*, [1902], 2 K. B., 427.

237. The transfer of a right of action in tort may, however, take place by the effect of a contract of insurance, by which the insurer who has paid for the total or partial destruction of the insured goods is subrogated to all the rights of the insured, and can maintain a suit for damages against the author of the loss even though the payment made may not have been within the terms of the policy.⁽¹⁾ But the insurer must sue in the name of the insured unless the right to sue has been properly assigned to him.⁽²⁾

The objection to an assignment of a right to sue for tort ceases as soon as a decree is obtained upon the right. It is then a judgment-debt⁽³⁾ and not an actionable claim and is undoubtedly assignable.⁽⁴⁾

238. On a similar principle it has been laid down that a contract based on personal considerations is not assignable without the consent of the debtor or the other party to the contract.⁽⁵⁾ Such contracts as those between master and servant, principal and agent, are naturally unassignable.⁽⁶⁾ On the same principle a legal practitioner cannot sell his briefs.⁽⁷⁾

239. Contracts can be said in strictness to be assignable only in the sense that the benefit of all that remains to be done under it can be assigned without the consent of the person on whose part there remains something to be done. Where, therefore, there are mutual obligations still to be enforced and the whole consideration has not been executed, there can be no assignment in the sense of discharging the original contract and creating privity or quasi-privity with a substituted person. When contracts involving personal obligations in the contractor are said not to be assignable, what is meant is, not that contracts involving obligations special and personal can be assigned in the full sense of shifting the burden of the obligation on to a substituted contractor any more than where it is special and personal, but that in the first case the assignor may rely upon the act of another as performance by himself, whereas in the second case he cannot. So wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned and can be put in suit by the assignee in his own name after notice.⁽⁸⁾ But the assignment to a person of the right to recover damages for breach of a contract is invalid inasmuch as such an assignment amounts to merely a right to sue which it is the policy of

(1) *Randal v. Cockran*, 1 Ves. S., 98; *Mason v. Samsbury*, 3 Doug., 61 (64); *Simpson v. Thomson*, 3 App. Cas., 279; *Castellani v. Preston*, 11 Q. B. D., 480. Per Lord Hobbhouse in *King v. Victoria Insurance Co.* [1896], A. C., 250; who said: "But it is claimed as a matter of positive law that, in order to sue for damage done to insured goods, insurers must show that if they had disputed their liability the claim of the insured must have been made good against them. If that be good law, the consequence would be that insurers could never admit a claim on which dispute might be raised except at the risk of finding themselves involved in the very dispute they have tried to avoid, by persons who have no interest in that dispute, but who are sued as being the authors of the loss. The proposition is, as their Lordships believe, as novel

as it is startling"—ib., p. 255.

(2) *King v. Victoria Insurance Co.* [1896], A. C., 250 (256).

(3) 3 Black Comm., 436, 438.

(4) *Ghulam Mohamed v. Indira Chand*, 7 B. L. R., 318.

(5) *Namaswamy v. Kadir*, I.L.R., 17 Mad., 168; *Furrow v. Wilson*, L. R., 4 C.P., 746; *Humble v. Hunter*, 12 Q. B., 810; *Arkansas Valley Co. v. Belden Mining Co.*, 127 U. S. R., 379, followed.

(6) *Furrow v. Wilson*, L. R., 4 C. P., 744 (747).

(7) *Burju Rai v. Muhammad*, (1899), A.W. N., 18.

(8) *Tollhurst v. Associated Portland Cement Manufacturers, Ltd.* [1902], 2 K. B., 660; O.A., (1902) A.C., 414. But see *Kemp v. Baerselman* [1906], 2 K. B., 604.

the law to discourage.⁽¹⁾ But if in such a case an assignment is made before the breach occurs then it would not be open to the same objection, though the assignee may have expected the breach and recovery of no more than damages. The reason is that in the one case what is sold is the benefit of a contract, while in the other the property sold is "a mere right to sue" for damages for its breach which this clause condemns. While personal contracts are, as such unassignable, there is nothing in the nature of an executory contract so as to render it unassignable.⁽²⁾ But even an executory contract may be unassignable if it is of a personal nature or confers an obligation which from its nature cannot be transferred. Thus where a stipulation in the sale-deed conferred the right of pre-emption on a person if he could raise the price before a certain date "without obtaining from others, and by your own earnings," it was held that the contract being personal was incapable of assignment.⁽³⁾

240. Of the rights *ex contractu* it may be generally premised that only money or property which is specified or capable of being specified is assignable. Thus while future debts due to an individual may be assigned, a right arising out of a promise to lend money where no fund is specified from which the loan is to be made, cannot be assigned.⁽⁴⁾ Similarly a right which would only give rise to a suit for unliquidated damages is not assignable, and hence an agreement for personal services or indeed any agreement of a personal character are unassignable.⁽⁵⁾ Thus formerly in common law where *B* being employed by *A* to transport goods for him to a foreign market delegated the entire employment to *C* who having performed all the terms of the original contract sued for the stipulated remuneration, but he was non-suited on the ground that there was no privity between the two parties.⁽⁶⁾ Similarly if an order given to a tradesman for the supply of goods was executed by another by the authority of the former, he was taken to have executed it as the agent of the former and was precluded from himself suing for them unless he had at the time given notice to the consumer that he was supplying them, in which case their acceptance would be treated as originating a new contract.⁽⁷⁾ The harshness of these rules was greatly relieved by equity which regarded all contracts as assignable. But even in equity personal contracts cannot be transferred. For if one engages a celebrated singer, to sing or a painter to paint, or a sculptor to execute some work of art, it is obvious that the contract cannot be assigned. So if a lawyer has been entrusted with a brief he could not transfer it.⁽⁸⁾ The right of occupying a house at a certain rent is, however, not a personal right and may be assigned.⁽⁹⁾ But where the contract is expressly or impliedly made unassignable, it cannot then be assigned. Such would be the contract for pre-emption if the pre-emptor could raise the stipulated purchase-money out of his own earnings.⁽¹⁰⁾ Similarly a contract by which a person bound himself to purchase goods of a specified quality from another undertaking not to purchase them from any other merchant for a certain time

(1) *Torkington v. Magee* [1902], 2 K. B. 427; *Alien Mohamed v. S. C. Chander*, I. L. R. 36 Cal., 345 (351); *Gopala Iyer v. Ramasani* (1909) 7 M. L. T. 220; 6 I. C., 290.

(2) *Juran v. Haji Osman*, 5 Bom. L. R., 378.

(3) *Uthandi v. Raghavachari*, 16 M. L. J. R., 106; following *Sital Pershad v. Luckmi Pershad*, I. L. R., 10 I. A., 129.

(4) *Tailby v. Official Receiver*, 13 App. Cas., 523.

(5) *Griffith v. Tower Publishing Co.*, [1897],

1 Ch., 21.

(6) *Schmalz v. Thomson*, 6 Taunt., 147.

(7) *Boulton v. Jones*, 2 H. & N., 564, 27 L. J., Ex. 117; *Hardman v. Booth*, 32 L. J., Ex., 105.

(8) *Birju v. Muhammad*, (1899), A. W. N., 18.

(9) *Ramzani v. Wazir*, (1887), A. W. N., 60.

(10) *Uthandi v. Raghavachari*, I. L. R., 29 Mad., 307.

is a contract of a personal nature the benefit of which could not be claimed by the purchaser's assignee.⁽¹⁾ A contract which is made to secure some future benefit on a future day for a consideration which is not completely executed, but involves the performance of some continuing duty, the assignment is allowed but subject to the performance of the required duty by the assignor. The assignee may then lose the fruits of the assignment, not only if the duty remain unperformed, but also if the assignor become bankrupt and his trustee in bankruptcy adopt and carry out the contract.⁽²⁾ On the other hand when there is no outstanding duty, a contract to transfer property, as for example by a testamentary disposition is valid, but it cannot be assigned so as to confer on the assignee any right on the strength of which he might obtain a declaration against the transferred.⁽³⁾ As regards the purchase and sale of goods, the rule in this country is the same; namely, that the benefit of such a contract may be assigned if the benefit is not coupled with a liability, and the nature of the contract has not been affected by personal considerations.⁽⁴⁾ When it is said that the benefit of a contract may be assigned what is meant is that the rights acquired under the contract may be assigned if their enjoyment is not subject to the burden of a duty or a liability, in which case the rights cannot be severed from the burden, and as the latter cannot as of right be transferred, so cannot also be the rights so connected with it.

241. But, as before remarked, where there is no outstanding duty a contract is, subject to the above restrictions, assignable.⁽⁵⁾ An assignment of a decree subject to a condition that the consideration should be paid if the assignee succeeded in recovering it from the judgment-debtor was upheld as not amounting to a traffic in litigation.⁽⁶⁾ Decrees as such are property and are therefore both liable to attachment and sale.⁽⁷⁾ And the Code of Civil Procedure recognizes the assignment of the subject-matter of the suit by leave of the Court.⁽⁸⁾

242. Public Office and Salaries.—The rule here enacted is grounded

on public policy, since a person is appointed to fill a public office on the ground of confidence reposed in him and in his personal capacity and which therefore cannot be transferred to another by him without reference to the superior authority responsible for his appointment. This clause, of course, does not invalidate exchanges customary in certain departments of Government, which though transfers are made between two officers equally qualified and eligible and which are permitted by the superior authority who controls their employment. Such transfers partake of the nature of a tripartite arrangement which is indistinguishable from the ordinary transfers made in the usual course of official life. The clause does not interdict these and those which are practically indistinguishable from them; otherwise offices are from their very nature unassignable. The following are instances of offices which have been held to be untransferable:—*kariama* right,⁽⁹⁾ office of *mutwali*⁽¹⁰⁾ or Archaka,⁽¹¹⁾ and Dharamkarta of a temple,⁽¹²⁾ and *mirasi*

(1) *Kemp v. Baerselman*, [1906], 2 K. B., 604.

(2) *Wilmot v. Alton*, [1897], 1 Q. B., 17.

(3) *Prag Dat v. Chote Singh*, 9 O. C., 55.

(4) *Jaffer Meher Ali v. The Budget Budget Jute Mills Co., Ltd.*, 1 L. R., 33 Ont., 702, followed in *Nathu v. Hansraj*, 9 Bom. L. R., 114.

(5) *Tolhurst v. Associated Portland Cement & Co., Ltd.* [1902], 2 K. B., 660; O. A., [1903] A. C., 414.

(6) *Gnanasambanda v. Velu Pandaram*, 4 C.W.N., 329 P.C.; *Rajah Varmah v. Ravi*

Varmah, 1 L.R., 12 Mad., 483.

(7) *Gopal Nana Shet v. Johari Mal*, 1 L. R., 16 Bom., 522; *Dellui and London Bank v. Pertap Singh*, 1 L.R., 28 All., 771 F.B.; *Gayadun v. Syed Muntas*, 10 O. C. 136.

(8) O. 22, r. 10, (Act V of 1903).

(9) *Keyaka v. Yaddatil*, 3 M.H.C.R., 380.

(10) *Wahud v. Ashruff*, 1 L.R., 8 Cal., 732, (734).

(11) *Narasimma v. Anantha*, 1 L. R., 4 Mad., 391.

(12) *Subbarayudu v. Kotayya*, 1 L.R., 51 Mad., 389.

office.⁽¹⁾ Service *vatan* lands also fall into the same category.⁽²⁾ The subject has been more fully dealt with before, to which reference must be made for more particular information (§ 197). The salaries of public officers are the remuneration paid to them for the efficient discharge of their allotted duties and inasmuch as they are payable and paid upon their performance they cannot be assigned away before their actual disbursement. Indeed, before actual payment the salary of a public officer is not his property, because he cannot even sue for its recovery, and as was observed in a case: "It is a general rule that a debt which a debtor cannot sue for cannot be attached, and as far as we are able to ascertain, the pay of an officer does not become his property until it actually reaches his hands. He is not in a position to maintain any action or suit for its recovery...until it can be established that the pay is a *debt* or *property* of...it cannot be attached."⁽³⁾

The clause interdicts the assignment of a public office and the salary of a public officer—terms which have been nowhere defined in the Act. The term "public officer" is defined in the Code of Civil Procedure⁽⁴⁾ and which again is an adaptation of the definition of "public servant" as given in section 21 of the Indian Penal Code.⁽⁵⁾ It is possible that every public servant is not necessarily a public officer for the term "officer" means "some person employed to exercise to some extent and in certain circumstances, a delegated function of Government. He is either armed with some authority or representative character, or his duties are immediately auxiliary to those of some person who is so armed"⁽⁶⁾ but the narrower definition of the term "public officer" which finds place in the Code of Civil Procedure should be a fair index of what is meant by that expression here. The word "salary" primarily means the recompense or consideration stipulated to be paid to a person periodically for services, and it may be doubted whether it is intended to include other sums such as travelling and cartage allowances paid to public officers in excess of their fixed stipends. In this respect the Code of Civil Procedure is more explicit⁽⁷⁾ and which confirms the belief that the clause is restricted merely to a salary as such.

243. The question whether the salary of a public officer due for past services is a "debt" liable to transfer is one the answer to which much depend upon whether it is an "actionable claim" i.e., a claim "which the Civil Courts recognize as affording grounds for relief." It has been so held in a case⁽⁸⁾ in which however the wider rule of English Law was followed, but whatever may have been the law anterior to the present enactment, the effect of the present clause is clearly to prohibit the transfer of all sums due or to become due on account of salary before they are actually paid out to the recipient.

244. Pensions.—The same policy justifies the prohibition enacted in this clause which equally renders invalid any assignment of all pensions whether political, civil or military. As such it re-enacts the following provisions of the Pensions Act.⁽⁹⁾

(1) *Rangasami v. Ranga*, I.L.R., 16 Mad.,

146.

(2) *Radhagai v. Ramchand*, I. L. R., 9 Bom., 198.

(3) *Bansi Lall v. Mercer*, 7 N.W.P.H.C.R., 331.

(4) S. 2 (17), Act V of 1908.

(5) For the meaning of which, see 1 Gour's Penal Law, §§ 114-142.

(6) *Reg. v. Ramajirav*, 12 B. H. C. R., 1; *Nazamuddin v. Queen Empress*, I. L. R., 28 Cal., 344 (346).

(7) S. 60 (i), Civil Procedure Code, (Act V of 1908).

(8) *P. & O.S.N. Co., v Secretary of State*, 5 B.H.C.R., (App.) 15; *Hussen Bhamjee v. Hicks*, 18 W.R., 124.

(9) Act XXIII of 1871.

11. No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court.

12. All assignments, agreements, orders, sales and securities of every kind made by the person entitled to any pension, pay or allowance mentioned in section 11, in respect of any money not payable at or before the making thereof, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein are null and void.

Assignments, etc., in anticipation of pension, to be void.

The policy of prohibiting the transfer of pensions is to insure its enjoyment by the pensioner in comfort. Being an offering made to the recipient in gratitude for his past services, and being almost always less than the salary which the pensioner was accustomed to draw, it is considered right, that its enjoyment shall be assured to the recipient. But being a limitation on the rights of the creditor, the term should be construed strictly so as to include only a periodical allowance or stipend granted not in respect of a right, privilege perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependents.⁽¹⁾ This Act, it should be noted, does not prohibit a transfer of *land*, though it may be in the transferer's possession in lieu of pension.⁽²⁾ Nor does it prohibit the assignment of a pension not granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance.⁽³⁾ Payments of money for purposes other than these may be "grants of money or land revenue" within the meaning of section 3 of the Pension's Act, but their assignment is not prohibited by section 12. So in England salaries and pensions not given for the performance of public services may be assigned.⁽⁴⁾ A *bonus* as well as pensions are both not attachable, though a bonus having been paid, may of course, be transferred like any other property.⁽⁵⁾

245. It will be noted that these actions practically cover the same ground as the clause under notice, though the latter is somewhat narrowed in its effect. Both however deal with pensions of all kinds, but while the clause prohibits their assignment generally, section 12 of the Pensions Act only prohibits their assignment before they are "payable," but which term has been understood to mean due and demandable by the person entitled. It was so held in a case in which the Zamorin of Calicut who was entitled to a Political pension of Rs. 6,000 a month payable quarterly devised to the plaintiff whatever might be in arrears at the time of his death. The Zamorin died on the 6th August 1892 before the quarterly instalment fell due, and whereupon the plaintiff sued for its recovery, and it was contended for him that the term "payable" was wide enough to

(1) *Secretary of State v. Khemchand*, I.L.R., 4 Bom., 432; *Balkrishna v. Gobind* (1902), A. W. N. 161; *Lachmi Narain v. Makund Singh*, I. L. R., 26 All., 617.

(2) *Balwant v. Secretary of State*, 7 Bom. L.R., 497 (512); *Secretary of State v. Khemchand*, I.L.R., 4 Bom., 432; *Lachmi Narain v. Makund Singh*, I.L.R., 26 All., 617; *Amna Bibi v. Najm-un-nissa*, I. L. R., 31 All., 382, (384).

(3) *Subraya v. Velayuda*, I.L.R., 30 Mad., 153.

(4) *Grenfell v. Windsor* (Dean of) 2 Beav. 544; *Liverpool Corporation v. Wright*, 28 L.J. Ch. 868, *Dent v. Dent*, L.R. 1 P. 386, distinguished in *Lucas v. Harris*, 18 Q.B.D. 127.

(5) *Muhammed v. Carlier*, I. L. R., Mad., 272; *Bawandas v. Mulchand*, I. L. R., 6 All., 173; see also *Bishamber v. Nawab Imdad*, I.L.R., 18 Cal., 216 (P. C.).

include the accrual of a right to receive payment as distinct from when the payment was actually due, but the Court overruled the contention and held that the word merely referred to the time when the payment was due and demandable as of right. It then went on to add that even if section 12 of the Pensions Act did not authorise that construction, the present clause was in point as it was more positively worded and prohibited all transfers of political pensions.⁽¹⁾ The term "pension" is a relative term and while it is true that the character of non-transferability is not indelibly impressed upon it even after it reaches the hands of the pensioner, still it undoubtedly retains that character so long as it remains unpaid in the hands of the Government irrespective of whether the intended beneficiary is alive or dead.⁽²⁾

246. While both the Act as well the clause deal with only a transfer *inter vivos* the clause has been construed to prohibit even a devise by a Hindu on the ground "that as the law of testamentary disposition among Hindus has been treated simply as a development of the law of gift *inter vivos* the principles applying to the latter under section 6 of the Transfer of Property Act, must be held equally applicable to the former, that is to say, that what cannot be given in life, cannot be given by will."⁽³⁾

247. Stipends and Political Pensions:—In this view it becomes necessary to examine with greater precision the meaning of the terms "stipends" and "political pensions" the transfer and devise of which is here prohibited. Stipends allowed to civil and military pensioners of Government are pensions and superannuation, compassionate or other allowances periodically payable on retirement from active service. But the term "political pension" is not susceptible of a similarly easy description. For one thing the word "pension" is nowhere defined, but it is undoubtedly used in its ordinary sense, meaning a periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past service, consideration or merit; or as compensation to dethroned princes, their families and dependents.⁽⁴⁾ A grant of money or land revenue as such is scarcely comprised in that term,⁽⁵⁾ though it would include an annuity settled in consideration of a lump sum paid down by the pensioner. Such was the case of the descendant of the King of Oudh who had inherited share in the interest of the Oudh loan of 1838 by the term of which interest at 4 per cent. was payable as pension in perpetuity. In 1842 the King made a further loan of 12 lakhs of rupees to the East India Company stipulating that the interest due thereon should be treated as an augmentation of the pension already secured by the previous loan of 1838. A creditor of a descendant of the original pensioner attached his share of the annuity in execution of his money decree and the question that their Lordships of the Privy Council had to decide was whether it was a "political pension" within the meaning of section 266 of the Civil Procedure Code 1882, so as to be exempt from attachment under that section, which they held it to be, overruling the creditor's contention that the arrangement of 1842 was in its nature akin to a deed of settlement by which the King made a provision, out of his private estate, in favour of members of his family who had a natural claim upon him for maintenance, in the following words:

(1) *Sridevi v. Krishnan*, I. L. R., 21 Mad., 105 (108).

(2) *Valia Thamburatti v. Anujan*, I. L. R., 26 Mad., 69 (71).

(3) *Sridevi v. Krishnan*, I. L. R., 21 Mad.,

105 (108).

(4) *Secretary of State v. Khemchand*, I. L. R., 4 Bom., 432 (436).

(5) *Ib.*

"The argument ignores the fact that, under a despotic government like that of Oudh in 1842, there was really no distinction observed between State property and private property vested in the Sovereign, and that all the estate of which he was possessed passed, on his decease to his successor in the throne."⁽¹⁾ The second contention that if it was a pension, it was not a political pension was held equally futile. "A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another Sovereign Power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay as well as the actual payment of the pension must, in such circumstances, be ascribed to reasons of State policy."⁽²⁾ This case is then instructive for it indicates not only what is a political pension but also what is not a political pension. The arrangement made with the King of Oudh was not unlike that which might be made any day with the Indian Post office which on payment of a certain sum of money grants an annuity, but which could not be termed a pension because the annuitant receives a return for his own money whereas the King of Oudh received an annuity in return for payment of what was his State property. Similarly the term "political" implies that the pension is granted for reasons of State. But a mere grant of land free of revenue or at a favourable rate as a reward for service is not a pension which implies the periodical payment of money as distinguished from a grant of property or money made once for all.⁽³⁾ Such was the case where in consideration of good service rendered to Government, the latter granted by *sanad* proprietary rights in certain villages to one Ganga Baksh subject to the payment of land revenue. His son mortgaged one of the villages and his son thereupon sued for a declaration that the property being a political pension was inalienable, but the Court held that the grant was not a pension, much less a political pension, that it was merely a grant of land in consideration of good service and which was subject to the ordinary incident of alienability.

248. Excepted Pensions :—This clause does not override the provisions of section 7 of the Pensions Act, which authorizes the transfer of pensions therein specified, and which would be transferable even though they fall into the category of political pensions the principle governing such, provisos being—*specialia generalibus derogant*.⁽⁴⁾ The plaintiff's ancestor was granted a pension by the Kings of Delhi as an indemnity for loss sustained by the resumption of lands held under *sanads* purporting to grant them in perpetuity. Shortly before his death her father executed a deed of gift in favour of his wife, which purported to assign to her the whole pension, he himself being entitled only to a share of it. The plaintiff contested the invalidity of the gift on the ground that under the Muhammadan Law it was *musha* (undivided part) which was untransferable, but the Court held it to be transferable under section 7 of the Pensions Act and which overrode the rule of Muhammadan Law to the contrary.⁽⁵⁾

(1) *Per Lord Watson in Bushambar Nath v. Imdad Ali Khan*, 1 L. R., 18 Cal., 216 (222) P. C.

(2) *Ib*, p. 222.

(3) *Lachmi Naran v. Makund Singh*, 1 L. R., 26 All., 617 (621, 622); *Ganpat Rao v. Ananda Rao*, 1 L. R., 28 All., 104; *O.A. Sardar Ganpat Rao v. Sardar Anand Rao*, 1 L. R., 32 All., 148, P. C.; *Amna Bibi v. Najm-un-nissa*, 1 L. R., 31 All., 382; *Mannu*

Lal v. Fazal Iman, 8 A.L.J.R., 692; *Panchanada v. Nila Kanula*, 1 L. R., 7 Mad., 191; *Kamar Tirumalai v. Bangaru*, 1 L. R., 21 Mad., 310; *Subraya Mudali v. Velayuda*, 1 L. R., 30 Mad., 153; *Bagwant v. Secretary of State*, 1 L. R., 29 Bom., 480 (493).

(4) "Special words derogate from general words."

(5) *Sahib-un-nissa Bibi v. Hafiza Bibi*, 1 L. R., 9 All., 213.

249. The provisions of these clauses are narrower than those of the English law, where it has been held that "a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable."⁽¹⁾ But even under the English law the pay or half-pay of a military officer as also pensions given for past services,⁽²⁾ cannot be legally sold.⁽³⁾

250. Opposed to the nature of the Interest.—This clause means that no transfer can be made of property which from its character cannot be transferred, as, for example, air, light, water, the ocean and things which are nobody's property (*nullius proprietas*), and to the use of which all are equally entitled, and in this sense such things are often spoken of as *res communes*. As regards the use of water, however, it must be added that water contained in a pool and tank, or a canal, may be and usually is, the subject of private ownership.⁽⁴⁾ Thus, no one has a right to tap another's canal and abstract the water therefrom for his own land, unless he has acquired that right by grant or prescription.⁽⁵⁾ And while a riparian proprietor may deal with a natural water-course as freely as with any portion of his land, he must not by so doing sensibly disturb the natural condition of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side.⁽⁶⁾ But the owner of an artificial water-course has a right to allow or deny the use of water flowing through it to other persons, unless they have also a clearly defined right enabling them to control the water and convert it to their own use—a right clearly found to have originated in some grant or valid contract, or immemorial user from which such title may be presumed.⁽⁷⁾ Water may then in such cases be the subject of private dominion, and even interests therein may be created as where the right of fishery, etc., are leased out. Another class of things, which though, inherently capable of being made subject of private appropriation in their natural state, have been conventionally classed as *res extra commercium*. They are such as public and religious offices and things dedicated to such purposes. In this respect the rules of Hindu and Mahomedan Law⁽⁸⁾ agreed with that of the ancient Romans in rigidly classing public trusts and property and offices as *extra commercium*.⁽⁹⁾ This was the common law of the country even before the present enactment, it being held that religious endowments in this country whether they be Hindu or Mahomedan were not alienable, though the annual revenues of such endowments, as distinguished from the *corpus*, might, for purposes essential to the temple, or other institution endowed, be occasionally pledged; as for example, for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring

(1) *Davis v. Duke of Marlborough*, 1 Sw. 74; *Dent v. Dent*, 2 L. R. 1 P., 366; *Ex parte Huggins*, 21 Ch. D., 85.

(2) *Lucas v. Harris*, 18 Q. B. D., 127; *Crouce v. Price*, 22 Q. B. D., 425.

(3) *Flaithy v. Odlum*, 2 Drew., & East, 681.

(4) *Perumal v. Ramasami*, 1 L. R., 11 Mad., 16.

(5) *Ran Bahadur v. Poodhee Roy* (1864), W.R., 319.

(6) *Moondour v. Kanhya Lal*, 3 W. R., 218, Cf. *Kali Kishen v. Jodoo Lal*, 5 C. L. R., 97, P. C.; *Narayan v. Keshav*, 1 L. R., 23 Bom.,

506.

(7) *Induject v. Lucknec*, 14 W.R., 349, *Heeranund v. Khub-eromassa*, 15 W. R., 516; *Debi Pershad v. Joynath*, 1 L. R., 24 Cal., 865, P. C.

(8) See Per Westropp, C.J., in *Narayan v. Chintaman*, 1 L. R., 5 Bom., 393 (396, 397) and the cases there cited; as to Mahomedan Law, see *Shama Churn Roy v. Abdul Kabeer*, 3 C.W.N., 158; *Mt. Rajeshwari v. Mahomed Abdullah*, 1 M. I. A., 422.

(9) *Rajoh Varma v. Kottayath*, 7 M. H. C. R., 210 (218, 219).

them.⁽¹⁾ In this class must also be included things dedicated to public, charitable, or religious purposes, regalia, heirlooms, etc., which are on the ground of public policy inalienable.⁽²⁾ On a similar principle the foreclosure or sale of a railway, canal, or other public work is prohibited.⁽³⁾

251. A political pension must then be a periodical allowance granted on political considerations or on account of past services or present infirmities, or as a compassionate allowance as distinguished from payments by Government in respect of any right, privilege, perquisite, or office.⁽⁴⁾ So the grant of a bonus or reward by Government is not a pension,⁽⁵⁾ nor is a *tora garas hak* which is an allowance made to *garasias* to preserve peace of the country and to render service if required in return for the allowance received by them.⁽⁶⁾ Similarly the grant of an annual cash allowance of a certain sum of money made by Government for the expenses of a *palanquin* subsequently exchanged for a grant of main land was held not to fall within the definition of a political pension⁽⁷⁾ both because it was not a periodical payment and was not the grant of money or land revenue. Another essential of a political pension is that it must be personal, thereby excluding grants made for religious or other charitable purposes.⁽⁸⁾ These cases have been dissented from in Bombay⁽⁹⁾ but upon a point unconnected with the present discussion. A political pension may assume the form of a *jagir* which is the grant of land revenue⁽¹⁰⁾ *prima facie* construed to be only for life, although it may possibly be granted in such terms as to make it hereditary; ⁽¹¹⁾ but it does not become hereditary if it was liable to resumption though in fact it was never resumed, and in such a case the *jagirdar* for the time being cannot charge the estate beyond his own lifetime, so that his successor takes the estate free from the burden⁽¹²⁾ of course if the *jagir* amount to a political pension that could not be validly charged by the *Jagirdar* even for his own life. And an annuity given by will stands on the same footing.⁽¹³⁾

252. No transfer for Unlawful Object or Consideration.—This

clause has been amended by a subsequent Act,⁽¹⁴⁾ with a view to bring it in conformity with the scheme of the amending Act which was recast to amplify the law relating to choses in action. But the amendment has stereotyped the original defect by introducing into a section, designed to enumerate the objects or things which are untransferable, a clause which has nothing to do with the things themselves, but makes an

(1) *Prosunno Kumari v. Golabchand*, 14 B.L.R., 450 P.C., *Narayan v. Chintaman*, I.L.R., 5 Bom., 393 (396).

(2) *Konwar Doorganath v. Ramchander*, I.L.R., 2 Cal., 341 (347) P.C.

(3) S. 67 (b) and the cases thereunder. In England similarly a permanent railway cannot be mortgaged, sold, or dealt with in any way—*Gardner v. London Chatham, &c., Co.*, L.R., 2 Ch., 201. In re *Panama, &c., L. R.*, 5 Ch., 318 (321).

(4) *Secretary of State v. Khemchand*, I.L.R., 4 Bom., 492; *Subraya Mudali v. Velazhuda*, I.L.R., 30 Mad., 153 (154, 155).

(5) *Khasim v. Carliet*, I.L.R., 5 Mad. 272.

(6) *Secretary of State v. Khemchand*, I.L.R., 4 Bom., 492.

(7) *Balwant v. Secretary of State*, I.L.R., 29 Bom., 480.

(8) *Secretary of State v. Abdul Hakim*, I.L.R., 2 Mad., 294; *Kolandai v. Sankara*, I.L.R., 5 Mad., 302; *Subramania v. Secretary of State*, I.L.R., 6 Mad., 361; *Atharulla v. Gouse*, I.L.R., 11 Mad., 283; *Venkateswara v. Secretary of State*, I.L.R., 31 Mad., 12; *Bahaddin v. Moti Lal*, (1878) P. R. No. 27.

(9) *Mrya Vali v. Sayad Bara*, I.L.R., 22 Bom., 496, following *Vyankaji v. Sarja Rao*, I.L.R., 16 Bom., 537.

(10) *Muhammad Qamaruddin v. Lachmi Nath*, (1906) P. R., No. 95.

(11) *Gulab Das v. Collector*, I.L.R., 3 Bom., 186 (190) P. C.

(12) *Id.*

(13) *Gopal Lal v. Marsden*, 10 C. W. N., 1102.

(14) By S. 3 (ii) of Act II of 1900. (Transfer of Property Amendment Act) for the following “(2) for an illegal purpose.”

excursion into the object and purpose of a transfer. As it is, the clause is an adaptation of section 23 of the Indian Contract Act, which similarly enacts as follows :—

23. The consideration or object of an agreement is lawful, unless—it is forbidden by law; or, is of such a nature that, if permitted, it would defeat the provisions of any law; or, is fraudulent; or involves or implies injury to the person or property of another; or, the Court regards it as immoral, or opposed to public policy.

What considerations and objects are lawful and what not.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or condition is unlawful is void.

Illustrations.

(a) *A* agrees to sell his house to *B* for 10,000 rupees. Here *B*'s promise to pay the sum of 10,000 rupees is the consideration for *A*'s promise to sell the house, and *A*'s promise to sell the house is the consideration for *B*'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) *A* promises to pay *B* 10,000 rupees at the end of six months, if *C* who owes that sum to *B*, fails to pay it. *B* promises to grant time to *C* accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) *A* promises, for a certain sum paid to him by *B*, to make good to *B* the value of his ship if it is wrecked on a certain voyage. Here *A*'s promise is the consideration for *B*'s payment, and *B*'s payment is the consideration for *A*'s promise, and these are lawful considerations.

(d) *A* promises to maintain *B*'s child, and *B* promises to pay *A* 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A*, *B* and *C* enter into an agreement for the division among them of gains acquired, or to be acquired by them by fraud. The agreement is void, as its object is unlawful.

(f) *A* promises to obtain for *B* an employment in the public service, and *B* promises to pay 1,000 rupees to *A*. The agreement is void, as the consideration for it is unlawful.

(g) *A* being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for *B* a lease of land belonging to his principal. The agreement between *A* and *B* is void, as it implies a fraud by concealment by *A* on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery; and *B* promises to restore the value of the things taken. The agreement is void, and its object is unlawful.

(i) *A*'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B*, upon an understanding with *A*, becomes the purchaser, and agrees to convey the estate to *A* upon receiving from him the price which *B* has paid. The agreement is void, because it is immoral.

(j) *A*, who is *B*'s mukhtar, promises to exercise his influence as such with *B* in favour of *C*, and *C* promises to pay 1,000 rupees to *A*. The agreement is void, because it is immoral.

(k) *A* agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

253. Consideration v. Object.—The next section further amplifies this section by declaring as void the whole agreement if its consideration and object is even in part unlawful, and in thus laying down the law the Indian Legislature has closely followed the English case in which Tindal, C. J., said: "If either part of the consideration be illegal, the whole falls to the ground, for a party cannot enforce a contract, where the consideration is illegal either in the whole or in part."⁽¹⁾ But the question will have to be further considered by and by. Although the terms "object" and "consideration" have been

(1) *Waite v. Jones*, 1 Bing., (N. C.), 656; *Lound v. Grimwade*, 39 Ch. D., 605. "As part of the consideration is illegal, it follows that the whole is bad." *Featherston v. Hutchinson*, 1 Co., Eliz., 199; *Waite v. Jones*, 1

Bing. (N. C.), 656 (662); *Shackell v. Posier*, 2 Bing. (N. C.), 634; cited *per* Stirling, J.; in *Lound v. Grimwade*, 39 Ch. D., 605 (613), followed in *Srirangachariar v. Ramasami*, 1 L. R., 18 Mad., 189 (191).

coupled together without discrimination both in this and the Indian Contract Act, there can be no doubt, but that they are in many cases distinguishable. The term "object" seems to imply the purpose or manifestation of intention in an overt act, as where one hires a house for a valuable consideration with the object of using it as a gambling house. In this sense it has nothing to do with consideration.⁽¹⁾ But both under this clause as well as under section 23 of the Indian Contract Act, a transfer is declared to be void; if either its object or its consideration or both are illegal. The Indian Contract Act enumerates several instances of their illegality, and these will have to be presently considered. For the present, it may be added that in order to render a transfer void it is by no means necessary that the entire consideration or object of the transfer should be illegal for if only a part thereof is illegal then it is sufficient to infect the entire transfer rendering it inoperative. A had entrusted a jewel box to the safe custody of B against whom he had to institute proceedings for criminal breach of trust, and while they were pending he also instituted a suit for recovery of his jewels, after which A withdrew from the criminal prosecution partly because B had relinquished a debt due to him from A but the latter continued to prosecute his suit and to which B pleaded his compromise as a bar. The Court however refused to entertain his plea on the ground that since a part of the consideration for the compromise was the abandonment of the criminal proceedings, the whole of the agreement was void under section 23 of the Indian Contract Act.⁽²⁾

254. Transfer forbidden by Law.—The term "law" used in this connection means the substantive law, and not merely processual law, such as the Code of Civil Procedure.⁽³⁾ So where the judgment-creditor accepted a bond in satisfaction of his decree in contravention of section 257-A of the last Code of Civil Procedure since repealed, it was held that the bond was not void since the words "any law" occurring in section 23 of the Indian Contract Act refer only to some substantive law and not to an adjective law like the Procedure Code.⁽⁴⁾ A sold to B certain properties for Rs. 300 and executed in his favour an unregistered sale deed. B had no purchase-money at hand and so executed a registered mortgage of the self-same properties in favour of A. The latter sued B on foot of his mortgage whereupon B contested the claim on the ground that since A had given him only an unregistered sale deed which in view of section 54 of the Transfer of Property Act could convey nothing to B his mortgage to A was invalid. The Court found that A had put B in possession of the property which he had enjoyed for over twenty years and which he was not prepared to relinquish. It therefore decreed the mortgage suit holding that it was not supported by unlawful consideration.⁽⁵⁾ It was obviously a case of absence of consideration rather than one of unlawful consideration, and it would have been a sufficient answer to B that he had perfected his title by possession lasting over twelve years and which had cured his defective title. As Hindu Law is a part of the substantive law of the land applicable to Hindus a contract in violation of it would be void. As such a stipulation that on breach of a

(1) Sir H. Cunningham confused the two terms when he said: "object and consideration are different names for the same thing viewed from the different points of view of the parties" Contract Act (8th ed.) 85. This statement has since been amended, in consequence of the criticism of the present writer followed in *Jaffer Meher Ali v. The Budge-Budge Jute Mills Co.*, I. L. R., 23

Cal., 702 (710); O. A., I. L. R., 34 Cal., 289; to the same effect; *Ansons Contracts* (9th Ed.) 189.

(2) *Nagappa v. Mau*, 3 L. B. R., 42.

(3) *Hukumchand v. Taharunnessa*, I. L. R., 16 Cal., 504.

(4) *Hukumchand v. Taharunnessa*, I. L. R., 16 Cal., 504 (507).

(5) *Fanindra v. Badruddin*, 5 I. C. 581.

condition the marriage between husband and wife should be void is itself void.⁽¹⁾ Even if the parties be Mahomedans whose personal law allows a wife to purchase a divorce, an agreement to advance money to a married woman to enable her to procure a divorce in a Court of law and marry the plaintiff is void as its object is both unlawful and opposed to public policy.⁽²⁾ It is illegal to pervert the course of justice, and it is consequently illegal to promise one a sum of money to give evidence whether true⁽³⁾ or false.⁽⁴⁾ So is payment made to an Ameen⁽⁵⁾ of the police Daroga⁽⁶⁾ to make a favourable report or to give or take money to get rid of a criminal proceedings not compoundable under section 345 of the Criminal Procedure Code.⁽⁷⁾ But while all contracts intended to stifle on resulting in stifling prosecution are void, there is no objection to take security for payment of a debt even though the debt itself should have arisen out of a criminal offence and the creditor has threatened prosecution for that offence, provided that the security was not the consideration for non-prosecution.⁽⁸⁾ The rule is that where the plaintiff cannot make out his case except through an immoral transaction to which he was a party he will fail.⁽⁹⁾ In the United and Central Provinces a proprietor of a village parting with it in certain cases becomes by force of law an occupancy tenant of the *sir*. When it is so it would be illegal to destroy such tenancy by a previous agreement for surrender made to circumvent accrual of the statutory status.⁽¹⁰⁾

When a transfer or contract is set aside on the ground of illegality, what is meant is that the transaction in its inception amounted to or involved an illegality or was of such a nature that if permitted it would defeat the provisions of the law.⁽¹¹⁾ Ordinarily, a license for distillation of liquor is personal to the licensee and it contains a clause against admitting a partner or subrenting his contract. As such B obtained a license but benami for A who sued him for accounts and B's defence was that legally he could not hold it for A, but his contention was overruled apparently on the ground that the prohibition provided no punishment for its breach and that B being found to be the trustee of A's or could not be permitted to set up the illegality of his own position and thus evade his liability to account to A.⁽¹²⁾ Some reference was made to public policy, but the Court adopted the words of Lord Davey "that public policy is not a site or trustworthy ground for legal decision."⁽¹³⁾

255. Transfer for Unlawful Object.—Transfer made in furtherance of an unlawful object are *ipso facto* void. Thus, transfers founded on past

(1) *Chaub Ram v. Mt. Nathi*, (1900) P. R., No. 15.

(2) *Mt. Rasban v. Mhd. Rubmanaz*, (1887) P. R., No. 46.

(3) *Sashanah v. Ramasamy*, 4 M.H.C.R., 7.

(4) *Maung Kyauk v. Maung Lo Ngo*, 4 Bur. L.T. 95; 10 I. C. 801.

(5) *Gogun Chunder v. Janokee*, 20 W. R., 235.

(6) *Protuma v. Dukkha*, 18 W. R., 450.

(7) S. 345 Cr. P. C.; Ss. 213, 214, Indian Penal Code; 1 Gour's Penal Law §§ 1615-1626; *Namasivaya v. Kylasa*, 7 M. H. C. R., 200; *Kandan Chetti v. Corjee*, 2 M. H. C. R. 187; *Amur Khan v. Amur Jan*, 3 C. W. N., 5; *Q. v. Balakishen*, 3 N.W.P.H.C.R., 166; *Subraya v. Subraya*, 4 M. H. C. R., 14; *Jeetoo v. Moneram*, 17 W.R., 54; *Chetan Das v. Hari Ram*, 8 A.L.J., 498; *Keshan Lal v. Aman*,

8 N.L.R., 97; *Baari v. Ram Saran*, 10 I.C., 189; *Majebar v. Mukhtashen*, 15 I. C. 259; *Dalsukhlam v. Bretton*, I. L. R., 28 Bom., 326; *Ganeshi v. Hassan*, (1909) P.W.R., No. 140.

(8) *Kessowji v. Hurjivan*, I.L.R., 11 Bom., 566.

(9) *Muncha Ram v. Regina Stranger*, I. L.R., 32 Bom., 581; *Rajkrisho v. Koylash. Chunder*, I. L. R., 8 Cal., 24.

(10) *Kashi Prosad v. Kedar Nath*, I.L.R., 20 All., 219 F. B.

(11) *Fraser v. Hill*, 1 Mac. Q. 392; *Govind v. Puckon* 4 Bom. L. R., 948.

(12) *Gobind v. Pucheco*, 4 Bom. L. R., 948; to the same effect *Gauri Shankar v. Mumtaz*, I.L.R., 2 All., 411.

(13) *Janson v. Driefontein Consolidated Mines Ltd.*, L.R. (1902) A.C., 484.

co-habitation are void.⁽¹⁾ The sale of goods for the purpose of smuggling them out of British territory is void.⁽²⁾ But a gift, to which an immoral condition is attached, remains a good gift, while the condition is void.⁽³⁾ In one case the donee was allowed to retain possession of the house gifted to her, because she had continued in its possession for eight years.⁽⁴⁾ It is laid down generally that a man cannot set up an illegal or fraudulent act of his own, in order to avoid his own deed. If A, in order to defraud C, allows B to acquire the legal ownership of his property, A will not generally be aided by equity in undoing his own act or avoiding his own subvention.⁽⁵⁾ In one case where the assignor, a director of a Company obtained an assignment of certain debts due by the defendant—or co-director of the same Company and whom the assignor wanted to be removed, on condition that the assignor should pay over to the creditors whatever should be recovered, the Court upheld the transaction holding that it was not tainted with any illegality.⁽⁶⁾ In America a contract to make compensation for services to be rendered in procuring evidence and securing a divorce is held to be illegal as there can be no suit even on a *quantum meruit*.⁽⁷⁾

256. A transfer made for an unlawful object is void,⁽⁸⁾ the effect of which is, that all collateral transactions relating thereto are similarly vitiated. Thus an agreement to indemnify a publisher of libellous matter is void and cannot be enforced,⁽⁹⁾ and money deposited with a surety with a view to indemnify him for any loss sustained in giving security required by law has been likewise held to be irrecoverable.⁽¹⁰⁾ A mortgage by the certificated administrator of a minor without the previous sanction of the civil court as required by law⁽¹¹⁾ is void, even though it may have been made to liquidate ancestral debts and save the property from sale in execution.⁽¹²⁾ Similarly where the transfer of occupancy-land is prohibited by law, its transfer by the tenant is void, and it would be so declared at the instance of the landlord.⁽¹³⁾ So, if in contravention of law, an occupancy-tenant mortgage his holding with possession to a person, who re-let it to the mortgagor on rent, the mortgagor could not recover the rent by suit, since the Court could not give effect to an agreement implying recognition of the transfer which was unlawful and therefore void.⁽¹⁴⁾ A transfer made in fraud of creditors is declared void by section 53, and a transfer made by an insolvent debtor which has the effect of favouring one creditor to the detriment of another is declared void by the law which will also have to be elsewhere considered.⁽¹⁵⁾ A transfer made *pendente lite* is similarly declared by section 52 to be destitute of legal effect. The purchase or hiring of articles to be used in a brothel or by a prostitute for the purpose of display is absolutely void, and

(1) *Benyon v. Nettlefield*, 3 M. & G., 100.

(2) *Biggs v. Lawrence*, 3 T.R., 454.

(3) *Ramsaroop v. Bala*, 1 L.R., 6 All., 313 (320).

(4) *Lachmi Narain v. Wilayat Begum*, 1 L.R., 2 All., 433.

(5) In re *Mapleback*: Ex parte *Caldecot*, L.R., 4 Ch. D., 150, quoted with approval in *Chenvirappa v. Puttappa*, 1 L. R., 11 Bom., at p. 713.

(6) *Fitzroy v. Carr* [1905], 2 K.B., 364; Following *Comfort v. Betts* [1891], 1 Q.B., 737.

(7) *Barngrover v. Pettigrew*, 2 L. R. A. (N. S.), 260.

(8) *Bartlett v. Vinor*, *Carthew*, 252; *Kamala v. Kalu*, 3 B. L. R. (A. C.), 44; *Gosani v.*

Robb, 1 L. R., 8 Bom., 398.

(9) *Poplett v. Stockdale*, 1 Ry. & M., 337.

(10) *Fateh Singh v. Samwal Singh*, 1 L. R., 1 All., 751.

(11) S. 18, Act XL of 1858.

(12) *Chennan v. Suleran*, 1 L.R., 2 All., 902; following *Surul Chunder v. Ashootosh*, 24 W. R., 46; *Dabee v. Subodra*, 25 W. R., 449; *Manjiram v. Tara Singh*, 1 L. R. 3 All., 852; *Ram Chunder v. Brojonath*, 1 L. R., 4 Cal., 929.

(13) *Durga v. Jhinguri*, 1 L.R., 7 All., 511.; *Jhinguri v. Durga*, 1 L.R., 7 All., 878, F. B.

(14) *Ram Sarup v. Kishen Lal*, 1 L. R., 29 All., 327.

(15) S. 53. Comm.

the price thereof cannot be recovered.⁽¹⁾ Indeed, no distinction is made in law between an unlawful and an immoral purpose, and the effect is the same whether the object be one or the other.⁽²⁾ Indeed, what is immoral is generally also illegal.⁽³⁾ And so the rent of lodgings knowingly let to a prostitute is irrecoverable;⁽⁴⁾ the maxim being *ex turpi causa non oritur actio*.⁽⁵⁾ And so a mortgage made by the father of certain dancing girls (*nairkins*), with the avowed object of getting his daughters taught singing with a view of practising prostitution would be invalid, unless it is shown that amongst the community of *nairkins*, singing was not a necessary prelude to prostitution.⁽⁶⁾ Transfers opposed to public policy are also void. To this class belong agreements trafficking in public offices, the nature of which has been already explained. An agreement that if the plaintiff allowed the defendant to be superannuated the latter shall pay him an annual share of the profits of the office stands on the same footing, as it has the effect of deceiving the public and misapplying the pension.⁽⁷⁾ A contract of insurance of a foreign ship or goods against British capture is illegal. Other contracts of a similar nature depend upon the relations of the British with the foreign powers. Smuggling being an offence against the revenues of the country is prohibited, and any contract for smuggling or having that effect is illegal.⁽⁸⁾

Transfers placing a restriction on the ordinary rights of parties are generally bad, unless the restriction is for their benefit. But the restriction then must not be indefinite and uncertain, though the benefit need not be mentioned in express words, if it can be otherwise shewn to be the object and intention of the contracting parties.⁽⁹⁾ Thus, where the vendor of a part of his land entered into an agreement with the purchaser that an adjoining plot should never be hereafter sold, but left for the common benefit of both parties and their successors, it was held that the agreement created an equity between the original parties, binding all who came into possession derivatively with notice of it.⁽¹⁰⁾

257. Another class of transfers indirectly dealt with in the Act is that

Maintenance and Champerty.

which is void for what is known in English law as maintenance and champerty. The law of maintenance and champerty is identical, and they both possess all common attributes the only difference being that maintenance is the genus of the offence of which champerty is a species. "Champerty,"⁽¹¹⁾ says Russell, "is a species of maintenance, being a bargain with the plaintiff or defendant *campum parture* to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense. It is defined in the old books to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or

(1) *Cannan v. Bryce*, 3 B. & A., 179; *Pearce v. Brooks*, L. R., 1 Ex., 213.

(2) *Per Pollock, C.B.*, in *Pearce v. Brooks*, L. R., 1 Ex., 213 (218).

(3) *Raj Kristo v. Kouzas*, 1 L.R., 8 Cal., 24.

(4) *Gaurmath v. Madhumau*, 9 B. L. R. (A. C.), 37.

(5) "No suit can arise out of a foul cause." And so said Narada: "And let the king who desires prosperity repress sinful proceedings which are unauthorized by moral law." *Colebrook's Dig.*, Vol. II, p. 301.

(6) *Khubchand v. Beram*, 1 L. R., 13 Bom., 150.

(7) *Prusons v. Thompson*, 1 H. Bl., 322 (326).

(8) *Biggs v. Lawrence*, 3 T. R., 454

(9) *McLean v. McKay*, L. R., 5 P. C. 327 (336); *Mann v. Stephens*, 15 Sim., 377; *Patching v. Dobbins*, Kay 1.

(10) Ss. 11, 40 *post* (q. v.), *McLean v. McKay* L. R., 5 P. C. 327 (336); following *Tulk v. Moxhay*, 2 Phill., 774.

(11) From *Campum parture* to divide the land. Thus Champerty in French law, signifies a familiar division of profits, being a part of the crop annually due to the landlord by bargain or custom; 4 Black, Comm., 136.

some profit out of it."⁽¹⁾ In one sense of the word, according to Blackstone, the term signifies the purchasing of a suit, or right of suing, 'a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one hath the right, but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society that are perpetually endeavouring to disturb the repose of their neighbours and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law...and they were punished by the forfeiture of a third part of their goods, and perpetual infamy."⁽²⁾ In England too, a statute⁽³⁾ was specifically directed against the offence, it being provided that no one shall sell or purchase any pretended right or title to land, unless the vendor has received the profits thereof for one whole year before such grant, or has been in actual possession of the land, or of the reversion or remainder, on pain that both purchaser and vendor shall each forfeit such land to the king and the prosecutor.⁽⁴⁾ Maintenance is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it.⁽⁵⁾ The English law of maintenance and champerty has not been formally introduced into this country,⁽⁶⁾ but its broad principles have been always recognized,⁽⁷⁾ and indeed, with the exception that it is not a punishable offence in this country, the principles applicable to the two countries are somewhat, similar. As observed by Romer, J., citing a passage from the judgment of Knight Bruce, L. J.: "Such an understanding, such an agreement... may or may not have amounted strictly in point of law to champerty or maintenance, so as to constitute a punishable offence, but must

(1) On Crimes (5th Ed.), I., p. 356. The definition is taken from 4 Black, Comm., 135, and the judgment of Tindal, C. J., in *Stanley v. Jones*, 7 Bing., 377, cited by Chitty, J., in *Coney v. Churchill*, 40 Ch. D., 481 (488, 489).

(2) 4 Black. Comm., 135.

(3) 92 Hen. VIII, c. 9.

(4) 4 Black. Comm., 135, 136, 1 Hawkin's Pleas of the Crown, 255, Barrettry is a cognate term being the offence of frequently exciting and stirring up suits and quarrels between His Majesty's subjects either at law or otherwise. This offence was made punishable by 12 Geo. I. C., 29. 1 Hawkin's Pleas of the Crown, 243; 4 Black. Comm., 134.

(5) 1 Hawkin's Pleas of the Crown, 249; 4 Black, Comm., 134.

(6) *Tarasoodandee v. Collector of Mymensingh*, 13 B. L. R., 495; *Mayor of Lyons v. East India Co.*, 1 M. I. A., 176; *Ram Coomar v. Chunder*, I. L. R., 2 Cal., 233, P. C.; *Ahmedbhoy v. Vuleebhoy*, I. L. R., 8 Bom., 382; *Mulla Jaffarji v. Jacali*, 7 M. H. C. R., 128. In the following cases it was held that Champerty could not be pleaded in this country; *Nobeen Chunder v. Ramgogernath* (1864), W. R., 63; *Punchanun v. Doorga*, (1864), W. R., 300; *Punch v. Kalu*, 9 W. R., 490 (in which law said, not "to have been definitely settled so far as this court is concerned). *Chedambara v. Renga*, 22 W. R., 148 (the statute of champerty does not obtain in the mofussil of India.) *Kishen Lall v. Pearce*,

(1852), S. D. A., 394, F. B. Champerty not *per se*, illegal, but that every such arrangement must stand or fall according to the peculiar nature of its conditions. In *Grose v. Amirtamayi*, 4 B. L. R., (O. C.), 1; followed in *Biswanath v. Khantamani*, 9 B. L. R., 76; the principle was applied and so in *Ramav v. Gorind*, 6 B. H. C. R., (A. C.), 53, it was conceded. In *Petchakutti v. Kamala*, 1 M. H. C. R., 153; the law held to be inapplicable to natives of India, but court must look to the general principles regarding public policy. Question considered in *Damodhai v. Kahandas*, 8 B. H. C. R. (O. C.). The English law applicable since there is nothing in the Contract law of Hindus and Mohammedans to affect it—(*Per Holloway J.*, in) *Mulla Jaffarji v. Jacali*, 7 M. H. C. R., 128 (144). In *Ram Coomar v. Chunder Kanta*, I. L. R., 2 Cal., 233, P. C., O. A., from *Chunder Kant v. Ram Coomar*, 13 B. L. R., 530, held that the English law as to maintenance is not of force as specific law in India either in the mofussil or in the presidency towns, but such contracts are invalid being opposed to public policy. Case followed in *Mokham Singh v. Rup Singh*, I. L. R., 15 All., 352, P. C.; *Raghunath v. Nil Kanth*, I. L. R., 20 Cal., 843, P. C.; *Achal Ram v. Kazim Hussain*, I. L. R., 27 All. 271 (290) P. C.; *Bhagwat Dayal Singh v. Debi Dayal*, I. L. R., 35 Cal., 420 P. C., (7) *Fisher v. Kamala Naicker*, 8 M. I. A., 170, and cases cited *supra*.

in my judgment be considered clearly against the policy of the law, clearly mischievous, clearly such as a court of equity ought to discourage and relieve against."⁽¹⁾ And the same test has been applied by the Privy Council in dealing with an Indian appeal, for they say: "There must be something against good policy and justice, something tending to promote unnecessary litigation, something that, in a legal sense, is immoral, and to the constitution of which a bad motive in the same sense is necessary."⁽²⁾

258. In England maintenance and champerty are indictable offences⁽³⁾

The rule stated. and are punishable as such⁽⁴⁾ and a transaction to be void must fall within the purview of the statute law on the subject, but in this country the same statutes being not in force as specific law either in the mofussil or in the presidency towns, the grounds on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is, that they are contrary to public policy.⁽⁵⁾ The result of this divergence of law is that the law as administered in India is more elastic than the rules which are to be gathered from the English decisions, and so it happens that some transactions effected under special circumstances albeit for the purpose of, and with a view to litigation, have been upheld in this country,⁽⁶⁾ though they clearly savoured of maintenance and champerty. But the general rule founded on the broad principles of equity to be observed in such transactions is to enquire whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, whether it is an unfair or illegitimate transaction got up for the purpose of merely spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive."⁽⁷⁾ But while in England a right of action accrues on a mere breach of the law,⁽⁸⁾ the transaction in this country cannot be impeached on the same technical grounds.⁽⁹⁾

259. Maintenance v. Indian Rule.—What transactions then do fall within the rule? Before answering the question it would be well to first eliminate those cases which do not come within the mischief of the rule, and are, therefore, not within its scope. It has been held from early times that a

(1) *Reynell v. Sprye*, 1 De. M. & G., 660 (677), cited in *Rees v. De Bernardy*, [1896] 2 Ch., 437 (446).

(2) *Fischer v. Kamala Naukei*, 8 M. I. A., 170 (187); followed in *Tarasoodaree v. The Collector of Mysore*, 13 B. L. R., 495 (505); *Chedambara v. Renga*, 13 B. L. R., 509 P. C.; *Abdool v. Doorga Prosad*, 1 L. R., 5 Cal., 4; *Tarachand v. Sukhlal*, 1 L. R., 12 Bom., 559; *Gopal v. Ganpatam*, 1 L. R., 14 Bom., 92; *Gurusami v. Subbaraya*, 1 L. R., 12 Mad., 118; *Ramanuja v. Narayana*, 1 L. R., 18 Mad., 374; *Husam v. Rahmat*, 1 L. R., 11 All., 128.

(3) 3 Edw., I. C., 25; 13 Edw., I. C., 49; 28 Edw., I. C., 1 Henry VIII, C. 9; as to which, see 1 Hawkin's Pleas of the Crown, C., 86, S. 7; 1 Russ. on Crimes (15th Ed.), 356-359.

(4) 2 Roll. Aler., 114; 2 Dust., 208; 1 Russ. on Crimes (5th Ed.), I., 359.

(5) *Fischer v. Kamala*, 8 M. I. A., 187; *Chedambara v. Renga*, 13 B. L. R., 509 (526), P. C.; *Ram Coomar v. Chunder Kanto*, 1 L. R., 2 Cal., (233), P. C.; following on the

applicability of English statutes to India; *Mayor of Lyons v. The East India Co.*, 1 M. I. A., 175; *Mokham Singh v. Rup Singh*, 1 L. R., 15 All., 352, P. C.; *Raghnath v. Nil Kanth*, 1 L. R., 20 Cal., 843, P. C.; *Debi Dayal v. Bhan Pertab*, 1 L. R., 31 Cal., 433; *Bhagwat Dayal Singh v. Debi Dayal*, 1 L. R., 35 Cal. 420 P. C.; *Achal Ram v. Kazim Hussain*, 1 L. R., 27 All., 271 (290) P. C.

(6) *Goculdas v. Lakshmidas*, 1 L. R., 3 Bom., 402 (413); *Mokham Singh v. Rup Singh*, 1 L. R., 15 All. 352, P. C.; *Ragunath v. Nil Kanth*, 1 L. R., 20 Cal., 843 P. C.; *Bhagwat Dayal Swajh v. Debi Dayal*, 1 L. R., 35 Cal., 420, P. C.; and cases cited *supra*.

(7) *Chedambara v. Renga*, 13 B. L. R., 509 (526) P. C.; followed in *Ram Coomar v. Chunder Kanto*, 1 L. R., 2 Cal., 233 (255), P. C.

(8) 1 Russ. on Crimes (5th Ed.), 359.

(9) *Ram Coomar v. Chunder Kanto*, 1 L. R., 2 Cal., 233 (254) P. C., in which all the previous case-law is reviewed.

man may maintain the suit of his kinsman, servant, or poor neighbour, out of charity and compassion with impunity.⁽¹⁾ (§ 1). And a fair agreement to supply funds even in consideration of having a share of property if recovered is not *per se* void.⁽²⁾ "But agreements of this kind ought to be carefully watched, and if they are found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for the improper objects or for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."⁽³⁾ In agreements of this kind, then, the questions are—(i) whether the agreement is extortionate and unconscionable, so as to be inequitable against the borrower; or (ii) whether the agreement has been made not with the *bona fide* object of assisting a claim believed to be just, and of obtaining reasonable compensation therefor, but for improper objects as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases effect is not to be given to the agreement.⁽⁴⁾

260. Transfers Valid and Void.—A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom the information is supplied is so far neither champertous nor void,⁽⁵⁾ but it would so become, if the person supplying the information, himself recovers or joins or actively assists in the recovery of the property, by procuring evidence or similar means,⁽⁶⁾ or if he agrees "to use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claim"⁽⁷⁾—in which case the contract is void, even if the property be in the hands of the trustee, or in court, and no hostile action is necessary to recover it.⁽⁸⁾ But where the purchaser of a share of land joins his vendor in a suit to recover his own property, his action cannot then be champertous.⁽⁹⁾ So where *A* sues in respect of his own interest for the violation of a contract made for him by *B*, as agent only, the assignment of *B*'s interest in the agreement in order to enable *A* to bring his suit, is not champerty or maintenance.⁽¹⁰⁾ And where a person is himself unable to prosecute his suit, a contract made in good faith with him to supply him with funds to carry on the suit on the security of the property in dispute will be enforced.⁽¹¹⁾ Such a contract is distinguishable from an officious intermeddling in the suits of another person or acts tending to prevent unnecessary litigation. Thus, where a Hindu widow who was ill-treated by her husband's surviving brother solicited and obtained the assistance of a stranger who helped her to leave the family house, and also made

(1) 4 Black Comm., 135.

(2) *Nathoo Lall v. Budree*, 1 N.W.P.H.C. R., 1.

(3) *Ram Coomar v. Chunder Kanto*, I.L.R., 2 Cal., 233. P. C.; followed in *Mokham Singh v. Rup Singh*, I. L. R., 15 All., 352, P. C.

(4) *Mokham Singh v. Rup Singh*, I. L. R., 15 All., 352, P. C.; *Kunwar Ram Lal v. Nil Kanth*, 20 I. A., 112.

(5) *Sprye v. Porter*, 7 E. & B., 58; *Rees v. De Bernardy* [1896] 2 Oh., 437 (447).

(6) *Per Romer, J.*, in *Rees v. De Bernardy* [1896] 2 Oh., 437 (447); citing *Sprye v. Porter*, 7 E. & B., 58; *Stanley v. Jones*, 7

Bing., 369.

(7) *Stanley v. Jones*, 7 Bing., 369; *Hutley v. Hutley*, L. R., 8 Q. B., 112.

(8) *Rees v. De Bernardy* [1896], 2 Ch., 437.

(9) *Munirakhun v. Bhodoy*, 12 W.R., 133.

(10) *Fischer v. Kamal Naicker*, 8 M. I. A., 170; *Jugmohan v. Buddun Koer*, 9 W. R., 243.

(11) *Nathoo Lal v. Budree*, 1 N.W.P.H.C. R., 1; *Chunder Kant v. Ram Coomar*, 13 B. L. R., 530, O. A.; *Ram Coomar v. Chunder Kanto*, I. L. R., 2 Cal., 233, P. C.; *Achal Ram v. Kazim Hussain*, I. L. R., 27 All., 271 (290) P. C.

her certain advances to pay off her debts and maintain herself, and thereupon she entered into an agreement with him for the recovery of her share of the joint estate which he agreed to do upon the widow having assigned to him the whole of her expectancy on trust, *first* to repay himself the costs of the suit, *secondly*, to retain, by way of his remuneration, one-half of what might be recovered therein; and *thirdly*, to hold the residue as security for repayment with interest at 12 per cent. of the advances made by him. The suit having resulted in a decree of a lac of rupees in favour of the widow, and her reversioner having sued both her and the assignee for declaring the invalidity of the assignment, it was held that it was not binding on the reversioner, except as regards the charge on the moiety of the estate for moneys advanced, and the expenses with interest at 12 per cent.⁽¹⁾ But where a person being apprehensive of losing a piece of land in consequence of a litigation pending, entered into an agreement with another for the conduct of the suit, at his own cost stipulating that on winning the suit the parties should erect a building at their joint expense, the rent of which should be equally enjoyed, giving the right of survivorship to the other party, it was held that having regard to the surrounding circumstances the agreement was not void as opposed to public policy.⁽²⁾ But apart from the law of champerty it is obviously against public policy to allow a stranger to interfere in family affairs and disturb its peace by entering into an agreement with the real heirs, that, if he established their claim he should be entitled to a share of the estate.⁽³⁾ Thus, a Mahomedan speculative mukhtear would not be allowed to prosecute a suit on behalf of a Hindu family, even at his own cost on the understanding of being given a share of the estate in case he succeeded in setting aside the improper alienations made by their father.⁽⁴⁾ So again where a person compromised for a small amount his claim against his debtor, on the representations made by the latter's friends as to his straitened circumstances and where subsequently a stranger intervened and took the assignment of the full claim and sued the debtor thereon alleging that the compromise had been induced by misrepresentations and was invalid and that the debtor being fully solvent might be ordered to pay the full claim assigned to him, it was held that the assignment being officious was void both on account of the law of maintenance, as on the more elastic rules of public policy.⁽⁵⁾ But where a mortgagee purchased a house in respect of which a suit was pending against the vendor on condition that the sale-deed was to be executed on determination of the suit, it was held that the contract was in effect an absolute sale of the equity of redemption and that it did not savour of champerty.⁽⁶⁾ And it may even be conceded that all speculation is not necessarily champertous, even though it may not much vary in the result.

261. A man in imminent danger of losing his property and with an adverse decree to appeal against, passed a bond for Rs. 25,000 for the purpose of meeting the expenses of an appeal amounting to Rs. 3,700. The debtor had entered into the contract with his eyes open and on the advice of his legal advisers, and probably having regard to the risks of

(1) *Biswanath v. Khantamani*, 9 B. L. R., 76; following *Grose v. Amirtamayi*, 4 B. L. R., 1, the facts of which were in every respect similar.

(2) *Damodhar v. Kahandas*, 8 B. H. C. R. (O.C.), 1; *Ramrav v. Govind*, 6 B. H. C. R. (A. C.), 63.

(3) *Ahmed Hossein v. Ram Sarun*, 13 W. R., 426; *Hasari v. Jadaun*, I. L. R., 5 All.,

76; *Tarachand v. Suklal*, I. L. R., 12 Bom., 559.

(4) *Ahmed Hossein v. Ram Sarun*, 13 W. R., 426.

(5) *Goculdas v. Lakhmidas*, I. L. R., 8 Bom., 402.

(6) *Ahmedbhoy v. Vulleebhoy*, I. L. R., 8 Bom., 359.

his litigation he could not have raised funds on more advantageous terms. But still the bargain was held to be a hard and unconscionable one and infected by the rule under discussion: "If the plaintiff believed the defendant's claim to have been a just one, or one in which there were not long odds against his chance of success, Rs. 25,000 in the event of success for an advance of Rs. 3,700 could not and would not have been considered by him to be reasonable recompense. On the other hand, if Rs. 25,000 were considered to be a reasonable recompense in the event of success for an advance of Rs. 3,700, it could only be on the ground that the plaintiff's claim was of such a highly speculative character as to make the odds long against his chances of success and the transaction one of gambling in litigation."⁽¹⁾ In the result, then, a decree for the actual amount advanced with simple interest at 20 per cent. per annum from the date of the bond was entered in favour of the plaintiff. In another case arising out of the bond executed in favour of the same plaintiff to defray the costs of appeal to the Privy Council the same Court reiterated its views and while expressing its sympathies for the plaintiff, placed him on the horns of the same dilemma and eventually passed a decree in the same proportion.⁽²⁾ And the same principle was again applied in another case decided by another Bench of the same Court, in which under similar circumstances the agreement was to give the creditor, for defraying expenses of the litigation, half the property in suit and half the meane profits in the event of success; "If it was a very risky contract, then obviously its enforcement would be against public policy on the ground of its being of a speculative character. If it was not of extraordinary risk, then it would be inequitable to enforce the contract, as the recompense secured was out of all proportion to risk incurred."⁽³⁾

262. But where the disproportion between the amount paid and the amount promised is reasonable, the Court would ordinarily uphold the transaction. Thus, land worth Rs. 100 may well be sold in consideration of a loan of Rs. 30.⁽⁴⁾ And in another case the sale of fourteen-sixteenths of a claim for Rs. 13,000 sold for Rs. 4,000 was similarly upheld.⁽⁵⁾ In deciding the question whether a transaction was *bona fide* or otherwise with reference to inadequacy of price regard should be had to the state of things as it might have appeared to the contracting parties at the time when the transaction was entered into; for, even a *bona fide* purchaser who takes upon himself the risk of litigation and consents to lose what he pays in a specified event, would ordinarily hesitate to pay the price which the property would fetch when the litigation proves successful.⁽⁶⁾ In judging these cases it should be noted that a transaction may be speculative, but that does not make it champertous.⁽⁷⁾ Thus, for example, the assignment of his equity of redemption by the mortgagor to another who was aware of a defect in the mortgagee's title and thereby hoped to derive profit, is not necessarily champertous because it is obviously speculative, and although the transaction might not be a praiseworthy one *in foro conscientiae*⁽⁸⁾ it could not

(1) *Chunni Kuar v. Rup Singh*, I. L. R., 11 All., 57 (73).

(2) *Loke Indar v. Rup Singh*, I. L. R., 11 All., 118 (125); *Sheik Abid v. Ram Saran*, 13 W. R., 426.

(3) *Husain v. Rahmat*, I. L. R., 11 All., 128 (136).

(4) *Gurusami v. Subbaraya*, I. L. R., 12 Mad., 118.

(5) *Abdool v. Doorga*, I. L. R., 5 Cal., 4.

(6) *Abdool v. Doorga*, I. L. R., 5 Cal., 4.

(7) *Gopal v. Gangaram*, I. L. R., 14 Bom., 72; *Ramanuja v. Narayana*, I. L. R., 18 Mad., 374; *Siva v. Ellamma*, I. L. R., 22 Mad., 310; *Deorao v. Sadasheo*, 1 Nag. L. R., 17.

(8) "In the Court of conscience," conscientiously, in a man's own conviction of what is equitable.

be regarded as one entered into with the object of gaining the spoils of an unrighteous litigation.⁽¹⁾ An assignment for whatever the assignor may be able to recover from the debtor, though highly speculative, is not necessarily bad for maintenance. But a transfer entered into with the ulterior object of procuring an adjudication in bankruptcy against the assignor, and so getting him removed from the directorate of the company in which the assignor was a co-director, and where the condition was, that the assignor should pay whatever he should be able to recover and realize from the assignor's debtors after deducting his own costs, was held to savour of maintenance, or being otherwise against public policy.⁽²⁾ But an assignment made with the ulterior object of harassing the debtor with litigation, is not necessarily vicious, if the assignment was complete, and was not used as a mere device to enable the assignee to sue. But the result would be different if the assistance was rendered with the avowed object of oppressing one's enemy.⁽³⁾ In other words, the sale of an interest to which a right to sue is incident is valid,⁽⁴⁾ but the sale of a mere right to sue is void.⁽⁵⁾

A transaction which may not be impeachable under this clause may still be attacked as void under the other sections of the Act, as for example, section 53.⁽⁶⁾ Thus a sale made to defeat an impending execution though not void under the clause, may still be successfully impeached under that section.⁽⁷⁾

263. Unlawful consideration.—Although the Indian Contract Act does not differentiate "motive" from "consideration" the two terms are clearly distinguishable.⁽⁸⁾ Thus, where a widow sued her husband's executor for breach of an agreement made with him to allow her to occupy a house, the property of her husband, and it appeared that the executor had agreed in accordance with the wishes of the deceased it was held that the desire on the part of the executor to carry out the wishes of the deceased would not amount to consideration. "Motive is not the same thing with consideration. Consideration means something of some value in the eye of the law, moving from the plaintiff."⁽⁹⁾ So, a moral obligation to repay benefits received in the past is really a satisfaction of the motive of pride or gratitude. It is really no consideration. Any other view "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."⁽¹⁰⁾ Such a motive is, however, sometimes designated a "good consideration" to differentiate it from "valuable consideration," which is the only nexus of a lawful agreement. A consideration is either (a) *executed* or present, (b) *executory* or future, and (c) *concurrent* as in the case of mutual promises. Past consideration is no consideration at all. A transfer for unlawful consideration is void. "for, although, in general the agreements into which parties enter have the force of law over those parties,—because *modus et conventio vincunt legem*;"⁽¹¹⁾ yet this rule does not apply where the interest of the public, or of morality are affected by the agreement, and may be injured by the observance of its provisions."⁽¹²⁾ Of an unlawful consideration, it may be

(1) *Gopal v. Gangaram*, I. L. R., 14 Bom., 72 (77).

(2) *Fitzroy v. Cave*, [1905] W. N., 103.

(3) *Haralal v. Shahu*, 10 W. R., 140.

(4) *Dickinson v. Burrell*, 35 L. J. Ch., 371.

(5) *Prosser v. Edmonds*, 41 R. R., 322;

followed in *Deorao v. Sadasheo*, 1 Nag. L. R., 17 (20).

(6) *Siva v. Ellamma*, I. L. R., 22 Mad., 310.

(7) *Rajan v. Adeshur*, I. L. R., 4 Bom., 70.

(8) *Jaffer Meher Ali v. Budge-Budge Jute*

Mills, I. L. R., 33 Cal., 702 (710), O. A., I. L. R., 34 Cal., 289.

(9) *Thomas v. Thomas*, 2 Q. B., 851.

(10) *Per Lord Denman in Eastwood v. Kenyon*, 11 A. & E., 438; *Mortimore v. Wright*, 6 M. & W., 482; *Vasudev v. Venkatesh*, 10 B. H. C. R., 139; *Tilackchand v. Jitmal*, ib., 206; *Sreenath v. Doorga*, 9 W. R., 216.

(11) "The form (of agreement) and the convention (of parties) override the law."

(12) *Chitney's Contracts* (12th Ed.), 671.

generally premised that either party may avoid the transfer so vitiated,⁽¹⁾ and parol evidence may be admitted to establish the illegality.⁽²⁾ If one of the several considerations is illegal, the whole contract is void.⁽³⁾ And if a transfer is supported by several considerations, one of which is illegal, the whole transfer is void, and in this respect it differs from a deed or a bond containing several covenants, some of which are illegal, in which case if the legal part can be severed from the illegal, the deed or bond is held to be good *pro tanto*.⁽⁴⁾ The legality of consideration is not presumed but must be proved by the party pleading it.⁽⁵⁾ Sometimes where the parties are not in *pari delicto*, relief may be obtained in equity. The legal effect of a transfer supported by *immoral* consideration was fully explained by Lord Selborne, L. C., who said (6) : (i) "Bonds or covenants founded on past co-habitation, whether adulterous, incestuous or simply immoral are valid in law, and not liable (unless there be other elements in the case) to be set aside in equity. (ii) Such bonds or covenants if given in consideration of future co-habitation are void in law, and therefore, of course, also void in equity. (iii) Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument," to which may be added (iv) that if the illegal consideration does not appear on the face of the instrument, equitable relief may be given in some circumstances to a *particeps criminis*.⁽³⁾ So it has been held in England that transfers founded on past co habitation are void,⁽⁷⁾ but a gift to which an immoral condition is attached, remains a good gift while the condition alone is void,⁽⁸⁾ and in one case the donee, who was the donor's mistress, was allowed to retain possession of a house, gifted to her on condition of her future immoral co-habitation with the donor because she had continued in its possession for eight years.⁽⁹⁾ But in Madras a bequest conditioned upon the continuance till death of the immoral relations between the testator and the legatee was held to be void and unenforceable.⁽¹⁰⁾ And a promise to pay a woman an allowance in consideration of past co-habitation has been held to be valid.⁽¹¹⁾ But an agreement between husband and wife for their future separation made in contemplation of a breach of conjugal infidelity is illegal,⁽¹²⁾ and money advanced to a married woman to procure a divorce from her husband with a view to marry the creditor is "*contra bonos mores*" and, therefore, void.⁽¹³⁾

264. Transfer opposed to public policy.—It will be seen that in many cases before cited, the transfer was held to be void not because it was unlawful, fraudulent or immoral, but because it was opposed to public policy. But in such a case on close examination it will be discovered that what is opposed to public policy is also either illegal or immoral. For "public policy" though a large term has now but a very limited application. As Burrough, J., said : "I protest against arguing too strongly upon public policy : it is a very

(1) *Holman v. Johnson*, Cowp., 341 (349).
 (2) *Collins v. Blanton*, 2 Wils., 341 (347);
Abbott v. Hendricks, 1 M. & G., 791.
 (3) *Lound v. Grimwade*, 39 Ch. D., 605.
 (4) *Baker v. Hedgecock*, 39 Ch. D., 520;
Davlat Singh v. Pandu, I. L. R., 9 Bom.,
 17; *Hill v. Clarke*, I. L. R., 27 All., 266.
 (5) *Kumala v. Beharee*, 11 W. R., 314.
 (6) *Ayerst v. Jenkins*, I. L. R., 16 Eq., 275
 (282).
 (7) *Benyon v. Nettlefield*, 3 M. & G., 100.
 (8) *Ramsaroop v. Bela*, I. L. R., 6 All.,
 818 (820).

(9) *Lachmi v. Wilayti*, I. L. R., 2 All.,
 433; affirmed O. A., *Ramsaroop v. Bela*, I. L.
 R., 6 All., 313, P. C.
 (10) *Tayaramma v. Seetaramaswami*, I. L.
 R., 23 Mad., 613.
 (11) S. 25, Cl 2, Indian Contract Act (IX
 of 1872); *Dhiraj v. Bikramajit*, I. L. R.,
 3 All., 787; *Man Kuar v. Jasodha*, I. L. R.,
 1 All., 478.
 (12) *Sitaram v. Aheeree*, 11 B. L. R., 129.
 (13) *Bai Bijli v. Nansa*, I. L. R., 10 Bom.,
 152.

unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.”⁽¹⁾ And so Lord Davey observed that public policy, was always an unsafe and treacherous ground for legal decision⁽²⁾. Consequently, when section 23 of the Indian Contract Act speaks of contracts as void because the Court regards them as opposed to “public policy,” it adopts a phrase which has neither a defined nor an invariable meaning. For, as observed, by their Lordships of the Privy Council “the determination of what is contrary to the so-called ‘policy of the law’ necessarily varies from time to time. Many transactions are upheld now by our courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion.”⁽³⁾ The courts are loath to lay down what is contrary to public policy. As Cave, J., remarked : “Certain kinds of contracts have been held void at common law on the ground of public policy ; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.”⁽⁴⁾ “The doctrine of public policy is regarded nowadays as one rather for the legislature than the courts, although the courts will not shrink from acting on it if the contract sought to be enforced leads to immorality or crime.”⁽⁵⁾ This then is the test equally applicable to contracts as well as to transfers. They are void because they are illegal or because they outrage morality or some cherished and well recognized standard of social order. Such would, for instance, be a transfer of property conditional upon the transferrer obtaining from the beneficiary a title of honour for which he might be unfit.⁽⁶⁾ On the same principle, law reprobates trafficking in a public office which is untransferable for another reason already considered. It has been held that the sale or resignation of such an office is contrary to public policy and cannot be enforced ;⁽⁷⁾ nor can the sale of a recommendation to a public office, or an agreement by a person for a pecuniary reward to use his influence in order to obtain such an office for another. The same reason equally applies to the transfer of the emoluments of such an office and the like.⁽⁸⁾

265. These common law prohibitions have received legislative sanction in this section,⁽⁹⁾ thereby still further narrowing down the uncertain field of public policy. But all the same there are undoubtedly some cases of transfer void as such on the grounds of public policy, which are neither illegal nor immoral. Such are transfers in restraint of trade, or common right or conjugal rights and those creating monopolies. So where the licensing magistrates who were authorized to grant licenses for the sale of ice cream in a hotel restricted it to sale within certain hours and only to week days the House of Lords held it to be an infringement of the common law right, not clearly sanctioned by the Legislature and the by-law passed thereunder, and as such *ultra vires* of the licensing magistrates.⁽¹⁰⁾ Following this case it was held in Madras that a power to interfere with

(1) *Richardson v. Mullish*, 2 Beng., p. 252.

(2) *Janson v. Driesfontein Consolidated Mines, Ltd.*, (1902) A. C. 484 (500).

(3) *Evanturel v. Evanturel*, L.R., 6 P. O. 1 (29).

(4) *Re Miranis*, (1891) 1 Q. B., 594 ; cited with approval per Lord Bramwell in *Mogul Steamship Co. v. McGregor Gow & Co.*, (1892) A.C., 25 (45).

(5) Per Farwell L.J., in *Hyams v. Stuart*

King, [1908] 2 K. B. 696 (727).

C. B. 578 ; *Fyfe v. Forbes*, 12 C. B. (N. S.) 191.

(6) *Eyerton v. Earl Brownlow*, 4 H.L.C., 1.

(7) Co. Litt. 294 n ; *Hopkins v. Prescott*, 4

(8) *Hartwell v. Hartwell*, 4 ves. 810.

(9) S. 6 (f) ante.

(10) *Rossi v. Edinburgh Corporation*, [1905] A. C., 21 (26).

the ordinary rights of citizens will not be interfered with in the absence of express grant unless it is necessarily implied as incidental to other powers expressly granted or is indispensable to repress the mischief contemplated and advance the remedy given. The Municipal Council of Mayavaram were empowered by a Local Act to license places for selling meat, and whereupon they granted to the plaintiff the exclusive right of selling meat, but the court held it to be *ultra vires* in the Municipality on the ground that the Act merely empowered it to consider the propriety of granting or withholding licenses in each case and not to enter into agreements which must preclude it from considering any such application except from a particular person.⁽¹⁾ But such a case must be distinguished from a combination of trading interests intended to secure monopoly in trade by extinguishing competition against which public policy is powerless to protect those who suffer from it.⁽²⁾ A Hindu wife is under a legal obligation to reside with her husband wherever he may choose to reside. Consequently, an antenuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her parental abode, would be void both because it defeats the rule of Hindu law as also because it is opposed to public policy.⁽³⁾ A contract for the future separation of husband and wife is void as contrary to public policy.⁽⁴⁾ And so is an agreement made by the husband to marry a person on the death of his wife and in consequence of which she permitted him to have access to her.⁽⁵⁾ Even a mere promise to marry a person by a married man on the death of his wife has been held to be contrary to public policy.⁽⁶⁾ And a similar policy renders invalid a condition in a will against the donees living with or under the control of their father, since it deters the father from performing his parental duties.⁽⁷⁾ A contract absolutely restraining marriage is invalid,⁽⁸⁾ though one which prohibits a second marriage⁽⁹⁾ or marriage with a particular person or limited class of persons; *e. g.*: a Scotsman,⁽¹⁰⁾ or a domestic servant⁽¹¹⁾ is legal; and so would be an agreement by a Hindu against polygamous marriage, except where the existing wife was barren.⁽¹²⁾ A servant cannot contract himself out of the benefit of a statute enacted for his protection,⁽¹³⁾ but such a case must largely depend upon the wording of the Statute.⁽¹⁴⁾ Contracts by way of gaming and wagering are now prohibited by the Contract Act,⁽¹⁵⁾ which contains other specific prohibitions all supported by public policy.⁽¹⁶⁾

266. Marriage Broccage.—In England agreements for marriage broccage are utterly void, as opposed to public policy.⁽¹⁷⁾ But it does not thence follow that they should be held equally void in this country, the social circumstances of which are widely different.⁽¹⁸⁾ But the English rules have nevertheless been given effect to in several decisions of the

(1) *Somu Pillai v. Municipal Council, Mayavaram*, I.L.R., 28 Mad., 520.

(2) *Mogul Steamship Co. v. McGregor Gow & Co.*, (1892) A. C., 25.

(3) *Tekait Mon Mohini v. Basanta*, I.L.R., 28 Cal., 751.

(4) *Hendley v. Westmeath (Marquis of)*, 6 B. and C. 200; *Wilson v. Wilson*, 1 H.L.C., 538.

(5) *Spiers v. Hunt*, [1908] 1 K.B., 720.

(6) *Wilson v. Carnley*, [1908] 1 K.B., 729.

(7) *Noel v. Sandbrook*, [1912] 2 Ch. 471.

(8) S. 26, Indian Contract Act (Act IX of 1872); *Baker v. White*, 2 Vern., 215; *Hartley v. Rice*, 10 East, 22; *Bellairs v. Bellairs*, L. R., 18 Eq., 510.

(9) *Newton v. Mursden*, 31 L.J., (Ch.) 690;

Allen v. Jackson, 1 Ch. D., 399.

(10) *Perrin v. Lyon*, 9 East, 170.

(11) *Jenner v. Turner*, 16 Ch. D., 188.

(12) *Gama v. Lahanoo*, 4 N.L.R., 86 (90).

(13) *Baddeley v. Granville*, 19 Q.B.D., 423.

(14) *Griffiths v. Dudley (Earl)*, 9 Q.B.D., 357.

(15) S. 30, Indian Contract Act (Act IX of 1872).

(16) Ss. 25-30, Indian Contract Act (Act IX of 1872).

(17) *Scott v. Tyler*, 2 W. & T. L. C., 431; *Hall v. Porter*, 2 Vern., 392; *Hermann v. Charlesworth*, [1905] 2 K.B., 123, reversing O.A., [1905] 1 K.B., 24.

(18) *Bakshi Das v. Nadu Das*, 1 C.L.J., 261 (268).

Indian Courts, (1) though their decisions are not all concordant, for while the Bombay High Court has refused to enforce such contracts even in favour of a person in *loco parentis*, the Madras Court at one time upheld them, (2) in a case which has since been overruled. (3) But a payment to a stranger was condemned even by that Court. (4) Similarly, an agreement by a prospective son-in-law to pay a certain sum to this mother-in-law by way of maintenance in consideration of her giving away her daughter in marriage has been condemned in England, as being opposed to public policy. (5) And this view has been followed in its entirety both by the Bombay and Calcutta Courts, (6) and there can be no doubt that a stipulation for maintenance, as such, is hardly distinguishable from a marriage brokerage, in which the primary consideration, regarding the happiness and welfare of the child is apt to be subordinated to pecuniary gain, and thereby reducing matrimony to a mere matter of huckstering sale—often a kidnapping into conjugal servitude. But at the same time, there may be cases of exceptional hardship in which to apply the rule rigidly would be to drive a party to destitution. And this necessary reservation has been justly made by the Courts both in Madras (7) and Allahabad. (8) But such cases must be regarded as rare and exceptional. (9) for to treat them otherwise would be paving a way to guardians for trafficking in infants placed under their care. In a recent case *Mookerjee, J.*, passed in review all the cases bearing on the subject, and from which he deduced the following six rules:—(1) That an agreement to remunerate or reward a third person in consideration of negotiating a marriage is contrary to public policy and cannot be enforced. (2) An agreement to pay money to the parents or guardian of a bride or bridegroom, the consideration of their consenting to the betrothal, is not necessarily immoral or opposed to public policy where the parents of the bride are not seeking her welfare, but give her to a husband otherwise ineligible in consideration of a benefit secured to themselves, the agreement by which such benefit if secured is opposed to public policy, and ought not to be enforced. (3) Where an agreement to pay money to the parents or guardian of a bride or bridegroom, in consideration of their consenting to the betrothal, is under the circumstances of the case neither immoral nor opposed to public policy, it will be enforced, and damages also will be awarded for breach of it. (4) A suit will lie to recover the value of ornaments or presents given to an intended bride or bridegroom in the event of the marriage contract being broken. (5) Although a Court may not enforce an agreement to pay money to the parents or guardian of an intended bride or bridegroom on the ground that the agreement is opposed to public policy, yet a suit is maintainable for the recovery of any sum actually

(1) *Dulari v. Vallabhdas*, I. L. R., 13 Bom., 126; *Pitamber v. Jagjivan*, ib. 131; *Dholidas v. Fulchand*, I. L. R., 22 Bom., 42; *Venkata v. Lakshmi*, I. L. R., 32 Mad., 185, F.B.; following *Dholi Das v. Fulchand*, I. L. R., 22 Bom., 42; overruling *Visvanathan v. Saminathan*, I. L. R., 13 Mad., 83; *Vaihiyanatham v. Gangarazu*, I. L. R., 17 Mad., 9.

(2) *Vishvanathan v. Saminathan*, I. L. R., 13 Mad., 83; distinguished in *Vaihiyanatham v. Gangarazu*, I. L. R., 17 Mad., 9. In Calcutta in *Ramchand v. Audaito*, I. L. R., 10 Cal., 1054, Garth, C.J., supported the Bombay view while *Beverley, J.*, held the contrary.

(3) *Venkata v. Lakshmi*, I. L. R., 32 Mad., 185, F.B.

(4) *Vaihiyanatham v. Gangarazu*, I. L. R.,

17 Mad., 9.

(5) *Ken v. Potter*, 3 P. Will, 76, *Story's Eq. Jur.*, 260, 261; *Duke of Hamilton v. Lord Mohun*, 1 P. Will, 118 (120); *Osborne v. Williams*, 18 Ves. J., 379; *Scott v. Tyler*, 2 W. & T. L. O., 231; *Dulari v. Vallabhdas*, I. L. R., 13 Bom., 126; *Pitamber v. Jagjivan*, ib., 131 (note); *Dholidas v. Fulchand*, I. L. R., 22 Bom., 688; *Ramchand v. Audaito*, I. L. R., 10 Cal., 1054.

(6) *Bakshi Das v. Nadu Das*, 1 C L.J., 261; *Baldeo Das v. Mohamaya*, 15 C W. N., 447.

(7) *Visvanathan v. Saminathan*, I. L. R., 13 Mad., 83.

(8) *Baldeo v. Jumna*, I. L. R., 23 All., 495 (496).

(9) Cf. *Shib Nundun v. Sree Narain*, 11 W. R., 415.

paid pursuant to the agreement, if the contract is broken and the marriage does not take place. (6) If one of the contracting parties alleges that the agreement is opposed to public policy it is for him to set out and prove those special circumstances which will invalidate the contract.⁽¹⁾ But the subject does not appear to be one upon which any general rule can be formulated. For instance, where the object of an agreement is to procure by corrupt means the guardian's consent to a desired marriage, the agreement is void, irrespective of the qualifications of the bridal pair.⁽²⁾ On the other hand, where such payment is customary and appears reasonable, the Courts are likely to give effect to the contract though it may savour of brokerage.

267. Bribes paid to officials are irrecoverable in a civil suit,⁽³⁾ and so
Corrupt payments. a deposit made with a surety against its forfeiture by a person called upon to furnish security for his good behaviour ~~or for his appearance in Court~~⁽⁵⁾ cannot be recovered. Money paid to a witness to give evidence in a civil suit falls into the same category.⁽⁶⁾ A promissory note given to a creditor in consideration of his threatened opposition to the discharge of the insolvent debtor, conferring as it does an advantage in fraud of the Insolvency law is void.⁽⁷⁾ An agreement to thwart a criminal prosecution is not only void but vicious.⁽⁸⁾ The Court will not enforce the penalty agreed to be paid on leaving a *Samaj*.⁽⁹⁾

268. Transfer in breach of law or covenant.—A partnership of a Government ferry in violation of the covenant against underletting is not a breach of the covenant:⁽¹⁰⁾ but an underlease opposed to an express covenant would apparently stand on a different footing.⁽¹¹⁾ So it has been held that an Abkari contractor cannot sub-let the license in contravention of the provisions of the Excise Acts.⁽¹²⁾ But the law violated must be, it appears, some substantive law and not merely an adjective law as the Procedure Code.⁽¹³⁾ And where a law provides that compound interest will not be decreed, it does not render a stipulation as to compound interest illegal.⁽¹⁴⁾ And so where the prohibition is made under only a pecuniary penalty, its violation being limited to the specific penalty, the contract is not void.⁽¹⁵⁾ So where the terms of a lease of a

(1) *Bakshi Das v. Nadu Das*, 1 C. L. J., 261 (266, 267).

(2) *Hira v. Bhandari*, (1892) P. R., No. 112; *Wazira Mal v. Rallia*, (1889) P. R., No. 128; *Baldeo Das v. Mohmaya*, 15 C. W. N., 447; *Kalavaqunt v. Lakshmi Narayan*, 3 I. C., 554; *Girdhari v. Neeladhar*, 10 A. L. J., 169.

(3) *Protima v. Dookhia*, 18 W. R., 450; followed in *Gogun v. Janokee*, 20 W. R., 235; *Picharkutty v. Narayanappa*, 2 M. H. C. R., 248.

(4) *Fateh Singh v. Sanwal*, I. L. R., 1 All., 751.

(5) *Laxmantal v. Mulshankar*, I. L. R., 32 Bom., 449 (453); following *Herman v. Jouchner*, 15 Q. B. D., 561.

(6) *Sashannah v. Ramasamy*, 4 M. H. C. R., 7.

(7) *Krishnappa v. Adimula*, I. L. R., 20 Mad., 84; *Agar Chand v. Viraraghavalu*, 3 M. H. C. R., 172.

(8) *Narasivaya v. Kylasa*, 7 M. H. C. R., 200; *Pudishary v. Karampally*, ib., 378.

(9) *Nitai v. Shubal*, 10 W. R., 349; *Huro-*

nath v. Nitto, 22 W. R., 517.

(10) *Gauri Shankar v. Mumtaz*, I. L. R., 2 All., 411, F. B., explained in *Debi v. Rup Ram*, I. L. R., 19 All., 577 (579).

(11) *Debi v. Rup Ram*, I. L. R., 10 All., 577 (579); *Judoonath v. Nobin Chunder*, 21 W. R., 289.

(12) *Ritchie v. Smith*, 18 L. J. C. P., 9; *Candell v. Dawson*, 17 L. J. C. P., 311; *Smith v. Marhood*, 15 L. J. (Ex.), 149; *Taylor v. The Crowland Co., Co.*, 23 L. J. (Ex.), 254; *Judoonath v. Nobin Chunder*, 21 W. R., 289; *Debi v. Rup Ram*, I. L. R., 10 All., 577 (589, 590); *Raghunath v. Nathu*, I. L. R., 19 Bom., 626; *Hormasji v. Pestonji*, I. L. R., 12 Bom., 422; *Jadoo Nath v. Nobin Chunder*, 21 W. R., 289; *Boister v. Wooma*, I. L. R., 16 Cal., 436; *Behari Lal v. Jagdish*, I. L. R., 31 Cal., 798 (804).

(13) *Hukam Chand v. Taharunnessa*, I. L. R., 16 Cal., 504.

(14) *Shama Charan v. Chuni Lal*, I. L. R., 26 Cal., 238.

(15) *Bhikanbhai v. Hiralal*, I. L. R., 24 Bom., 622.

ferry were against assignment or sub-renting the ferry, but such a transfer was not prohibited by statute or by a rule framed under a statute, an assignment, though made in violation of a contract, was held to be valid as between the renter and his transferee, though it may be invalid as against Government.⁽¹⁾ But a transaction intended to have and having the effect of defeating the right of the Crown to escheat is void,⁽²⁾ but if a person is within his right, and divides or alienates his property, there is nothing illegal.⁽³⁾ Thus a settlement in prospect of a marriage with the donee is valid.⁽⁴⁾ And while the transfer of property in consideration of foregoing a criminal prosecution is void, there is nothing illegal in compromising a case which the law has declared to be compoundable, and in which case the policy of the law is to allow the party aggrieved to redress himself by obtaining such reparation as may be arranged between the parties.⁽⁵⁾ But in non-compoundable cases in which public justice has to be vindicated, the accused cannot make amends by paying money to the complainant, and the court will not enforce a transfer,⁽⁶⁾ which is a misprision of felony.⁽⁷⁾ But a court is not bound to take notice of the infraction of the Municipal law of a foreign country,⁽⁸⁾ and even in non-compoundable cases, if the magistrate sanctions withdrawal and the parties have come to terms under which the accused have agreed to pay a sum of money to the complainant as a *solatium*, it was held that the error of the magistrate ought not to affect the position of the parties.⁽⁹⁾ But it may be permissible to question the soundness of this view. If the felony was non-compoundable, the fact that the magistrate exceeded his powers in permitting its compromise, the terms of which do not appear to have been brought to his notice, would not wipe out the illegality which tainted the transaction. If a man buys property of another, who was raising the money for the purpose of giving as a bribe, of which the purchaser was ignorant, he cannot be damned unless he can be shown to have been privy to the design.⁽¹⁰⁾ "A man to whom a civil debt is due, may take securities for that debt from his debtor, even though the debt arises out of a criminal offence and he threatens to prosecute for that offence, provided that he does not, in consideration of such securities, agree not to prosecute, and such an agreement will not be inferred from the creditor using strong language. He must not, however, by stifling a prosecution, obtain a guarantee for his debt from third parties."⁽¹¹⁾

269. An agreement is not illegal or opposed to public policy merely because it was forbidden under a pecuniary penalty, the penal consequences of which would be limited to the imposition of the specific penalty, but it would not make the contract void. Thus where under the Bombay Tolls Act the Government leased to the plaintiff the levy of tolls

(1) *Abdula v. Mammad*, I. L. R., 26 Mad., 156.

(2) *Tamara v. Maranat*, I. L. R., 3 Mad., 215.

(3) *Ram Nurunjun v. Prayag*, I. L. R., 8 Cal., 138.

(4) *Jallun v. Nobin Mohun*, 25 W. R., 32; cf. *Jogeswar v. Panch Cowri*, 14 W. R., 154; R. followed in *Ram Chand v. Audaito*, I. L. R., 10 Cal., 1054.

(5) *Amir Khan v. Amir Jan*, 3 C. W. N., 5; *Mothooranath v. Gopal*, 5 W. R. (S. C. C. Ref.), 16; *Mothoora Nath v. Kenaram*, 7 W. R., 33; *Kumala v. Beharee*, 11 W. R., 314.

(6) *Kandan v. Coorgee*, 2 M. H. C. R., 187; *Srirangachariar v. Ramasami*, I. L. R.,

18 Mad., 189; *Q. v. Balkishen*, 3 N. W. P. H. C. R., 166, F. B., *Jetoo v. Monuram*, 17 W. R., 84; *Kessowjee v. Hurjivan*, I. L. R., 11 Bom., 566.

(7) *Williams v. Bayley*, 1 H. L. C., 200 (220); *Kessowji v. Hurjivan*, I. L. R., 11 Bom., 566 (572).

(8) *Subaraya v. Subraya*, 4 M. H. C. R., 14.

(9) *Nubee Buksh v. Hingon*, 8 W. R., 412.

(10) *Rajkristo v. Koylash*, I. L. R., 8 Cal., 24.

(11) *Kessowji v. Hurjivan*, I. L. R., 11 Bom., 566 (572); explaining *Flower v. Sadler*, L. R., 10 Q. B. D., 572; *Ward v. Lloyd*, 7 Scott, N. R., 499.

on certain conditions, one of them being that the plaintiff should not sub-let the tolls without the permission of the Collector previously obtained, and providing that in case of a breach of the condition the Collector might impose a fine of Rs. 200, the plaintiff having sub-let the tolls in contravention of the terms of his lease, sued the defendant to recover the premium due for the sub-lease, it was contended for the latter that the lease was illegal and as such void, having been made in violation of the terms of the Tolls Act, but the contention was overruled.⁽¹⁾

270. Locus Poenitentiae.—In a case in which the transaction is still inchoate, or the grantor still retains a *locus poenitentiae*, the formal act may be relieved against by reference to the real intention of the parties, the reason being that in such cases the violation or infringement of the law had not been completed.⁽²⁾ Hence, when an illegal purpose has been effected by a transfer of the property, the transferee is not to be treated as holding it for the benefit of the transferor,⁽³⁾ and the latter is ever afterwards precluded from proving the real nature of the transaction.⁽⁴⁾

271. Disqualified Transferees.—The law against the transferability of property to a person legally disqualified to be transferee is a branch of the law against maintenance and champerty which has just been discussed. For it is to discourage the malpractices which arose out of the law officers trafficking in questionable claims that the early statutes against champerty were directed. Thus it was provided by the Statute of Westminster I that “no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters, having in the King’s Courts, for lands, tenements or other things, for to have part or profit thereof by covenant made between them; and he that shall, be punished at the King’s pleasure.”⁽⁵⁾ Another statute passed in the same reign further extended the scope of the prohibition by prescribing that “the chancellor, treasurer, justices, nor any of the King’s Council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King’s house, clerk or lay shall, nor receive any church, nor advowson of a church, land, nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof.”⁽⁶⁾ And this statute was again extended by another which ordained that “The King wills that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another.”⁽⁷⁾ The penalty of attainder was provided for disobedience “but it may not be understood hereby that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents, or next friends.”⁽⁸⁾

(1) *Bhikanbhai v. Hiratal*, I. L. R., 24 Bom., 622; distinguishing *Raghunath v. Nathu*, I. L. R., 19 Bom., 626; and see *Gangadhar v. Damodar*, I. L. R., 21 Bom., 522; *Judoonath v. Nobin Chunder*, 21 W. R., 289; *Gauri Shankar v. Mumtaz Ali*, I. L. R., 2 All., 411.

(2) *Bowers v. Foster*, 27 L. J., 262; *Taylor v. Bowers*, 1 Q. B. D., 291; *Sham Lal v. Amarendra Nath*, I. L. R., 23 Cal., 460; and the cases therein cited.

(3) *Chenvirappa v. Puttapa*, I. L. R., 11 Bom., 708 (719); *Tamarasherri v. Maranat Vasudewan*, I. L. R., 3 Mad., 215.

(4) *Goberdhan v. Ratu Roy*, I. L. R., 23 Cal., 962; *Kali Charan v. Basik Lal*, ib. 962 note.

(5) 3 Edw. I. C., 25.

(6) 13 Edw. I. C., 49.

(7) 28 Edw. I. C., 11; 1 Rich. II., C. 4, extended the restriction to all persons.

(8) But with respect to the Counsellor it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of “champerty” 2 Inst., 564, 1 Russel on Crimes (5th Ed.), 358.

A similar prohibition is separately and more specifically enacted by the Act,⁽¹⁾ and the Code of Civil Procedure,⁽²⁾ the former of which enumerates the class of persons legally disqualified to be transferees, under which judges, legal practitioners, mukhtars, clerks, bailiffs, and other officers connected with court of justice are disqualified from buying any actionable claim. Similarly, though upon other grounds a minor,⁽³⁾ an idiot and alien enemies cannot be transferees.

272. Excepted Transfers.—The clause “nothing in *this* section”

Clause (1). implies that by virtue of this section alone no transfer can be validated which may otherwise be forbidden or void under any other law. This clause, added by the Amending Act of 1885, is identical with the second clause in section (1086) and has been inserted against any doubt which, in view of section 117, may arise as to its applicability to leases for agricultural purposes. Under this clause then an occupancy-tenant holding an untransferable land cannot alienate it.⁽⁴⁾ An occupancy-tenant in the United and Central Provinces, holding as he does, untransferable interest cannot transfer it.⁽⁵⁾ In Bengal such a right is not *per se* transferable or untransferable, but it may be so according to the local custom.⁽⁶⁾

273. The lessee of an estate from whom rent is due thereon cannot lease

Farmer of an Estate.

his rights, and if he does so, his liability for rent does not cease.⁽⁷⁾ *Putni* right over a specific area lying within a *putni* taluk is transferable.⁽⁸⁾

7. Every person competent to contract and entitled to

Persons competent to transfer.

transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

274. Analogous Law.—This is an enabling section and enacts that persons lawfully capable of transferring property may do so in the manner allowed and prescribed by any law for the time being in force. Section 11 of the Contract Act,⁽⁹⁾ defines persons who are competent to enter into contracts. It says: “Every person is competent to contract who is of the age of majority

(1) S. 136 *post* (q. v.).

(2) S. 292.

(3) *Fatima Bibi v. Debnath Shah*, I. L. R., 20 Cal., 508; but see *Mohamed Arif v. Saraswati Debya*, I. L. R., 18 Cal., 259; *Sashi Bhushan Dutt v. Jadunath Dutt*, I. L. R., 11 Cal., 552 (where such a contract is held to be voidable at the option of the minor); *Hanmant Lakshman v. Jagarao*, I. L. R., 13 Bom., 50. “A money-bond taken by a minor is good in law, and may be sued on.”

(4) *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, F. B.

(5) N. W. P. Rent Act, (XII of 1881). S. 9. Now see ss. 20, 21, N. W. P. Tenancy Act (Loc. Act II of 1901), *Gopal Pandey v. Parsotam Das*, I. L. R., 5 All., 121, F. B.; *Madanlal v. Mahomed Ali*, A. L. J. R., 476,

Banmalai v. Bisheshwar, I. L. R., 29 All., 129 (132, 133); C. P. Tenancy Act (XI of 1898), S. 46. But a tenant may create an usufructuary mortgage of his occupancy holding in the United Provinces; *Brij Mohan v. Algu*, I. L. R., 26 All., 78; *contra*. He can only give a sub-lease, *Banmalai v. Bisheshwar*, I. L. R., 29 All., 129 (132, 133).

(6) *Palakāhari Rai v. Mannars*, I. L. R., 23 Cal., 179, and cases cited under S. 108 (j), *post*.

(7) *Sashi Bhushan Raha v. Tara Lal Singh Deo Bahadur*, I. L. R., 22 Cal., 494; *Gaya Prasad v. Baijnath*, I. L. R., 14 All., 176.

(8) *Madhub Ram v. Doyal Chand Ghose*, I. L. R., 25 Cal., 445, see s. 117, *post comm*.

(9) Act IX of 1872.

according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Thus then excepting persons who are of unsound mind all adults may enter into any lawful contracts, unless they are disqualified from contracting, by any law to which the contracting party may be subject. This qualification need not be explicit, but may be implied from a reasonable construction of the law.⁽¹⁾ One who is usually of unsound mind but occasionally of sound mind, may enter into a contract when he is of sound mind but not when he is of unsound mind.⁽²⁾ Under the Indian Majority Act,⁽³⁾ which applies to all persons domiciled in India, the period of minority is ruled to last until the completion of the eighteenth year. This holds good for either sex and supersedes the personal and local laws by which this question was formerly decided.⁽⁴⁾ A European not domiciled but only temporarily residing in India is not governed by the Indian Majority Act, but by the personal law of his personal domicile.⁽⁵⁾

The provisions of this section are closely analogous to section 7 of the Trusts Act,⁽⁶⁾ which provides for the creation of a trust under similar circumstances. The competency to transfer or create a trust is then coincident with the competency to contract. But in order to effect a valid transfer the intending transferrer must not only be competent, but must also have some interest in the property over which he must possess disposing power.

275. Principle.—Instead of codifying the complex body of rules and law regulating the competency of parties to transfer, this section simply enacts that the Act must be understood to be subject to these rules. What these rules are, could not, of course, be defined by reference to a single enactment or for that matter, to the general body of enactments, for the competency of a person to make and take transfer depends not only on the law of contracts, but also the personal law to which he may be subject. It is impossible to deal with the subject adequately here, but an attempt is made to summarize it only so far as it affects the law of transfer.

276. Meaning of words.—"Every person" would include a corporation, society, a firm of partners or the like.⁽⁷⁾

277. Competency to contract.—The first requisite of a valid transfer is that the transferrer must have possessed the power to contract, which is conditioned by his being (i) a major, (ii) of sound mind, and (iii) free from any other legal disqualification. The subject of majority has been briefly noticed in the foregoing paragraph. The Indian Majority Act,⁽⁸⁾ which applies to all persons domiciled in British India,⁽⁹⁾ enacts that the period of minority shall last until the completion of the eighteenth year.⁽¹⁰⁾ Before the passing of the Act, however, the law applicable to determine majority was the personal law of the parties, which in the case of Hindus⁽¹¹⁾ and Mohamedans⁽¹²⁾ fixed the age of majority at the sixteenth year,

(1) *Dhumpat v. Shoolbudra*, I. L. R., 8 Cal., 620.

(2) S. 12, Indian Contract Act (IX of 1872).

(3) Act IX of 1875.

(4) *Reade v. Krishna*, I. L. R., 9 Mad., 291; *Sarat Chandra v. Foreman*, I. L. R., 12 All., 213.

(5) *Rohilkand and Kumaon Bank v. Row*, I. L. R., 7 All., 490.

(6) Act II of 1882.

(7) So the General Clauses Act, s. 3 (39), (Act X of 1897), enacts:—" 'Person' shall

include any company or association or body of individuals, whether incorporated or not." So according to the English Interpretation Act, 1889 (52 & 53 Vict., c. 63, s. 19) a person includes "any body of persons corporate or unincorporate."

(8) Act IX of 1875.

(9) *Ib.*, S. 1.

(10) *Ib.*, S. 3.

(11) *Mothoormohan v. Soorendro*, I. L. R., 1 Cal., 108, F. B.

(12) *Abdul v. Elias*, 8 W. R., 301.

and of Europeans at twenty-one years.⁽¹⁾ Thus in a case arising before the Act, a Mahomedan upon completing the full age of sixteen years was held to have attained majority under the Mahomedan law,⁽²⁾ which was applicable to him before the Majority Act,⁽³⁾ which was avowedly passed to extend the period of nonage,⁽⁴⁾ and to secure more uniformity and certainty respecting the age of majority. The Act further extends the period of minority up to the completion of twenty-one years in the case of two classes of persons, namely: (i) minors who have guardians appointed or declared by a Court, and (ii) those whose property is under the superintendence of the Court of Wards.⁽⁵⁾ On the other hand, the Act does not affect the capacity of any person to act in matters of marriage, dower, divorce, and adoption, or the religion or religious rites and usages of any class of the British subject.

278. As regards the competency of minors, the section does not say what

legal effect is to be given to the contracts and transfers of
Minor's transfer. minors, and it would thus seem that by placing a limit on competency, the contracts of minors may be either void or voidable. It was until recently held that a contract entered into by a minor was only voidable at his option and not void,⁽⁶⁾ and that minors possessed a qualified power to transfer property, a power of effecting it subject to its subsequent⁽⁷⁾ avoidance or ratification by them at their option upon attaining majority. But this view has now been overruled by the Privy Council who have held a minor's contract to be not only voidable but void. Indeed, in the view of their Lordships "the question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the (Contract) Act, and cannot arise in the case of an infant" who being incompetent to contract cannot make any contract at all.⁽⁸⁾ This view of the law has had the effect of cutting at the root of a considerable body of case-law which had been growing in India for half a century, from before the passing of the Indian Contract Act. The decision of the Privy Council naturally does away with the doctrine of ratification, for there can be no ratification of a transaction which never had any legal existence.⁽⁹⁾

279. This revolutionary ruling of the Court of ultimate appeal not only

Previous Law as to minor's contracts.

does not accord with the long course of Indian decisions, but is also opposed to the law as administered in England, in cases not covered by the Infants' Relief Act,⁽¹⁰⁾ and which generally coincided with that propounded by the Indian

(1) *Rollo v. Smith*, 1 B. L. R. (O. C.) 10; *Myna v. Oottaram*, 8 M. I. A., 400.

(2) *Damodar v. Wilayet Hussain*, I. L. R., 7 All., 763.

(3) S. 2 (c).

(4) *Ib.* Preamble.

(5) *Ib.*, S. 3; *Rudra v. Bhola*, I. L. R., 12 Cal., 612; *Brijmohun v. Rudra*, I. L. R., 17 Cal., 944; *Gordhandas v. Harivalubhdas*, I. L. R., 21 Bom., 281.

(6) *Rennie v. Gunga*, 3 W. R., 10; *Hari Ram v. Jitan Ram*, 3 B. L. R., (A. O.), 426; *Sashi Bhusan v. Jadu*, I. L. R., 11 Cal., 552; *Mahamed v. Saraswati*, I. L. R., 19 Cal., 259; *Sham Charan v. Chowdhry*, I. L. R., 21 Cal., 872; *Khairunnessa v. Loke Nath*, I. L. R., 27 Cal., 276; *Krishnasamy v. Sundarappayyar*, I. L. R., 18 Mad., 415; *Madan Mohan v. Rangji Lall*, I. L. R., 23 All., 288 (290); *Hanmant v. Jayrao*, I. L. R., 13 Bom.,

50; *Kashiba v. Shripat*, I. L. R., 19 Bom., 697; *Sadashiv v. Trimbak*, I. L. R., 23 Bom., 146.

(7) *Mansoor v. Ramdayal*, 3 W. R., 50, but *contra* in *Fatima v. Debnath*, I. L. R., 20 Cal., 508; following *Flight v. Bolland*, 4 Russ., 298; cf. *Kashiba v. Shripat*, I. L. R., 19 Bom., 697 (English law enacted in India).

(8) *Mohori Bibi v. Dharmodas* I. L. R., 30 Cal., 539 P. C.; following *Thurstan v. Nottingham Society*, [1902], 1 Ch., O. A. [1903], A. C., 6, followed in *Kamta Prasad v. Sheo Gopal*, I. L. R., 26 All., 342; *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (514, 515); *Mhd. Salim Khan v. Nago*, 1 Nag. L. R., 185.

(9) *Pollock's Contracts* (7th Ed.), 55.

(10) 37 & 38 Vict., C. 62. As to which see *Pollock's Contracts* (7th Ed.) 62, *et seq.*

Courts.⁽¹⁾ In this respect the law seems to have been uniformly the same. For it was held in a case ⁽²⁾ decided prior to the passing of the Contract Act that a mortgage executed by the agent of a minor owner and registered was not void but only voidable, and that until it was so avoided by some distinct act of the minor on his attaining majority, it must be considered to be a valid transaction. And there could be no question but that a minor's liability for contracts for necessities must be held to be binding on him, though under the Contract Act, ⁽³⁾ only his property and not his person is now liable. As regards the contracts of infants it was held that infancy was the personal privilege of which no one could take advantage but the infant himself; and, therefore, though the contract of the infant was voidable, yet it bound the other adult party to it.⁽⁴⁾ Therefore in a contract for the purchase or sale of immoveable property or for the performance of work, or of marriage, whilst the adult contracting party was bound and could be compelled by the minor to perform his promise, the minor himself was held to have incurred no corresponding liability.⁽⁵⁾ But now, since a minor can make no contract at all, the other contracting party, though an adult, can equally say of a minor's contract with him, that he is not bound by his agreement as there is no legal sanction to its legal validity which alone makes a contract capable of execution. Formerly in case of reciprocal promises giving rise to mutual obligations the minor could, it would appear, have sued until he was legally competent to ratify his contract, though a minor could not enforce the specific performance of a contract against an adult contracting party.⁽⁶⁾ On the other hand, he could not be compelled to complete a contract for the purchase of property, but if he had paid a deposit under such a contract, he could not on that account claim to recover it back.⁽⁷⁾

280. Doctrine of Ratification.—With reference to ratification, contracts may be divided into two classes (a) those that are valid unless disaffirmed, and (b) those that require ratification for their validity. The first class includes contracts "where an infant acquired an interest in permanent property to which obligations attach, or entered into a contract which involves continuous rights and duties, benefits and liabilities and took some benefit under the contract, he would be bound unless he expressly disclaimed the contract; on the other hand, a promise to perform an isolated act, such as to pay a reward for services rendered, or a contract wholly executory, would not be binding upon the infant unless he expressly ratified it upon coming of age."⁽⁸⁾ A minor lessee who occupies until majority would thus be bound for the rent which accrued during his minority. A minor mortgagee was similarly bound by the conditions of the deed, it being immaterial whether he was the original grantee or had taken by descent. But the case was, of course, different where the minor was the mortgagor, the advantage or disadvantage in that case depending on circumstances which could not be appreciated or taken into account at the commencement of such transaction, and the law accordingly allowed a minor as mortgagor or as a party to any other contract where he is

(1) The civil law, however, held a minor's contracts void and not voidable merely. Grotius, *De Jure Belli et Pacis* ii, 11, 5; Pothier, *Obligations*, s. 51; Gaius *Dig.*, 44, 7, 1, s. 12; Justinian, *Institutes*, 3, 19, 8; *Molyneux v. National Land &c., Co.*, [1905], A. C., 555 (561).

(2) *Hari Ram v. Jitan Ram*, 3 B. L. R., 426.

(3) S. 68.

(4) *Bac. Abr. Infants* (T.), 4.

(5) *Warwick v. Bruce*, 6 Taunt., 118; *Behari Lal v. Beni Lal*, I. L. R., 3 All., 408 (412).

(6) *Flight v. Bolland*, 4 Russ., 298.

(7) *Sunder Lal v. Chittarmal*, I. L. R., 29 All., 1, 215.

(8) *Anson's Contracts* (9th ed.), 114.

made the obligor a period of three years⁽¹⁾ after his coming of age in order that he might determine for himself whether he would confirm or repudiate the contract.⁽²⁾ And so a minor who became possessed of shares during his minority was held liable for calls which accrued during his infancy.⁽³⁾ So again an infant partner could not claim the profits without being also debited with the losses of the firm. "The infant by holding himself out as a partner, contracted a continual obligation, and that obligation remains till he thinks proper to put an end to it....If he wished to be understood as no longer continuing a partner, he ought to have notified it to the world."⁽⁴⁾ Contracts which require ratification for their validity are those which are not continuous in their operation. In England this was the common law, and, although later statutes⁽⁵⁾ have considerably modified it, it has left unaffected the old distinction between contracts.⁽⁵⁾

Under Hindu Law a minor can accept a gift, but his acceptance is voidable. It may, however, be presumed from his continuing in possession after attaining majority.

281. Ratification may be express or implied, and repudiation must be within a reasonable time, fixed at three years⁽⁶⁾ after the cessation of the disability or when the facts entitling him to repudiate the contract first become known to him. A minor could not be allowed to wait and see if the contract would be beneficial to him and then ratify or repudiate it.⁽⁷⁾ And in judging whether the election has been made within reasonable time regard must be had to whether the infant had notice of what he is called upon to decide. An infant is bound by the constructive notice of the contents of the deed which he had executed and if he did not repudiate it within four years, after he came of age he was held in an English case to be bound by its contents.⁽⁸⁾ But in another case where the minor had been ignorant of the provisions of a settlement made during infancy, and it had remained inoperative for over thirty years, it was held that the lapse of time was perfectly reasonable.⁽⁹⁾ The reasonableness in respect of time must then entirely depend upon the circumstances of each case.⁽¹⁰⁾ But the power of repudiation is a privilege which the law has given to the minor. As Lord Watson says: "It laid no obligation upon him—it merely conferred upon him a privilege of which he might or might not avail himself, as he chose. If he chooses to be inactive, his opportunity passes away: if he chooses to be active, the law comes to his assistance."⁽¹¹⁾ A minor cannot ratify a transaction which is *ab initio* void, as for example a mortgage of his immoveable property by his guardian appointed under the Bengal Minors Act,⁽¹²⁾ and who could not create a valid mortgage,⁽¹³⁾ without the sanction of the Civil Court.⁽¹⁴⁾ But in the above

(1) Art. 114, Sch. II, Limitation Act (XV of 1877).

(2) *Behari Lal v. Beni Lal*, 1 L. R., 3 All., 408 (412).

(3) *Evelyn v. Clanchester*, 3 Burr., 1717; *North-Western Ry. Co., v. McMichael*, 5 Ex., 114; *In re Yealand's consols*, 53 L. T., 922; *Whittingham v. Vaurdy*, 60 L. T., 956.

(4) Per Best, J., in *Goode v. Harrison*, 5 B. & Ald., 159.

(5) Infants' Relief Act 1874 (37 & 38 Vict. C. 62), which has declared such contracts absolutely void. By 9 Geo. IV, C. 14, infants' contracts could be ratified *in writing*. But under the first-named statute there can be no ratification (*ib.*, S. 2).

(6) S. 7, Art. 114, Sch. II, Limitation Act (XV of 1877); *Bissumbhur v. Sooradhuny*, 3 W. R., 21 (22).

(7) *Carter v. Silber* [1892], 2 Ch., 2780a; *Edwards v. Carter* [1893], A. C., 360 (365).

(8) Per Lord Halsbury, L. C., in *Edwards v. Carter*, [1893], A. C., 360 (365).

(9) *Parvinton v. Forrester*, [1893], 2 Ch., 46 (69).

(10) *Ib.* (69).

(11) *Edwards v. Carter*, [1893], A. C., 360 (366).

(12) Act XL of 1858.

(13) *Ib.*, S. 18.

(14) *Manji Ram v. Tara Singh*, 1 L. R., 3 All., 652.

case a mortgage by the minor would, according to the older cases, still have been only voidable and not void.⁽¹⁾

And in a case decided since the pronouncement by the Privy Council⁽²⁾ it has been held that a grant made by a minor may be ratified by him on coming of age, and it will be then binding on him.⁽³⁾ This case, professedly decided on the authority of an earlier decision of the Privy Council, makes no attempt to distinguish the latest pronouncement by that tribunal. And there is scarcely anything in principle to distinguish the two cases. For if it be competent for a person emerging from disability to impliedly ratify a transaction by taking up and carrying on "the transactions commenced while he was under disability in such a way as to bind himself as to the whole"—what is there to prevent him from otherwise ratifying and confirming it? The correct consequence of the view taken by the Court of ultimate appeal has been appreciated by the Madras Court who have held that a minor could not renew the debt contracted for during his infancy since the original contract being void, it can form no valid consideration to support its novation.⁽⁴⁾ In any view a minor cannot, on attaining majority, ratify a transfer made during his minority by his guardian so as to affect the rights of an intermediate transferee for value.⁽⁵⁾

282. A person avoiding a transfer must communicate his decision to the other contracting party, unless indeed, the latter is shown to have had knowledge of the fact from which notice may be inferred.⁽⁶⁾ Where, therefore, a person had during his minority mortgaged with possession certain immoveable property, and subsequently after attaining his majority, he sold the same property as unincumbered to a third party without any notice to the mortgagee of his intention to avoid the mortgage, it was held that the purchaser could not turn the mortgagee out of possession since in such a case avoidance of the mortgage cannot be inferred from the subsequent sale as incumbered, of the property to another.⁽⁷⁾ Long inaction unaccounted for is then held to be a ratification of the contract,⁽⁸⁾ where the proprietor of an estate refused to let a property, but his agent notwithstanding executed an *amuldustuck* (permit) and put the applicant into possession, and the agent subsequently informed his principal of the lease but not of the execution of the *amuldustuck*, it was held that the proprietor being under no legal obligation to take early steps to disavow the act of their agent, ratification could not be inferred from the circumstances.⁽⁹⁾ Under Hindu Law, and under the Guardians and Wards Act,⁽¹⁰⁾ a minor is incompetent to act as guardian of any minor except his own wife or child, or where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family. A minor then is competent to be the managing member of a joint family, and as such, he has as much power to bind his co-parceners as an adult. Although a minor may not be himself bound by a contract, his surety is none

(1) *Madan Mohan v. Rangī Lal*, I. L. R., 23 All., 288 (290).

(2) *Mohori Bibi v. Dharmodas*, I. L. R., 30 Cal., 539, P. C.

(3) *Roy v. Thakur Ramjiwan*, I. L. R., 33 Cal., 369, following *Gregon v. Udoy Aditya Deb*, I. L. R., 17 Cal., 223, P. C.

(4) *Ramaswami v. Anthappa*, 16 M. L. J. R., 422, but see *Mt. Kundum Bibi v. Sree Narayan*, 11 C. W. N., 35.

(5) *Ghasiram v. Mt. Bivia*, 1 Nag. L. R., 66.

(6) *Madan Mohan v. Rangī Lal*, I. L. R., 23 All., 288 (291).

(7) *Madhan Mohan v. Rangī Lal*, I. L. R., 23 All., 288 (291); following *Mahamed v. Saraswati*, I. L. R., 18 Cal., 259, which, however, was doubted in *Raj Coomary v. Preo*, 1 C. W. N., 453.

(8) *Ishan Chunder v. Sreekant*, 9 W. R., 110.

(9) *Muhbool v. Suheedun*, 14 W. R., 378.

(10) S. 21. Act VIII of 1890.

the less liable. "It is like the case of a person who, to appease the anger of a child, requests another to lend a guinea to the child to play with, and promises if the child loses or does not give back the coin, to make it good to the lender."⁽¹⁾ Similarly an adult is bound by a promise made jointly with a minor.⁽²⁾ A person knowingly appointing a minor as his agent is bound by his acts.⁽³⁾

283. A person repudiating his contract is bound to restore to the other party all the benefits which he has received from him under the contract,⁽⁴⁾ and so on repudiation of a voidable contract he may have not only to restore the money paid or the land or goods delivered, but also to hand over the profits, if any, he made since the term "benefits" would comprise both. For it is an equitable rule recognized in India that on avoidance the parties must be placed in the same position as if the contract had never taken place.⁽⁵⁾ Thus, if an infant has paid a sum of money as part of the consideration for a lease of premises and has occupied them, he cannot recover back the money from which he has derived an advantage. But if he had not occupied the premises, the result would have been different, for then having derived no benefit whatever from the contract, there would be the total failure of the consideration.⁽⁶⁾ But if money advanced to an infant on a mortgage declared void is spent by him, there is then no benefit which he is bound to restore.⁽⁷⁾

284. A minor possessing sufficient understanding who enters into a contract by representing himself to be a major and competent to manage his own affairs is estopped,⁽⁸⁾ and is precluded from suing afterwards to set aside the contract. But in order to estop a minor, it must be shown that he has practised fraud operating to deceive,⁽⁹⁾ that he has made a fraudulent misrepresentation, a fraudulent allegation that a state of things existed in the truth of which he had no honest belief,⁽¹⁰⁾ and the onus of proving this clearly lies upon the party who seeks to bind

(1) *Kashiba v. Sripat*, I. L. R., 19 Bom., 697 (703); English Law is the same. *Harris v. Huntback*, 1 Burrow, 373; *Duncomb v. Tickridge*, Ayley, 94; *Butcher v. Steuart*, 11 M. & W., 857; *Bird v. Gammon*, 3 Bing N. C., 889; *Birkmyre v. Darnell*, 1 S. L. C., 336.

(2) S. 43, Indian Contract Act (IX of 1872).

(3) *Madan Gopal v. The Hindu Biscuit Co.*, 4 Bom. L. R., 627.

(4) S. 64, Indian Contract Act (IX of 1872), cf. S. 86, Indian Trusts Act (II of 1882); under S. 38 of the Specific Relief Act (I of 1877), he may have to pay compensation; *Brahmo Dutt v. Dharmo*, I. L. R., 26 Cal., 387, O. A.; *Mohori Bibee v. Dharmodas* I. L. R., 30 Cal., 539, P. C.

(5) *Muhammad v. Ottayil*, 1 M. H. C. R., 390.

(6) *Holmes v. Blogg*, 8 Taunt., 508; explained in *Corpe v. Overton*, 10 Bing., 259; *Hamilton v. Vaughan-Sherrin, etc., Co.*, [1894], 3 Ch., 589 (593).

(7) *Dhurmo Dass v. Brahmo*, I. L. R., 25 Cal., 616, O. A.; *Brohmo v. Dharmo*, I. L. R., 26 Cal., 381.

(8) *Ganesh v. Bapu*, I. L. R., 21 Bom., 198, in which it was held that the minor was estop-

ped under S. 115 of the Evidence Act, without fraud or deceit: so far dissented from in *Dhurmo Dass v. Brahmo*, I. L. R., 25 Cal., 616 (622), O. A.; *Brahmo v. Dhurmo*, I. L. R., 26 Cal., 381; O. A., I. L. R., 30 Cal., 539 P. C., in which however their Lordships refrained from deciding the question whether a minor would be estopped by his fraudulent misrepresentation holding that in the case before them the misrepresentation was made to a person who was not misled thereby. In *Ram Ratun v. Sheo Nandan*, I. L. R., 29 Cal., 126 a minor representing himself to be a major and so collecting rents was held estopped from recovering the same rent by suing through his guardian. To the same effect. *Surendranath v. Krishna*, 15 O. W. N., 239; contra (*sed obiter*) *Jagar Nath v. Lalita Prasad*, I. L. R., 31 All. 21 (27); Cf. *Gharibullah v. Kalak Singh*, I. L. R., 25 All., 407, P. C.

(9) *Dhurmo Dass v. Brahmo*, I. L. R., 25 Cal., 616 (622), O. A.; *Brahmo v. Dharmo*, I. L. R., 26 Cal., 381.

(10) *Raj Coomary v. Preo*, 1 O. W. N., 453; doubting *Sashibhusan v. Jadunath*, I. L. R., 11 Cal., 552; *Mahomed v. Saraswati*, I. L. R., 18 Cal., 269.

the minor.⁽¹⁾ But where the conduct of the minor has been clearly inequitable, inference of fraud may justifiably be made. Thus a minor who, representing himself to be a major and competent to manage his own affairs, collected rent and gave receipt therefor, he was estopped by his conduct from recovering again the money once paid to him by his tenants, by instituting a suit through his guardian.⁽²⁾ But apart from fraud it has been held that where a person represented himself as major and afterwards questioned his own acts on the ground of his minority, the burden of proof would lie upon him to show that he was a minor at the time of the transaction he seeks to set aside. A minor plaintiff sued through his mother for partition and obtained a decree which he executed. But subsequently he filed a compromise in which he alleged that he had then attained his majority and prayed for the dismissal of the suit as the decree had been adjusted out of court. But subsequently he sued by his next friend to set it aside on the ground of fraud, and the Court held that having once averred that he was a major, it lay on him to show that his own description was false,⁽³⁾ and in deciding the case amongst other points, the statement of his age as given by him in the heading of his deposition in a case, was held to be of considerable importance, "if the party who made it wishes to get rid of it in a subsequent litigation and claims the privileges of minority, but does not explain how it was that he allowed his age to be put down as if he were a major."⁽⁴⁾ But it must appear that the statement as to age was made by him. A mortgagee advanced a sum of money to a minor on his representation that he was of age by which the creditor was misled. It was held that the mortgagee could enforce his security.⁽⁵⁾ A mortgage of his property by a minor to defend himself against a charge of dacoity in which his liberty was at stake was upheld on the ground that the loan was incurred for necessities.⁽⁶⁾ As regards torts, a minor is responsible for his own acts.⁽⁷⁾

285. Lunatic.—The contract of a lunatic whether executory or executed is binding upon him to the same extent as if he had been sane, unless he can prove that he did not know what he was doing, and that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.⁽⁸⁾ A person may have been adjudged a lunatic, but his contracts are not on that account void, the crux of the matter being knowledge of his state by the other party who must have reason to suppose that the person he was dealing with was insane.⁽⁹⁾ A disposition of property by a lunatic during a lucid interval is considered done by a person perfectly capable of contracting, managing and disposing of his affairs at that period.⁽¹⁰⁾ A person apparently of sound mind, entering into a contract for the transfer of his property which is fair and *bona fide*, can sue to set it aside on the ground of his

(1) *Jamsetji v. Kashinath*, 3 Bom. L. R., 898 (901); *Virupakshappa v. Shidappa*, I. L. R., 26 Bom., 109 (113, 116).

(2) *Ram Ratan v. Shew Nandun*, I. L. R., 29 Cal., 126.

(3) *Virupakshappa v. Shidappa*, I. L. R., 26 Bom., 109 (113, 116).

(4) *Mungniram v. Gursahai*, I. L. R., 16 Cal., 847, P. C.; followed in *Virupakshappa v. Shidappa*, I. L. R., 26 Bom., 109 (177); *Oriental Government, etc., Co. v. Narasimha*, I. L. R., 25 Mad., 183 (196, 197).

(5) *Sarat Chund v. Mohun*, I. L. R. 25 Cal., 371; following *Nelson v. Stocker*, 4 D. G. & J. 453; doubting *Dhannull v. Ram*

Chunder, I. L. R., 24 Cal., 265, in which the contrary was laid down that there was no obligation upon the infant which could be enforced upon the contract.

(6) *Sham Charan v. Chowdhury*, I. L. R., 21 Cal., 872.

(7) *Luchmon v. Narayan*, 3 N. W. P. H. C. R., 191.

(8) *Imperial Loan Co. v. Stone*, [1892] 1 Q. B., 601.

(9) *Molton v. Camroux*, 2 Exch., 487, 4 Exch., 17; *Hall v. Warren*, 9 Ves., 605.

(10) *Per Eldon*, L. C., in *Hall v. Warren*, 9 Ves., 605.

lunacy. But the courts are reluctant to help a lunatic where the other party has acted fairly and cannot be restored to the *status quo*.⁽¹⁾ It was at one time doubted whether a lunatic could be held liable on an executory contract,⁽²⁾ but the point has now been settled by authority that he is liable.⁽³⁾ In other respects the law generally follows that relating to a minor.⁽⁴⁾ A lunatic is liable for necessities in pursuance of a legal obligation, and not on an implied contract—for a lunatic obviously cannot contract. (§ 274)

Drunken person. 286. A contract with a drunken person stands on the same footing. It is voidable only, and not void.⁽⁵⁾

287. Disqualified Proprietor.—A person whose property is under the management of the Court of Wards is generally incompetent to contract, and therefore to transfer his property. In such cases the incapacity generally depends upon the construction to be placed on the several local Acts regulating the management of property by the Court of Wards.⁽⁶⁾ For instance, a person whose estate is taken up for management under the Jhansi Incumbered Estates Act,⁽⁷⁾ is declared incompetent to mortgage his proprietary rights in land. If therefore he purports to mortgage his property in defiance of the law the mortgagee could not invoke the assistance of section 43 to compel the disqualified mortgagor to make good his representation after removal of the disqualification, inasmuch as a transfer illegal under a special statute cannot be legalized by reference to the more general provisions of section 43, and which could not be used to defeat the law.⁽⁸⁾ This appears to have been overlooked in a case decided by the Bombay High Court in which the defendant had in violation of the provisions of section 325-A of the Code of Civil Procedure, 1882, sold his property to the plaintiff who sued for its recovery and whereupon the Court considered the principles underlying section 18 of the Specific Relief Act and 43 of this enactment applicable, and on their strength decreed the claim.⁽⁹⁾ It is sometimes argued that an incompetency to transfer does not necessarily imply an incompetency to contract and that therefore if a person may validly contract to transfer property, his invalid transfer would still imply a contract which the obligee might compel him to make good when the disability disappears. But the contract to transfer *in futuro* is not the same as transfer *in praesenti*, nor can the former be implied from the latter and the salutary provisions of the statutes enacted for the relief of incumbered estates would be frustrated if a construction were permitted giving to an illegal transfer the effect of merely a transfer postponed, and thus enabling one to compass circuitously what cannot be achieved directly. Moreover, the consideration or object of such an agreement being the transfer of property which is by law

(1) *Molton v. Camroux*, 4 Exch., 17; *Selby v. Jackson*, 13 L. J., Ch., 249.

(2) *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

(3) *Imperial Loan Co. v. Stone*, [1892], 1 Q. B., 601.

(4) *Cl. Wentworth v. Tubb*, 1 Y. & C. C. C., 171.

(5) *Mathews v. Baxter*, L. R., 8 Exch., 132; explaining *Gore v. Gibson*, 13 M. & W., 623 (in which "void" was apparently used in the sense of "voidable"); *Molton v. Camroux*, 2 Exch., 487; 4 Exch., 17.

(6) *Jiwan Lal v. Gokul Das*, 17 C. P. L. R., 13.

(7) Act XVI of 1882.

(8) *Radha Bai v. Kamod Singh*, I. L. R., 30 All., 38.

(9) *Magniram v. Bakubai*, I. L. R., 96 Bom., 510, *contra*, *Murray v. Murat Singh*, 3 N. L. R., 171; The argument that the restriction occurs in a processual Code dealing with the "execution of decrees by Collector" and has no wider outlook than the satisfaction of the decree was neither adduced nor considered in these cases. See the subject further discussed under S. 43 *post*.

untransferable is void under section 23 of the Indian Contract Act, both because the transfer is forbidden by law and the object of the agreement is of such a nature that if permitted, it would defeat the provisions of the law. (1) But in considering the effect of a statute in this connexion regard must be had to its nature and purpose, the extent of the prohibition and its attendant penalties, for while it is true that effect must be given to the provisions of law, it is equally true that the provisions of law must not be divorced from its purpose: *cessante ratione legis, cessat et ipsa lex*. (2)

288. The contracts of a married woman in India, it should be observed,

Married women.

depends upon the personal law to which she is subject. A Hindu husband is not liable for a debt contracted by his wife, except where it has been contracted under his express authority, or under circumstances of such pressing necessity that his authority may be implied. So where during the temporary absence of her husband in a neighbouring district for about one year, a wife conjointly with her husband's brothers executed a mortgage of the family house in order to pay off her husband's creditors and for expenses of family cultivation, it was held that the wife was not justified in borrowing money to pay her husband's debts, and the want of money for cultivation of his lands would not justify her in pledging his credit for a joint loan taken by his brothers in which his liability would extend to the whole debt, nor would it justify her hypothecating his property, and that therefore the husband and his property were not liable for the debt. (3) But in such a case the wife herself would be liable to the extent of her *Stridhan* (4) over which a Hindu wife has absolute disposing power and which she may exercise without her husband's consent. (5) In this respect the law agrees with cases which have been decided with reference to the English statutes (6) which constitute the *Magna Charta* of the English wife. But by the common law, being a *femme covert*, a wife could not contract, except with the authority express or implied of her husband.

289. In India there is no restrictive prohibition against the validity of

Aliens.

contracts of friendly aliens, although no doubt an alien enemy, or a British subject adhering to the King's enemies, cannot contract or enforce any existing contracts during the continuance of hostilities, (7) but his rights as to contracts made prior to the outbreak of hostilities are merely suspended and may be enforced upon the conclusion of peace. Foreign sovereigns and ambassadors are not subject to the jurisdiction of the British Courts in which contracts made by them cannot be enforced, except to the extent provided in the Code of Civil Procedure. (8) A sovereign residing in the British Territory as a private person, and contracting, as such, is entitled to the same privilege. (9)

(1) *Radha Bai v. Kamal Singh*, I.L.R., 30 All., 38.

(2) "The reason of the law ceasing, the law itself ceases."

(3) *Puri v. Mahadeo*, I.L.R., 3 All., 122. *Nathubhai v. Javher*, I. L. R., 1 Bom., 121.

(4) *Nathubhai v. Javher*, I. L. R., 1 Bom., 121 (124).

(5) *Nathubhai v. Javher*, I.L.R., 1 Bom. 121 (123) and authorities therein cited; *Luchman v. Kachurn*, 19 W. R., 292.

(6) Married Women's Property Act, 1870, 33 & 34 Vict. C. 93, passed 9th August, 1870, amended by 37 & 38 Vict. C., 50, passed 30th July, 1874, consolidated by 45 & 46 Vict. C., 75, amended by 56 & 57 Vict. C., 63.

(7) *O'Mealy v. Wilson*, 1 Camp., 418.

(8) Chap. XXVIII, ss. 430-434.

(9) *Mighall v. The Sultan of Johore* [1894], 1 Q. B., 149, in which it was held that the Sultan could not be sued for the breach of a promise of marriage.

290. A barrister cannot sue, (1) nor be sued, (2) for fees which are paid to him as mere *honoraria*, but this mutual disability is confined to his services only as a barrister, and does not extend to extra-professional services as where he does the work of an attorney. (3) Until the year 1858 physicians also suffered from the same disability as barristers, but in that year a statute, (4) was passed enabling them to sue subject to the right of any college of physicians to make by-laws to the contrary by which their fellows would be bound. In India members of the medical profession are under no legal or professional restriction, and may sue for their remuneration and be sued for unskilful treatment.

291. Pardanashin.—Transactions with *pardanashin* woman form a special class in this country and are governed by rules the leading principles of which generally correspond with those affecting minors, idiots, and other persons of limited capacity. And first, what is a *pardanashin*? In ordinary parlance, as in law, the term signifies a woman who in accordance with the custom of the country lives in seclusion and does not appear in public before men. Of course, every woman is not to be deemed *pardanashin*. On the other hand, it is laid down that a party claiming the *status* and privileges of a *pardanashin* must aver and prove the fact in each case. (5) A person who lives in some degree of seclusion is not deemed to be a *pardah* lady. And a lady who is shown to have appeared before the Registrar for registration of certain documents, and appeared as a witness in court in a suit, put in tenants and fixed and recovered rents from them in respect of her house, paid municipal rates and taxes and was in the habit of visiting the *mutwali* of the street, could not be treated on a footing of a *pardah* lady. (6) Again, a woman is either a *pardanashin*, or she is not: there is no middle course. As their Lordships of the Privy Council in one case observed: "The term *quasi-pardanashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman, who, not being of the *pardanashin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection, which law gives to *pardanashins*, must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain and well-known and easily ascertained class of women, well-known rules of law are established with the wisdom of which we are not now concerned. Outside that class, it must depend in each case on the character and position of the individual woman, whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove, that it was so in case of dispute." (7) Assuming then that a woman is established to be a *pardanashin*, she is then entitled to that protection which the Chancery Court in England always extends to the weak, ignorant and infirm, and to those who for any other

(1) *Smith v. Gurneshee Lal*, 3 N. W. P. H. C. R., 83.

(2) *Kennedy v. Brown*, 13 C.B. (N.S.), 677; *In re Brasseur and Oskely* [1896] 2 Ch. 487; *Thakar Das v. Beechey*, (1906) P. R., No. 49 F. B.; but *contra* (implied) in *General Council of the Bar v. Land Revenue Commissioners*, [1907] 1 K. B., 462. *Achamparambath v. Gantz*, 1 L. R., 3 Mad., 198, F. B.; *Parbati v. Dick*, 8 O. P. L. R., 18.

(3) *Land Mortgage Bank v. Elmes*, 25 W.

R., 332.

(4) 21 & 22 Vict. C., 90, S. 31, re-enacted by the Medical Act, 1886, 49 & 50 Vict. C. 48, S. 6.

(5) *Shaik Ismail v. Amirbibi*, 4 Bom. L. R. 146.

(6) *Shaik Ismail v. Amirbibi*, 4 Bom. L. R., 146 (149).

(7) *Hodges v. The Delhi and London Bank*, 1 L.R., 28 All., 141 (145), P.O.

reason are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shewn. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transaction to shew that its terms are fair and equitable. The most usual mode of discharging this *onus* is by showing that the lady had good independent advice in the matter, and acted therein altogether at arm's length from the other contracting party. (1) It must also be shown to the satisfaction of the court that the deeds and powers executed by the *pardanashin* had been explained to and understood by her. (2) Where the conveyance by a *pardah* woman is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about. (3) Merely reading over a document to a *pardah* woman who was sitting behind a curtain followed by her signature, is not sufficient to charge her with liability unless it is shewn that the real gist of the deed was conveyed to her mind. (4) Registration of a document by a *pardah* woman is by itself no evidence of its genuineness. (5) In the case of a death-bed disposition this circumstance is all the more necessary. (6) And when legal proof is wanting, its absence cannot be compensated by any legitimate inference arising out of or by any of the facts disclosed by the other parts of the case. (7) But where a *pardah* woman executes a mortgage in conjunction with her son and brother, the circumstance is sufficient to discharge the *onus* cast upon the creditor. (8)

The Court looks askance at a voluntary deed executed by a *pardah* lady in favour of a person holding a fiduciary position. (9) But there is no fiduciary relationship between a person claiming succession and the creditor who assisted her in litigation and advanced or procured funds for its maintenance. (10) Where the transaction has been above board, and no case of undue influence has been pleaded in the plaint or raised by the issues, the fact that the sale was in favour of her husband would not damn the deed as obtained by undue influence. (11) The protection given by law to a *pardanashin* cannot be transmuted into a legal disability. There is no absolute rule of law that a gift by a *pardanashin* is invalid unless it is proved that she had independent advice. The possession or absence of independent advice is a fact to be taken into consideration and well weighed on a review of all the circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction cannot be impeached. If upon a review of the facts—which include

(1) *Kanyee Lall v. Kaminee*, 1 B.L.R., 315; *Rakhun v. Ahmed*, 22 W.R., 443; *Bizloor Rahim v. Shamsunnissa*, 11 M.I.A., 551 (585).

(2) *Sudisht Lal v. Sheobarat*, I.L.R., 7 Cal., 245, P.C.; approved in *Shambati v. Jago*, I.L.R., 29 Cal., 749, P.C.; *Amirbibi v. Abdul*, 9 Bom. L.R., 658; following *Asgar Ali v. Delroos*, I.L.R., 3 Cal., 324, P.C.; *Sum-suddin v. Abdul*, I.L.R., 31 Bom., 165 (175); *Achan v. Thakur Das*, I.L.R., 17 All., 125, O.A.; *Sham Sundar v. Achan*, I.L.R., 21 All., 71, P.C.; *Mariam v. Sakina*, I.L.R., 14 All., 8.

(3) *Fuzzul v. Amjud*, 17 W.R., 523.

(4) *Amirbibi v. Abdul*, 9 Bom., L.R., 658.

(5) *Fuzzul v. Amjud*, 17 W.R., 523; *Doole Chand v. Oomda*, 13 W.R., 233; *Delroos v.*

Asghar, 15 B.L.R., 167, O.A.; *Asghar v. Delroos*, I.L.R., 3 Cal., 324, P.C.; *Monohar v. Bhagnbati*, 1 B.L.R., (O.C.), 28; *Kanailal v. Kamini*, *ib.*, 31 note; *Thakoordeen v. Ali Hossain*, 13 B.L.R., 427, P.C.; *Soondur v. Kishore Lal*, 5 W.R., 246; *Roop Narain v. Gujadhur*, 9 W.R., 297.

(6) *Grish Chunder v. Bhuggobutty*, 13 M. I.A., 419.

(7) *Seetul v. Doolhin*, 11 M.I.A., 268.

(8) *Baai Bibi v. Sami*, I.L.R., 18 Mad., 257; *Khatija v. Ismail*, I.L.R., 12 Mad., 380.

(9) *Rajabai v. Ismail*, 7 B.H.C.R., 27.

(10) *Thakur Das v. Jairaj*, I.L.R., 26 All., 130 (134), P.C.

(11) *Muhammad v. Najiban*, I.L.R., 20 All., 447, P.C.

the nature of the thing done and the training and habit of mind of the grantor as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then, the deed of gift would be upheld. Independent outside advice is an essentially different thing from independent outside control. Where undue influence is pleaded, it is necessary to consider whether the facts of the case fall within the category of the principle which applies to every case where influence is acquired and abused, where confidence is reposed and betrayed.⁽¹⁾ The law throws around a pardanashin a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to and was really understood by the grantor. In such cases, it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. A deed of gift was executed by a lady in favour of a son of her paramour and agent, and therefore to all intents and purposes in his own favour, in respect of about a moiety of her absolute estate. The deed as granted was, considering the circumstances of her life, not in any way an unnatural disposition of part of her property. The deed was granted by the lady as the expression of her deliberate mind and apart from any undue influence exerted upon it. For a considerable period of time the donor had been in the habit of managing her own affairs, of entering up her accounts and of attending to business. She was a capable woman, fully alive to the direction of her own interests and welfare of what she was doing. It was held by the Privy Council that the deed of gift was valid and should be upheld.⁽²⁾ A lender who had made a loan to a pardah lady, through her agent acting under *mukhtearnama*, is not relieved of the duty of having to prove that he had advanced the money after due inquiry as to the necessity of the loan, that the agent had power to borrow, and that the money was applied to the use for which it was lent.⁽³⁾ In other respects, the law relating to incapacitated persons equally applies to transactions with a pardah woman.

292. Hindu Father.—Under Hindu Law, the power of a Hindu father

(1) **Power over self-acquired property.** to deal with his self-acquired property is uncircumscribed by any restrictions.⁽⁴⁾ He may dispose of it to any one either by gift or will, to which his sons cannot object, even though it be in favour of a stranger.⁽⁵⁾ And where he makes the disposition in favour of his sons, he is competent to leave his self-acquired property to descend as ancestral property; the question being one of intention, mainly turning on the construction of the instrument of gift, in the absence of which, however, it is

(1) Per Lord Kingsdown in *Smith v. Kay*, 7 H. L. C., 750; cited per Lord Shaw in *Kali Baksh Singh v. Ram Gopal*, 21 I. C., 985, P. C.

(2) *Kali Baksh Singh v. Ram Gopal*, 21 I. C., 985, P. C.

(3) *Golam v. Muddun*, 18 W. R., 257.

(4) *Beer Perbap v. Maharajah Rajender*, The Hunsapore case, 12 M. I. A., 38; *Balwant Singh v. Ramkishore*, I. L. R., 20 All., 267 P. C.; overruling the earlier cases in which the contrary was laid down; *Nagalingam v. Ramchandra*, I. L. R., 24 Mad., 429; *Kamil v. Budh* (1893) P. R., No. 30; *Sohanlal v.*

Labbu Ram, (1907) P. R., No. 150; *Baijoo v. Anjori*, 3 C. P. L. R., 153. *Bishen Perkash v. Bawa*, 12 B. L. R., 430, P. C., (*Mithila law*). *Verabhadra v. Marudaga*, I. L. R., 34 Mad., 188 (201).

(5) *Samasundara v. Ganga Bissen*, I. L. R., 28 Mad., 386; *Nagalingam v. Ramchandra*, I. L. R., 24 Mad., 429 (437); overruling *Tarachand v. Reebam*, 3 M. H. C. R., 60; and following *Balwant v. Rani Kishori*, I. L. R., 20 All., 297; *Sri Raja Rao v. The Court of Wards*, I. L. R., 22 Mad., 385 (397).

presumed that the sons were intended to inherit as their ancestral estate.⁽¹⁾ So again, if a partition is made by the father on the footing that the property is partible property, although there is in point of law a disposition made by the father, there can be no doubt that the father intends that the quality of ancestral property shall remain.⁽²⁾ Disposition of his self-acquired property by will by a father to his sons, from which it was clear that he intended his sons to take the property in severalty (in other respects the disposition, being in conformity with the precepts of Hindu Law), would in the absence of words indicating any intention that the sons should hold their shares free from the incidents of ancestral property be regarded as that of ancestral property.⁽³⁾

293. While therefore, the father has unlimited power of disposition over

his self-acquired property, his power over the ancestral joint-family property is limited, and controlled by the rights of the other members, who, in a Mitakshara family, are all joint tenants of the undivided estate in which no member has any defined share, the property passing on the death of any member to the survivors.⁽⁴⁾ Such is the case whether the property possessed by the family be ancestral or joint family property. All property is regarded as ancestral if its origin can be traced back to a nucleus which has materially contributed to its growth,⁽⁵⁾ to which must be added property which a man inherits from a direct male ancestor, not more than three degrees higher than himself which is also classed as ancestral property. But property which though not ancestral may still be joint, as where it is acquired jointly or with the aid of joint funds, or where it is voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it. In all such cases the property being of the joint family, it is subject to alienation only at the hands of the manager in case of necessity and where the father is the manager also in satisfaction of his antecedent debt. Hence, where a member of such a family executed a deed of gift treating the property as his self acquired property, and it was found that the same was the joint property of the family, the whole deed was set aside.⁽⁶⁾ But a transfer by a Hindu father, who was sonless at the time, cannot be disputed by his subsequently adopted son. The custom of allowing a reversioner not born at the time of alienation to contest it, bears no analogy to the case of an adopted son. The reversioner claims through some ancestor, while the adopted son can claim only through his father who himself was the alienator.⁽⁷⁾ A Hindu father disposing of an ancestral joint family property under a deed, without the assent of his son, only operates on the property represented by his share, and is binding on him alone. He is, however, empowered to transfer his son's interest in the property to pay off an antecedent debt, or in pursuance of

(1) *Mahamed v. Shewukram*, 14 B. L. R., 226, P. C. : followed in *Nagalingam v. Ramachandra*, I. L. R., 24 Mad., 429 (437).

(2) *Nagalingam v. Ramachandra*, I. L. R., 24 Mad., 429 (437); following *Muddon Gopal v. Ram Buksh*, 6 W. R. (C. R.), 71.

(3) *Nagalingam v. Ramachandra*, I. L. R., 24 Mad., 429 (438); distinguishing *Jagnohan Das v. Mangal Das*, I. L. R., 10 Bom., 528 (574).

(4) *Beer Kishore v. Hur Bullub*, 7 W. R., 502.

(5) *Dhunookdharee v. Gunput*, 10 W. R., 122; *Rampershad v. Sheochurn*, 10 M. I. A., 490 (505) "upon the facts it must be admitted

ed that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute." *Lakshman v. Jannabai*, I. L. R., 6 Bom. 225 (232, 233); *Ahmedbhoy v. Cassumbhoy*, I. L. R., 13 Bom. 534 (548); *Dwarkaprasad v. Jannadas*, 13 Bom. L. R. 133 (136, 137).

(6) *Gopal Lal v. Mahadeo*, 6 C. W. N., 651.

(7) *Ralua v. Gulab Singh* (1901), B. L. R., 42; *Rambhat v. Lakshman*, I. L. R., 5 Bom., 630.

a moral or religious obligation justifying the transaction, in the absence of which, the purchaser so far as the son's rights are concerned, takes nothing, but is regarded as a mere trespasser liable to be ejected at any time within twelve years, that is, before he has perfected his title by adverse possession.⁽¹⁾ There is no more presumption in favour of the father than in favour of any other manager, that moneys borrowed by him are for family purposes.⁽²⁾ In both cases, in the absence of consent the following principles would apply :—(i) The power must be exercised only in case of need. (ii) The matters to be considered are (a) the existence of pressure, (b) the means of averting it, (c) the benefit to be conferred. (iii) If the lender or purchaser be a party to mismanagement, he cannot take advantage of his own wrong. (iv) The lender or purchaser, however, unless he acts *mala fide*, is not affected though better management might have preserved the estate from debt. (v) The lender or purchaser is bound to enquire; but (vi) if he does enquire and acts honestly, the real existence of necessity is not a condition precedent to the validity of the transaction provided the necessity alleged is sufficient and reasonably credited. (vii) The lender or purchaser is not bound to see to the application of the money advanced.⁽³⁾

294. Any individual member by withholding his consent cannot defeat the power which, as manager, the father possesses to alien or encumber the property for a joint-family necessity. It has accordingly been laid down in a series of decisions of the Privy Council that, where joint ancestral property has passed out of a joint family under a conveyance executed by the father, in consideration of an antecedent debtor in order to pay off an antecedent debt, his sons cannot recover that property unless they show (a) that the debts were contracted for immoral purposes, and (b) that the purchasers had notice that they were so contracted.⁽⁴⁾

295. Now as the term "antecedent debt" is intended to convey a debt existing or incurred prior to and independent of the transfer, in dispute, it follows that if the debt was incurred even a moment earlier than the transfer, it would be an antecedent debt, and as such, binding on the joint family, though the same debt if incurred contemporaneously with the transfer, or as its consideration would exonerate all but the father's coparcenary interest.⁽⁵⁾ Moreover, in the case of a mortgage-

(1) *Balwant Rao v. Ramkrishna*, 3 Bom. L. R., 632; distinguishing *Shrinivas v. Hanmant*, 1. L. R., 24 Bom., 240, F. B.; following *Unni v. Kunchi*, 1. L. R., 14 Mad., 260. (The sons need not sue to set aside the sale under S. 39 of the Specific Relief Act, and hence Art. 144 and not Art. 91 would apply).

(2) *Krishna v. Vasudev*, 1. L. R., 21 Bom., 808; *Guru Sami v. Ganapatia*, 1. L. R., 5 Mad., 337; *Subramanya v. Sadashiva*, 1. L. R., 8 Mad., 75; *Chennayya v. Perumal*, 1. L. R., 13 Mad., 51.

(3) *Nathaji v. Sitarani*, 4 Bom. L. R., 587.

(4) *Hanooman Persaud v. Mt. Babooee*, 6 M. I. A., 393 (421); *Girdhari v. Kanto Lal*, 14 B. L. R., 187, P. C.; *Suraj Bansi v. Shiv Prasad*, 1. L. R., 5 Cal., 148, P. C.; *Nanome v. Modun*, 1. L. R., 13 Cal., 21 P. C.; *Bagbut v. Mt. Girja*, 1. L. R., 15 Cal., 717, P. C.; *Surja Prasad v. Golab Chand*, 1. L. R.,

27 Cal., 704; *Lala Surja Prasad v. Golab Chand*, ib. 724; *Arunachala v. Munisami*, 1. L. R. 7 Mad., 39; *Addaiki v. Natesa*, 17 M. L. J. R., 283; *Ningaraidi v. Lakshmanna*, 3 Bom. L. R. 647 (651); *Badri Prasad v. Madan Lal*, 1. L. R., 15 All., 75 F. B.; *Debi Dal v. Jadu Rai*, 1. L. R., 24 All., 459; contra *Janna v. Nain Sukh*, 1. L. R., 9 All., 493, must be deemed to be overruled (*Per Banerji and Aikman, JJ.*, in *Debi Dal v. Jadu Rai*), 1. L. R., 24 All., 459 (460).

(5) *Suraj Buns v. Sheopershad*, 1. L. R., 5 Cal. 148, P. C.; *Venkataramanaya v. Venkataramanadas*, 1. L. R., 29 Mad. 200 (204); *Venkataramanaya v. Venkataramanadas*, 1. L. R., 29 Mad. 200; *Bhagwati Prasad v. Ganga Prasad*, 8 A. L. J. 649 (650); *Chandra Deo v. Mata Prasad*, 1. L. R. 31 All., 176 F. B.; *Mahabir v. Basant*, 12 I. C. 347 (349); *Jangi Singh v. Ganga Singh*, 10 O. C., 360; *Hira Ram v. Uderam*, 9 N. L. R. 74.

debt incurred by the father the debt is the primary obligation, and the mortgage is only a collateral security for its discharge. If the debt is binding on the son, its discharge by making an usufructuary mortgage or by enforcing the security by sale would seem to be equally binding on the son, inasmuch as he is thereby exonerated from liability to discharge the debt of the father by means of other family property. In this view there should be no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred, for in either case the debt is binding on the son and the enforcement of the security exonerates the son from the burden of his father's debts.⁽¹⁾ But it is probably too late now to contend for the logic of reason which is overborne by the almost consensus of authorities, according to which the liability of the son's coparcenary interest is limited only to the case of antecedent debt, or of course, legal necessity.⁽²⁾ On the other hand, there are cases in which the courts have held the son's share bound even though the debt was the consideration of the mortgage, but in doing so they have reconciled themselves to the view of the Privy Council by holding that even a debt so incurred must be designated antecedent.⁽³⁾ There are, moreover, cases which neither refer to the Privy Council nor feel themselves trammelled by the distinction drawn by that tribunal, and in which the non-existence of the debt and its immorality are held to be the only grounds for exoneration of the coparcenary interest from liability.⁽⁴⁾ But the term "antecedent debt" has come to stay and it cannot be put out of account merely because it is a practically unnecessary exorcism of an archaic law. An antecedent debt stands apart, and has nothing in common with legal necessity. Consequently, it need not be a debt incurred for the necessities of the family.⁽⁵⁾

296. It is the general principle that a Hindu son is liable for his father's

Extent of son's liability.

debt to the extent of the ancestral estate which comes to the son, under the Mitakshara and at his birth, and under the Dayabhaga at his father's death; provided always that the debt has not been contracted for an immoral or illegal purpose. It is the remedy of the sons that they may sue to prevent their father from wrongfully dealing with the estate; but they are not co-equal with him as regards authority to deal with others concerning it and the father has authority over them.⁽⁶⁾ And it would appear that in this respect a minor son is in no better position than an adult son.⁽⁷⁾ A mortgage of a specific property may be either in consideration of a debt antecedent to that mortgage, or it may be contracted on that mortgage itself,⁽⁸⁾ and in both cases, subject to the same limitations the

(1) *Chidambara v. Koothaperumal*, I.L.R., 27 Mad., 326; dissenting from *Sami v. Ponnamal*, I. L. R., 21 Mad., 38; following *Ramasanayyan v. Virasami*, I.L.R., 31 Mad., 222; *Palani v. Rangayya*, I.L.R. 22 Mad., 207; *Suraj Prasad v. Golab Chand*, I. L. R., 28 Cal. 517; *Debi v. Jadu*, I. L. R., 24 All., 69; *Ramchandra v. Fakrappa*, 2 Bom., I. L. R., 450. The case itself was overruled in *Venkataramanaya v. Venkataramana*, I.L.R., 29 Mad., 200, F. B.

(2) *Muddun Thakoor v. Kanto Lal*, 14 B. L. R., 187, P.O.; *Suraj Bansi v. Sheo Persad*, I. L. R. 3 Cal., 148, P.O.; *Nanomi v. Modhun Mohun*, I. L. R., 13 Cal., 21, P. C.; *Bhagbut Pershad v. Girja Koer*, I.L.R., 15 Cal., 717, P. C.; *Mahabir v. Moheswar Nath*, I. L. R., 17 Cal., 584; *Venkataramanaya v. Venkataramana*, I. L. R., 29 Mad., 200, F.B.

(3) *Luchman Doss v. Giridhur*, I. L. R., 5 Cal., 855; *Khalilul Rahman v. Gobind Pershad*, I.L.R., 20 Cal., 328; *Chintaman v. Kashurath*, I. L. R., 14 Bom., 320.

(4) *Debi Dat v. Jadu Rai*, I.L.R., 44 All., 459.

(5) *Bhagwati Prasad v. Ganga Prasad*, 8 A.L.J., 649 (650).

(6) In all these respects the *Mithila* law does not differ from the *Mitakshara*:—*Girdhari Lal v. Kanto Lal*, 14 B. L. R., 187, P. C.; *Nanomi v. Modhun Mohun*, I. L. R., 13 Cal., 21 (33), P. C.

(7) *Suraj Bansi v. Shiv Prasad*, I. L. R., 5 Cal., 148, P. C.; *Nathaji v. Sitaram*, 4 Bom. L. R., 587 (594).

(8) *Luchman v. Giridhur*, I. L. R. 5 Cal., 855, F. B.; explained in *Khalilul v. Gobind*, I. L. R., 20 Cal., 328.

sons are under a pious obligation to discharge it. Thus every non-immoral debt of the father binds the general assets from the first, and so may constitute a joint family necessity from which would thereafter justify a specific charge or alienation. It may be open to a son to suggest his own mode of meeting such joint family necessity until his father has aliened or created a specific charge on the joint ancestral property for the purpose. But the father being the natural and necessary guardian is allowed considerable discretion, and a transaction cannot be set aside merely on the ground that it was not assented to by all the members. Hence where property belonging to a joint Mitakshara family is sold by the father, the only ground upon which the sons can assail the sale is that it was made without consideration or that it was tainted with immorality or illegality, though in such a case the sons may well claim to exonerate their coparcenary interests on the ground that it could not be aliened except for a debt which was either antecedent or was supported by necessity; (1) and in such case if the sale be in excess of the necessity the sons could impeach the alienation though they would be bound to refund the consideration supported by necessity.⁽²⁾ But the decided cases lack in harmony on this point, for while there are cases in which except for an antecedent debt the father's *status* is indistinguishable from any other male manager⁽³⁾ there are others in which the view is still taken that the sons cannot impeach the father's alienation except upon the ground of its illegality or immorality.⁽⁴⁾ The distinction is material in the former view; it will be on the alienee to justify the alienation in his favour whereas in the latter view its validity will be presumed, it being then on the sons to impeach it. And the same want of harmony pervades the question whether the power was exercised to incur a debt or to make an alienation. This conflict of views was passed in review in a recent case, but in which, however, the Court found itself divided, the majority of the Judges supporting the first view from which however the minority dissented being inclined to the second view.⁽⁵⁾ But the view of the majority appears to have for the time being settled the law at Allahabad, ⁽⁶⁾ though it is there conceded that if the son allows his father's alienation to remain unchallenged till he is driven to a suit his consent thereto would be presumed ⁽⁷⁾ and which appears to be a perilous concession to the broader view. But whichever view may ultimately be settled, there can be no doubt that the days of "pious duty" are gone and that the view of the Courts is not likely to place the father's acts in a class apart from those of any other manager. And the law in this respect would appear to be the same, whether the transfer be voluntary or involuntary, for example, in execution, ⁽⁸⁾ since the

(1) *Sheo Dayal v. Jagar Nath*, 8 A. L. J. 992 (924); *Ram Dayal v. Ajudhia*, I.L.R. 28 All. 328 (930); *Sahadeo Rai v. Ram Sewak*, 6 I. C. 331 (933).

(2) *Mababir Prasad v. Basant Singh*, 12 I. C. 347 (349) *contra*; *Wadhawamal v. Wadhama*, (1906) P. L. R. No. 144.

(3) *Chandradeo Singh v. Mataprasad*, I L. R. 31 All. 176 F. B.

(4) *Chidambara v. Koothaperumal*, I.L.R., 27 Mad. 326; *Malayandi v. Subbaraya*, 8 I. C. 854 (855).

(5) *Chandradeo Singh v. Mata Prasad*, I.L.R., 31 All., 176 F.B. Stanley C J., Knox and Aikman JJ. constituted the majority while Banerji and Richards JJ. held *contra*. The text of Mitakshara would seem to favour the narrower view placing the father on no

higher pedestal than any other manager—See *Mitakshara*, Ch. I. S. 1 Cl. 27.

(6) *Nath Mal Das v. Dalip Singh*, 13 I. C. 401; To the same effect per Sundara Aiyar, J. in *Krishnasami Dass Reddi (In re)* 13, I. C. 648.

(7) *Kamta Prasad Singh v. Sidh Narayan Singh*, 14 I. C. 251.

(8) *Narayancharya v. Narso*, I. L. R., 1 Bom., 260; followed in *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom., 494 (498); *Kastur v. Appa*, I. L. R., 5 Bom., 621 (629); *Sadasiva v. Dinkat*, I. L. R., 6 Bom., 520 (522); *Pakirchand v. Motichand*, I. L. R., 7 Bom., 438 (441); *Ramphal v. Deg Narain*, I.L.R., 8 Cal., 517 (524); *Joharmal v. Elkmath*, I.L.R., 24 Bom., 343 (345); *Ratnam v. Gobindarajulu*, I. L. R., 2 Mad., 339 (345).

circumstance which renders an alienation unimpeachable is not the form of the transfer but the existence of an unimpeachable necessity. And even apart from necessity, the sons are liable to the extent of the ancestral property in their hands, though in such a case the courts have first charged the father's interest, holding the property possessed by the sons liable only to make good the deficiency.⁽¹⁾ The sons may be under pious duty to discharge not only the father's debts, but also the obligation incurred by him as a surety for payment of money on behalf of another ⁽²⁾ as where the father bound himself as surety to pay the rent at any time due by a lessee in respect of the premises demised to him.⁽³⁾ But the case would be otherwise if the security was given for good behaviour or for keeping the peace.⁽⁴⁾

According to two decisions of the Madras High Court there was said to be no religious or moral obligation on a father to bring about the marriage of his son,⁽⁵⁾ or daughter.⁽⁶⁾ In this view an alienation of joint property for this purpose would not then bind the coparcenary body. But the Madras view does not take note of the fact that under Hindu law marriage is a sacrament (*Sanskara*) which is a recognized head of necessity⁽⁷⁾ and it is now so held in several cases which may be regarded as settling the question by their preponderance.⁽⁸⁾

297. As regards the burden of proof, it is established that the person claiming the benefit of an alienation must establish a *prima facie* case, as by showing that the alienation was made for a justifiable purpose, or that he had taken in that belief.⁽⁹⁾ All he is then required to shew is that the alienation was made for a purpose *ostensibly* justifiable, and it would then be for the other to show that the purpose was not justifiable.⁽¹⁰⁾ But if once it is admitted or proved that the alienation was for an antecedent debt, the purchaser is not then bound to show that there had been a proper enquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities.⁽¹¹⁾ But in order that a son's interest should pass, the transfer must purport to pass that interest, it must not be limited to pass merely the father's personal interest.⁽¹²⁾

(1) *Kishen Pershad v. Tipan Pershad*, I. L. R., 34 Cal., 735.

(2) *Tukarambhat v. Gangaram*, I.L.R., 23 Bom., 454; *Sutramayya v. Venkataramanna*, I.L.R., 11 Mad., 373; *Chetti Kulam v. Chetti Kulam*, I.L.R., 28 Mad., 377; *Gopal Rao v. Berar Manufacturing Co.*, 1 Nag. L. R., 173; *Jai Kumar v. Gauri Nath*, 3 A.L.J., R. 506.

(3) *Chetti Kulam v. Chetti Kulam*, I.L.R., 28 Mad., 377.

(4) *Maharaja of Benares v. Ramkumar*, I. L. R., 26 All., 611.

(5) *Govindarazulu v. Devarabholla*, I. L. R., 27 Mad., 206. Dissented from in *Sundarabai v. Shivnarayana*, I.L.R., 32 Bom. 81; *Devulapalli v. Polavarapu*, I.L.R., 34 Mad., 422.

(6) *Sundari v. Subramania*, I. L. R., 26 Mad., 505.

(7) *Sundarabai v. Shivnarayana*, I. L. R., 32 Bom. 81 (86, 88).

(8) *Devulapalli v. Polavarapu*, I. L. R., 34 Mad., 422; *Marina v. Doddiseti*, (1911) 12 I. C. 539; 2 M.W.N. 380; *Gopala Krishnamaraju v. Venkatanarasa*, (1912) 23 M. L. J.

288 F. B.; *Gadirazu v. Saripatti*, (1912) M. W. N. 1231; *Sapayya v. Rukhamma*, 19 M. L. J., 666; *Nandan Prasad v. Ajudhia Prasad*, I. L. R., 32 All. 325 F. B.; *Ramcoomar v. Ichamayi*, I. L. R., 6 Cal., 36; *Seenu Ammal v. Angamuthu*, 13 I. C. 802; *See Mitakshara*, S. VII, pl. 3.

(9) See S.38 post; *Girdhari Lall v. Kantoo*, 14 B. L. R., 187, P. C.

(10) *Subramanya v. Sadashiva*, I. L. R., 8 Mad., 75.

(11) *Bhagbut v. Girja*, I.L.R., 15 Cal., 717 P. C.; *Chennayya v. Perumal*, I. L. R., 13 Mad., 51; *Samu v. Ponnammal*, I. L. R., 21 Mad., 28; *Khalilul v. Gobind*, I.L.R., 20 Cal., 328; *Hathaji v. Sitarum*, 4 Bom., L. R., 587 (601).

(12) *Narayanrao v. Javhervahu*, I.L.R., 12 Bom., 436; *Nathaji v. Sitarum*, 4 Bom., L.R. 587 (595, 603). In *Jumsetji v. Kashinath*, I. L. R., 26 Bom., 326; *Simbhunath v. Golap Singh*, I. L. R., 14 Cal., 572, P. C.; *Upooroop v. Lalla*, I.L.R. 6 Cal., 749; *Jugul Kishori v. Ananda*, I. L. R., 22 Cal., 545; *Khavunnessa v. Loka Nath*, I. L. R., 27 Cal., 276, in which the transaction was inchoate.

298. The sons are not bound by an alienation made by a Hindu father to his concubine in consideration of past co-habitation.⁽¹⁾ A Mitakshara father has no right to make a gift of howsoever small a portion of the family land to a temple,⁽²⁾ but if the gift be for the benefit of the family idol it would be upheld as made for a proper purpose of family.⁽³⁾ Ancestral property may be sold by a father to effect his release from prison.⁽⁴⁾ But he cannot execute a gift to his wife and married daughters to the prejudice of his infant son,⁽⁵⁾ though he may make a gift to daughters or his married sister out of the family property to a reasonable extent by way of marriage portions.⁽⁶⁾ A nephew cannot object, to an alienation made by his uncle,⁽⁷⁾ nor by a son who at the time of alienation was neither born nor begotten.⁽⁸⁾ And if the son has consented, the grandson cannot object,⁽⁹⁾ but the son of an adopted son bears no relation to the latter's father, since the relations established by the Kritrima form of adoption is confined to the contracting father, and does not extend further.⁽¹⁰⁾ On the death of the father, the management of the joint family devolves on the eldest son or of the other male member of the family, and if the sons be minors, then the management may devolve on their mother or some other relation. The law as to the powers of alienation of a Hindu widow has been already discussed (§ 303), and will have to be more exhaustively expounded later on.⁽¹¹⁾ The powers of the manager of a Hindu family now next call for notice.

299. Hindu Manager.—A Hindu family is regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family unless the contrary is shown.⁽¹²⁾ The managing member of a Hindu joint family holds a position, in relation to the other members of the family and the family property, peculiar to himself, and not precisely analogous to anything known to English law. He is not the agent with delegated authority in a fiduciary and accountable relation to the other members of the family.⁽¹³⁾ He is the mere mouth-piece of the family, and as long as a member of such a family is a minor, he is in the position of a trustee for him of the joint property to the extent of his share in it, and is liable to account for it to him when the trust ceases.⁽¹⁴⁾ On the other hand, the other members so long as they choose to continue in a state of commensality and joint fruition do not possess individually any several proprietary right other than an alienable right to call for partition. But where, however, the manage-

(1) *Ningaraddi v. Lakshmawa*, 3 B. L. R., 647 (651); *Vrandavandas v. Yamunabai*, 12 B. H. C. R., 229.

(2) *Muthusami v. Dorasami*, 11 M. L. J. R., 310; *Baba v. Timma*, I. L. R., 7 Mad., 357; *Ramanna v. Venkata*, I. L. R., 11 Mad., 246.

(3) *Raghunath v. Gobind*, I L. R., 8 All. 76; explained in *Muthusami v. Dorasami*, 11 M. L. J. R., 310.

(4) *Duleep Singh v. Sreekishoon*, 4 N. W. P. H. C. R., 83.

(5) *Rayaklal v. Subbanna*, I. L. R., 16 Mad., 84.

(6) *Kadutamma v. Narasimha*, 17 M. L. J. 529; *Kamakshi v. Chakrapany*, I. L. R., 30 Mad., 452; *Ramasami v. Vengidasami*, I. L. R., 22 Mad., 113.

(7) *Adjoodia v. Kashee*, 4 N. W. P. H. C. R., 31.

(8) *Madho v. Hurmat*, 3 Agra, 432; *Jado v. Rane*, 5 N. W. P. H. C. R., 113; but otherwise if then in the womb—*Minakhi v. Virappa*, I. L. R., 8 Mad., 89; a son conceived being equal to a son born; *Sabapathi v. Somasundaram*, I. L. R., 16 Mad., 76.

(9) *Buraik v. Greedharee*, 9 W. R., 337.

(10) *Juswant v. Doolee*, 25 W. R., 255.

(11) S. 38 post.

(12) *Gan Savant v. Narayan*, I. L. R., 7 Bom., 467.

(13) *Muhammad v. Radhe Ram*, I. L. R., 22 All., 307.

(14) *Chuckun Lall v. Poran*, 9 W. R., 483; *Ranganmani v. Kasinath*, 3 B. L. R., (O. P.), 1; *Ganpat v. Annaji*, I. L. R., 23 Bom., 144; *Pirthi Lal v. Jowahir*, I. L. R., 14 Cal., 493, P. C.; *Shankar v. Hardeo*, I. L. R., 16 Cal., 397, P. C.; *Annamalai v. Murugasa*, I. L. R., 26 Mad., 544, P. C.

ment of a family is entrusted to a member on express condition, that he should maintain and be liable to render account, the manager is then liable to account on the footing of an ordinary agent.⁽¹⁾ But apart from agreement, a member of a joint family cannot sue for a share of the profits of the joint family estate as he has no definite share until partition. He may, however, sue for partition of such estate, if the estate is not impartible, and then he is entitled to an account.⁽²⁾ When a debt is contracted by the managing member of a joint family for a joint family purpose, the joint family and not the managing member alone becomes liable for it. In this respect there is no difference between the Mitakshara and the Dayabhaga schools of law.⁽³⁾ On the other hand, the joint family is not liable for the personal debts of the manager⁽⁴⁾ unless if it is shown that the manager⁽⁴⁾ had incurred the debt as the agent of the other co-parceners or that it was subsequently acquiesced in by them,⁽⁵⁾ in the absence of which the contracting party alone might be liable for restitution provided that the personal remedy against him is enforced and its recovery is within time.⁽⁶⁾ A debt incurred by the manager is presumed to be a family debt, but when one of the members is a minor, the creditor seeking to enforce his claim against the family property, must show that the debt was contracted *bona fide* and for the benefit of the family.⁽⁷⁾ But a person lending money on the security of an undivided Hindu family is bound to make enquiries as to the necessity that exists for the loan, and this he must do equally, whether all the members of the family are adults or minors.⁽⁸⁾ But where the family has been carrying on an ancestral trade, the infant members are bound by the acts of the manager, which are necessarily incident to, and flowing out of, the carrying on of that trade.

300. The manager can pledge the property and credit of the family

Allienation for family trade. for the ordinary purposes of that trade, and third persons dealing *bona fide* with such manager are not bound to investigate the status of the family. Such acts as are necessary for the material existence of the undivided family, or the preservation of the family property, will equally bind all the members.⁽⁹⁾ The law was thus stated in a case which has been since followed as enunciating the leading principle on the subject; "The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bona fide* trade dealings, should not be held bound to investigate the status of the family represented by the manager, whilst dealing with him on the credit of the family property. Were such a power not implied, property in a family trade, which is recognized by Hindu law to be a valuable inheritance, would become practically useless to the other members of an undivided family, wherever an infant was concerned, for no one would deal with a manager, if the minor were to be at liberty, on coming of age, to challenge, as against third

(1) *Setrucherla v. Setrucherla*, I.L.R., 22 Mad., 470 P. C.

(2) *Pirithi Lal v. Jowahir*, I.L.R., 14 Cal., 493, P. C.; *Shankar v. Hardeo*, I. L. R., 16 Cal., 397, P. C.

(3) *Dwarka Nath v. Bungshi Chandra*, 9 C.W.N., 879; *Baldeo v. Mobarak Ali*, I. L. R., 29 Cal., 583; *Abbakke v. Kinhiamma*, I. L. R., 29 Mad., 491.

(4) *Ranjit Sing v. Amullya*, 9 C.W.N., 923.

(5) *Ranjit Sing v. Amullya*, 9 C. W. N., 923 (927).

(6) *Palukdhary v. Baljit*, 4 C. L. J., 543.

(7) *Tandavaya v. Valli*, 1 M.H.C.R., 398.

(8) *Gane v. Kane*, 4 B.H.C.R., (A. C.), 169.

(9) *Ram Lal v. Lakshmichand*, 1 B. H. C. R., (A. C.), 51; followed in *Trimbak v. Gopal Shes*, *ib.*, 27; *Johurra v. Sreegopal*, I. L. R., 1 Cal., 470; *Sham Narain v. Rughobur*, I. L. R., 3 Cal., 508; *Joykisto v. Nityanund*, *ib.*, 738; *Bemola v. Mohun*, I. L. R., 5 Cal., 792 (805); *Rampartab v. Foolibai*, I. L. R., 20 Bom.. 767.

parties, the trade-transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest and the recognition of a trade as inheritable property renders it necessary, for the general benefit of the family, that the protection which the Hindu law generally extends to the interests of a minor should be so far trenched upon as to bind him by acts of the family manager, necessary for the carrying on and consequent preservation of that family property; but that infringement is not to be carried beyond the actual necessity of the case."⁽¹⁾ In such a case, then, the question of necessity or propriety does not arise.⁽²⁾ Of course, members of a joint family carrying on a trade in partnership and contracting with the outside public in the course of that trade, can have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in courts of law as any other partnership.⁽³⁾ In a Bombay case it was, however, laid down that such a partnership has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account for the past profits and losses.⁽⁴⁾ And it was accordingly laid down that the rights and liabilities arising out of joint ownership in a trading business, created through the operation of Hindu law between the members of an undivided Hindu family, cannot be determined by exclusive reference to the Contract Act,⁽⁵⁾ but must be considered also with regard to the general rules of Hindu law which regulate the transactions of united families.⁽⁶⁾ As against this view, it may be submitted that as between the partners *inter se* the rule laid down would no doubt apply: but as against a stranger it is difficult to see why the general law should not prevail. Indeed, this was conceded by the Privy Council in a case in which their Lordships observed: "The authorities⁽⁷⁾ cited by Mr. Cowell have no application to this case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case, the manager of a family business has a certain power of pledging assets for the requirements of the business."⁽⁸⁾ On the other hand, a contract to convey by the manager of a joint family cannot be specifically enforced against the other members unless the latter were either parties to such a suit, or to the contract or had authorized the manager to enter into it or have ratified it. In such a case the question whether the sale will bind the other members under Hindu law does not arise.⁽⁹⁾ Where one of several partners has under arrangement with the other partners the sole management of the business he has the power of borrowing as incidental to the power to trade, and the power

(1) *Ram Lal v. Lakshmichand*, 1 B.H.C.R. (A.P.), 51 (71, 72); followed in *Johurra v. Sreegopal*, 1 L.R., 1 Cal., 470; cited with approval by Garth, C.J., and Pontifex, J., in *Bemola v. Mohun*, 1 L.R., 5 Cal., 792 (805); *Morrison v. Verschoye*, 6 C.W.N., 429 (451).

(2) *Bemola v. Mohun*, 1 L.R., 5 Cal., 792 (805). The law is the same whether the family be governed by the Mitakshara or the Dayabhaga (ib., 805).

(3) *Ramsebuk v. Ram Lal*, 1 L.R., 6 Cal., 815. A Hindu infant does not by birth become a partner, although he is entitled to interest in a joint family; *Lutchmanan v. Siva*, 1 L.R., 26 Cal., 349, but the correct-

ness of this view may be questioned; see *In re Heeroon Mahomed*, 1 L.R., 14 Bom., 189; of course the minors are not bound if the manager starts a new business—*Makhun v. Ram Lal*, 3 C.W.N., 134.

(4) *Samalbhai v. Someshwar*, 1 L.R., 5 Bom., 38.

(5) Act IX of 1872.

(6) *Samalbhai v. Someshwar*, 1 L.R., 5 Bom., 38.

(7) *Sham Sundar v. Achhan*, 1 L.R., 21 All., 71 (83) P.C.

(8) *Kosuri Ramaragie v. Ivalury*, 1 L.R., 26 Mad., 74.

(9) *Ib.*, p. 83.

to pledge the partnership assets as incidental to the power of borrowing. Where a partner has power to borrow on mortgage for the purpose of trade, he has power to give a mortgage for an antecedent debt.⁽¹⁾

301. But one thing is certain that whether the manager be the father or any other member, the validity of a mortgage by him of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business,⁽²⁾ to carry it on,⁽³⁾ preserve⁽⁴⁾ or to improve it.⁽⁵⁾ And in the case of improvements of the family property, made by the managing member of a Hindu family where the sum spent was large, but the discretion was exercised *bona fide* and for the benefit of the estate, and the family had this benefit, it was held that the discretion should not be narrowly scrutinized.⁽⁶⁾ In order to bind the family, the managing member must have acted in his representative capacity. Where therefore he executed a mortgage which was clearly intended to be executed by all the members of the joint family, but was signed only by the manager for himself and his son, the other members having refused to execute it, it was held that the document did not go beyond the stage of a proposed agreement which had never been perfected and upon which even the executants could not be sued, since they had executed it upon the understanding that the other brothers would join, and the other party had contracted on the same faith.⁽⁷⁾ The question in such cases is one of intention, for if the liability undertaken is joint and several, there is then no reason why the contract as agreed should not be enforced.⁽⁸⁾ A member who stands by and sees to the application of the money raised by sale of the family property, for the common benefit in which he does not participate, cannot afterwards turn round to impugn the propriety of the transaction.⁽⁹⁾ A prudent manager will always act with the consent of the other members, which may, however, be inferred from pressing necessity.⁽¹⁰⁾ The eldest brother as manager of the family cannot grant a valid permanent lease, without some consideration being proved to have been paid or applied towards meeting any necessary expenses of the joint family,⁽¹¹⁾ from which it follows that an alienation unsupported by consideration or other countervailing advantage or benefit would not be upheld.⁽¹²⁾ The manager may refer a dispute to arbitration and the award consequent thereon will bind the minors equally with the adult members, provided the reference was made for the benefit of the family.⁽¹³⁾

(1) *Asan Kari Ravutha v. Somasundaram*, I. L. R., 31 Mad., 206; following *General Auction Estate & Co. v. Smith*, L. R., 3 Ch., 432; The English doctrine that a single partner cannot mortgage the immoveable property of the firm does not apply to India. *Id.*, p. 208; explaining *Harrison v. Delhi and London Bank*, I. L. R., 4 All., 437 (457).

(2) *Sakharam v. Devji*, I. L. R., 23 Bom., 372
(3) *Muttusvami v. Subbaramanaya*, 1 M. H. C. R., 309; *Ratnam v. Govindarajulu*, I. L. R., 2 Mad., 339.

(4) *Durgibai Singh v. Bhan Partab*, 9 A. L. J., 63.

(5) *Ratnam v. Govindarajulu*, I. L. R., 2 Mad., 339; following *Hunooman Persaud v. Munraj*, 6 M. I. A., 393; *Saravana v. Muttayi*, 6 M. H. C. R., 371.

(6) *Sivasami v. Sivugan*, I. L. R., 25 Mad.,

389.

(7) *Sivasami v. Sivugan*, I. L. R., 25 Mad., 389 (393); *Latch v. Westlake*, 11 A. & E., 959; *Underhill v. Horwood*, 10 Ves. J., 209 (226); *Charlton v. Earl of Burham*, L. R., 4 Ch., 433.

(8) *White v. Bisto*, 2 Hay., 567; *Juggernath v. Dooro*, 14 W. R., 80.

(9) *Miller v. Runga Nath*, I. L. R., 12 Cal., 389; *Chuttan Lal v. Jai Ram*, I. L. R., 33 All., 293; followed in *Kamta Parshad v. Sidh Narain*, 14 I. C., 251.

(10) *Braro Mohun v. Luchman*, (1864) W. R., 83.

(11) *Bala v. Balaji*, I. L. R., 22 Bom., 825.

(12) *Balaji v. Nana*, 5 Bom. L. R., 95; *Ram Ratan v. Lachman*, 5 A. L. J. R., 417.

(13) *Bhawanani v. Deo Raj*, I. L. R., 5 All., 542; *Sheo Persad v. Gunga*, 5 W. R., 221; *Ramanand v. Gobind*, I. L. R., 5 All., 384.

302. The touchstone of all alienations is necessity which in exceptional cases may justify an alienation even by a member of the joint family.⁽¹⁾ In Bengal and the United Provinces an individual member cannot alienate his own share on his own private account without the consent of the other co-sharers, but such alienations are allowed in Bombay,⁽²⁾ Madras,⁽³⁾ and the Central Provinces.⁽⁴⁾ In the Punjab, a sonless Jat proprietor is allowed to alienate his land to one of his heirs, to the exclusion of others where alienations to a stranger would be entirely restricted. ⁽⁵⁾ While the father of the eldest member of the joint family is usually its manager, Hindu law authorizes a younger member of a Mitakshara joint Hindu family to alienate or otherwise deal with immoveable property belonging to the family for family necessity, whenever he is put forward to the outside world by the elder members of the family as the managing member.⁽⁶⁾

303. Hindu Widow.—The power of alienation of a Hindu widow succeeding to the property of her husband is limited and subject to well defined rules. She is often described as a life-tenant, but this is clearly a misnomer, inasmuch as the estate which she inherits from her husband is not merely a life-estate, but the limited estate of a female known to Hindu law.⁽⁷⁾ If there be collateral heirs of her husband, she cannot of her own will alienate the property beyond her own lifetime except for special purposes. But the restrictions on her power of alienation are inseparable from her estate, and independent of the existence of heirs capable of taking on her death, and so in the absence of any heir if the property passes to the Crown, it has the same power of protecting its interest as an heir by impeaching any injurious alienation by the widow.⁽⁸⁾ Over her *stridhan*, however, a Hindu widow has absolute power of disposition and alienation. But an exception is made in the case of *stridhan* when it is immoveable property received from her husband which she is not entitled to alienate, except for purposes justifying alienation of any other property which she receives by inheritance.⁽⁹⁾ But if it had been bestowed on her by her husband coupled with an express power of alienation she would then have full

(1) *Balghobind v. Narain*, 1 I. L. R., 15 All., 339, P. C.; approving *Sadabart v. Foolbosh*, 3 B. L. R. 31, F. B.; *Madho v. Mehraban*, I. L. R., 18 Cal., 157, P. C.; *Bhagirathi v. Sheobhik*, I. L. R., 20 All., 325; *Jumna v. Gunga*, I. L. R., 19 Cal., 401; *Gopal Lal v. Mahadeo*, 6 C. W. N., 651; *Narayan v. Political Agent*, 7 Bom. L. R., 172.

(2) *Takaram v. Ramchandra*, 6 B. H. C. R. (A. C.), 247; *Vasudev v. Venkatesh*, 10 B. H. C. R., 139; *Fakirapa v. Channa*, ib., 162, F. B. (Inasmuch as the husband may also alienate: *Sultanji v. Raghunath*, 2 B. H. C. R., 48; *Rangayana v. Ganapakhatta*, I. L. R., 15 Bom., 673; *Gurlingapa v. Nundapa*, I. L. R., 21 Bom., 797; *Balghobind Das v. Narain Lal*, I. L. R., 15 All., 339 s. o.; *Chandra Deo Singh v. Matprasad*, I. L. R., 31 All., 176, (208) F. B.; *Kali Shankar v. Nawab Singh*, I. L. R., 31 All., 507 (509).

(3) *Virasvami v. Ayyesvami*, 1 M. H. C. R., 471; *Venkata v. Chinnaya*, 5 M. H. C. R., 166; *Villa v. Yamenamuea*, 8 M. H. C. R., 6; *Sivaganana v. Perisami*, I. L. R., 1 Mad., 312, P. C.

(4) *Diwaker v. Janardhan*, 3 C. P. L. R.,

64; *Abdul Aziz v. Ajulhia*, 15 C. P. L. R., 156.

(5) *Mudit Narayan v. Ranglal*, I. L. R., 29 Cal., 797, "even a single individual may conclude a donation mortgage or sale of immoveable property during a season of distress for the sake of the family." (*Vrihaspati* cited in *Mitak*, Ch. I., S. 1. V. 28; *Harita in Vivada Ratnakar*, Ch. I, p. 4).

(6) *Rala v. Banna*, (1901) P. R., 14.

(7) *Jamnabai v. Dharsey*, 4 Bom. L. R., 893; *Kone v. Bola*, 12 M. L. J. R., 387.

(8) *Collector v. Cavalry*, 8 M. I. A., 529; *Lakshmbai v. Ganpat*, 5 B. H. C. R. (O. C.), 128.

(9) *Dayabagga*, Ch. IV, S. 1, pl. 21 to 23, *Vyavahara-Mayuka*, Ch. IV, S. 10, pl. 9; *Tin Cowres v. Denonath*, 3 W. R., 49; *Ram She-wuk v. Sheo Gobind*, 8 W. R., 519; *Thakoor Davee v. Balackram*, 11 M. I. A. 139; *Doe d Kulammal v. Kuppu*, 1 M. H. C. R., 85 (in which said—"perhaps" she cannot alienate); *Datuluri v. Mullapudi*, 2 M. H. C. R., 860; *Gangadaraiaya v. Paramessaramma*, 5 M. H. C. R., 1111; *Venkata v. Venkata*, I. L. R., 1 Mad., 281 (286), O. A., I. L. R., 2 Mad., 883 P. C.; *Gunput Singh v. Gunga*, 2 Agra, 220.

power to alienate.⁽¹⁾ But in any other case a gift which, though creating a heritable estate, does not give her that power. But immoveable property purchased by her with her *stridhan* is not subject to the same restriction.⁽²⁾ *Stridhan* which a woman may freely dispose of is termed *Sondayika Stridhan*. Dismissing then out of consideration this property, over which the Hindu widow exercises plenary power of alienation, it may now be useful to inquire under what circumstances she is competent to transfer the rest of her property, whether moveable or immoveable, for they appear both to be subject to the same rule.⁽³⁾ The law on the subject has been thus laid down by the Privy Council: "It is admitted, on all hands, that if there be collateral heirs of the husband, the widow cannot of her own will alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred."⁽⁴⁾ But it surely is not the necessary or logical consequence of this latter proposition that, in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether stops. The exception in favour of alienation with consent may be due to a presumption of law that, where that consent is given, the purpose for which the alienation is made must be proper."⁽⁵⁾

304. Her power of alienation is then primarily confined to two special objects, *viz.*, for religious duties, or charitable donations.⁽⁶⁾ Her obligation to pay her husband's debts falls under the head of religious duties, and she is bound to discharge them, only if they were not contracted for immoral purposes. She may also mortgage or sell the estate to procure the necessary funds for the maintenance and marriage of her children, or for her own maintenance or to defray the expenses of her own religious ceremonies. She may mortgage her property to defend her husband's title, ⁽⁷⁾ and herself against a criminal prosecution, or to save her property from sale; ⁽⁸⁾ costs of litigation being a recognized head of necessity: but this does not mean that a widow engaged in litigation has an unlimited power of borrowing ⁽⁹⁾ For in order to constitute the justifying legal necessity she must not anticipate her wants, but must wait till the necessity arises,⁽¹⁰⁾ and which should be reasonable ⁽¹¹⁾ and such as she

(1) *Jeevaiah v. Mt. Sona*, 1 N. W. P. H. C. R. 66; *Koonjibehari v. Premchand*, 1 L. R. 5 Cal. 684; *Kamria v. Mahilal*, 1 L. R. 10 All. 495; *Mulchand v. Bai Manohar*, 1 L. R., 7 Bom. 491.

(2) *Tuchmun v. Kalichurn*, 19 W. R. 292, P. C.; *Venkata v. Venkata*, 1 L. R., 2 Mad. 333 (335), P. C.

(3) *Bhugwandeon v. Myra Bree*, 10 M. I. A. 513; *Collector of Masulipatam v. Cavalry*, 8 M. I. A., 551; *Panlharinath v. Govind*, 9 Bom. L. R., 1305 (1315, 1319), *contra* *Ratansi v. Umerbai* 9 I. C., 997 (999).

(4) But the power reposed in the reversioner of validating an invalid alienation cannot be delegated by him to his executor: *Modhu Sudan v. Rooke*, 1 L. R., 25 Cal., 1, P. C.; *Hayes v. Harendra Narain*, 1 L. R., 21 Cal., 698.

(5) *Collector v. Cavalry*, 8 M. I. A., 529 (550),

P. C.; *Gurunath v. Krishnaji*, 1 L. R., 4 Bom., 462; *Dhondo v. Balkrishna*, 1 L. R., 8 Bom., 190; *Mohideay v. Harrik*, 1 L. R., 9 Cal., 244; *Karappa v. Alagu*, 1 L. R., 4 Mad., 152.

(6) *Lukhee v. Gokool*, 13 M. I. A., 209.

(7) *Karimuddin v. Gobind* 1 L. R., 31 All. 497, P. C.; *Debi Dayal v. Bhan Pertab*, 1 L. R., 31 Cal., 433 (443).

(8) *Nobin Chandra v. Kherode Nath*, 6 C. W. N., 648; *Debi Dayal v. Bhan Pertab*, 1 L. R., 31 Cal., 433.

(9) *Bhimavaddi v. Bhaskar*, 6 Bom., L. R., 628; *Roy Radha v. Nauratan*, 6 C. L. J., 490; *Ram v. Zulfikan*, (1890), P. R., No. 44.

(10) *Kalliyana Sundaram v. Subba*, 14 M. L. J., 139; *Kanchannapalli v. Abu Kamachariu*, 10 I. C., 676. (677); *Velappa (In re)* 13 I. C., 640.

(11) *Rameshwar v. Chandi Pershad*, 1 L. R., 38, Cal., 721, (746).

had not brought upon herself by her own conduct.⁽¹⁾ A widow may pay off time barred debts, ⁽²⁾ and generally her position is not different from that of a manager of a joint family. The latter can act with the consent, express or implied, of the body of co-parceners. In the widow's case the co-parceners are reduced to herself, and the estate centres in her. She can, therefore, do what the body of co-parceners can do, subject always to the condition that she acts fairly to the expectant heirs. The rights of these heirs impose on persons dealing with a widow, the obligation of special circumspection, failing which they may find their securities against the estate to be of no avail after the widow's death. A Hindu widow in possession of an estate as its qualified owner represents the estate in a suit brought against her, and reversioners are bound by a decree fairly and properly passed against her ⁽³⁾ though, it would seem, not by the award of arbitrators appointed by her⁽⁴⁾ or by a compromise made by the widow even though it was embodied in a decree.⁽⁵⁾ But this is probably an extreme view: for while the widow is not competent to embark upon speculative ventures, still if the widow makes a good bargain for herself, and it did not prejudice the position of the then reversioners it would doubtless be given effect to.⁽⁶⁾ As regards the management of the estate a Hindu widow has at least all the powers of the manager of an infant's estate. She can therefore validly grant a permanent lease if it is for the benefit of the estate. ⁽⁷⁾ But inasmuch as a Hindu widow has merely a possessory title an adverse possession against her is not adverse against the reversioners.⁽⁸⁾ Though a Hindu widow is competent to pay off her husband's debts, and for which she may, if inevitable, alienate his property, the same right is not possessed by a Hindu wife during the lifetime of her husband.⁽⁹⁾ The burden of proving legal necessity is in every case on the alienees.⁽¹⁰⁾

(1) *Indar v. Latta*, I. L. R., 4 All., 532; *Kaliyana Sundaram v. Subba*, 14 M. L. J., 139; *Arjan v. Indar*, (1911) P. W. R., 128; *In Debi Dayal v. Bhan Pertab*, I. L. R., 31 Cal., 433 (443), *Rampini and Pargiter, JJ*, held that the widow was not bound to pay the cost of litigation out of the profits of the estate, but that the same being "debts incurred to protect and benefit the property... were properly chargeable on the estate." The learned Judges cite *Anjad Ali v. Moni Ram*, I. L. R., 12 Cal., 52; *Hurry Mohun v. Ganesh Chunder*, I. L. R., 10 Cal., 823 (837, 838) F.B., for this statement but of the cases cited the first is no authority for the view, while the latter lays down the contrary, and which it is submitted is the law: *Binda v. Baldeo*, 12 I. C., 336.

(2) *Chunmaji v. Dinkar*, I. L. R., 11 Bom., 320; *Kandasami v. Rajagopal*, 5 I. C., 382; *Udai v. Asutosh*, I. L. R., 21 Cal., 190; *Kontappa v. Subba*, I. L. R., 13 Mad., 189; *Jhalla v. Jewa*, (1884) P. R., No. 117; *contra Melgirappa v. Shivappa*, 6 B. H. C. R., 270; *Phalku v. Sorab*, (1885) P. R., No. 108 F.B. But Hindu Law recognized no limitation to payment of just debts.

(3) *Katama v. Raja of Shivgunga*, 9 M. I. A., 604; *Nogender Ghose v. Kamini*, 11 M. I. A., 241 (267); *an ex parte* decree binds them, *Lakshminarayana v. Subharayadu*, 17 M. L.

J. R., 160. But not if the decree was obtained on a compromise *Gobind v. Khunni Lal*, 4 A. L. J. R., 365.

(4) *Ram Sarup v. Ram Dei*, I. L. R., 29 All., 239.

(5) *Mt. Soban Bibi v. Hiran Bibi*, 1 I. C., 180 (181); *Gobind v. Khunni Lal*, I. L. R., 29 All., 487.

(6) *Behari Lal v. Dauds Husain*, 18 I. C., 721.

(7) *Dayamani v. Srinivas*, I. L. R., 33 Cal., 842.

(8) Art. 141, Sch. 1, Indian Limitation Act (IX of 1908); *Ranchordas v. Parvatibai*, I. L. R., 23 Bom., 725 P. C.; *Amrit Dhat v. Bindesri*, I. L. R., 23 All., 448; *Jhomanan v. Tiloki*, I. L. R., 25 All., 435; *Sheo Chandhuri v. Sadho Das*, 18 I. C., 948; *Hardwar Rai v. Balram Rai*, 18 I. C., 959.

(9) *Himmat Bahadur v. Bhawani Kunwar*, I. L. R., 30 All., 352 (358) O. A., *Bhawani Kunwar v. Himmat Bahadur*, I. L. R., 33 All., 342 P. C.

(10) *Dhondo v. Balkrishna*, I. L. R., 8 Bom., 190; *Tika Ram v. Deputy Commissioner*, I. L. R., 26 Cal., 707, P. O., *Rameshwar v. Chandi Prasad*, I. L. R., 38 Cal., 721 (752); *Mt. Janha Bi v. Balabhadra*, 10 I. C., 350; *In re Doraisawmy*, 15 I. C., 602. See S. 36 Comm.

305. A reversioner may intervene to prevent an improper alienation made by a widow, and as to alienations already made, he may obtain a declaration that they do not bind him,⁽¹⁾ and if a proper case is made out, the fact that the reversioner may not succeed to the estate for many years is no ground for refusing it.⁽²⁾ Where an alienation is partly for legal necessity and partly not, the reversioner may obtain a decree only with respect to the improper alienation, and on death of the widow he may recover the property sold by her from the vendee on payment of such portion of the consideration as represented moneys borrowed by the widow for legal necessity.⁽³⁾ But the reversioner is not entitled to the same equity if the alienation was fully justified by necessity.⁽⁴⁾

According to Hindu law prevailing in the French territories, a widow succeeding to the property of her husband takes an absolute estate, whose character does not change by her subsequent migration to British territory, unless there be some evidence to show that since her change of the domicile she had adopted the system of law prevalent in British India.⁽⁵⁾

306. Co-widows.—One co-widow cannot transfer property without the consent of the other.⁽⁶⁾ But such consent may be general, express or implied, and where a co-widow empowers another to generally manage the estate, the managing co-widow has implied authority to alienate the family property for legal necessity.⁽⁷⁾ An alienation by one of two co-widows is not *ipso facto* invalid with reference to the interest of the other co-widow.⁽⁸⁾ And there is nothing in law to debar the co-widows, from effecting a partition of their interests in the estate, though such partition would have merely the effect of a family arrangement made for the convenient enjoyment of joint property leaving unimpaired the right of the reversioner to the estate.⁽⁹⁾

307. A widow may upon re-marriage forfeit her inheritance,⁽¹⁰⁾ unless she belongs to a caste in which re-marriage does not occasion forfeiture.⁽¹¹⁾ But among high caste Hindus, and those belonging to the Maraver⁽¹²⁾ or Lingait⁽¹³⁾ castes, or governed by the Widow Re-marriage Act which enabled widows to re-marry who could not have previously done so,⁽¹⁴⁾ re-marriage by a widow does occasion forfeiture of property inherited from her deceased husband. It should be noted that the Act does not affect persons who could have re-married before, and who therefore do not fall within the scope of the Act, nor are subject to the disability to inherit which it creates.⁽¹⁵⁾ A Hindu widow in whom property has become vested after

(1) *Chhotu v. Mt. Shenbarti*, 5 C.W.N., 445.

(2) *Uendra v. Gopceenath*, I.L.R., 29 Cal., 817.

(3) *Gobind v. Baldeo*, I L R., 25 All., 330; *Jhamman Kunwar v. Tiloki*, I. L. R., 25 All., 435; *Ram Dai v. Abu Jafar*, I. L. R., 27 All., 494; *Gobinda Nandan v. Vasudeva*, 16 I. C. 385; *Singam Setti v. Draupadi*, I.L.R., 31 All., 153.

(4) *Raghubar Dayal v. Akbhar Khan*, 5 A. L. J. 366.

(5) *Milathi v. Subharaaya*, 11 M.L.J. R., 309.

(6) *Gajapati v. Pasupati*, I.L.R., 16 Mad., 1 P.O.; *Mahadevarao v. Basagawda*, I.L.R., 29 Bom., 346.

(7) *Mahadevappa v. Basagawda*, I. L. R., 29 Bom., 346; *Thakurmani v. Dai Rani Koeri*, I. L. R., 33 Cal., 1079.

(8) *Subbammal v. Avadaiyammal*, I.L.R.,

30 Mad., 3; *Kalliyana v. Subba Mooraner*, 14 M.L.J., 139.

(9) *Durga Dul v. Gita*, I. L. R., 33 All., 443; *Kanni Annal v. Annamakannu*, I. L. R., 23 Mad., 504.

(10) S. 2, Widow Re-marriage Act (XV of 1856), *Vithu v. Govinda*, I. L. R., 22 Bom., 132.

(11) *Parekh v. Bai Vakhat*, I.L.R., 11 Bom., 119; *Har Saran v. Nandi*, I. L. R., 11 All., 330; *Ajmad v. Moniram*, I.L.R., 13 Cal., 52.

(12) *Murugayi v. Virmakali*, I. L. R., 1 Mad., 226.

(13) *Koduthi v. Madu*, I. L. R. 7 Mad., 321.

(14) Ss. 2, 3, & 4, Act XV of 1856: *Subbarama v. Rama Sami*, I.L.R., 23 Mad., 171.

(15) *Ranjit v. Radha*, I L. R., 20 All., 476 (Kurmi caste case *Har Saran v. Nandi*, I. L. R., 11 All., 330; *Dharam Das v. Nand Lal* (1889), A.W.N., 78.

the death of her husband is not divested by her subsequent unchastity, which is an impediment to succession but is no ground for forfeiture.⁽¹⁾ But the enjoyment of a maintenance-grant is conditional on her continued chastity, and in case of her incontinence not only a grant made may be forfeited,⁽²⁾ but a decree passed for maintenance in her favour may be set aside.⁽³⁾ But it would appear that a sum of money given to a widow without restriction in lieu of maintenance, would be her absolute property which she could retain in any case. ⁽⁴⁾

308. It has been stated before that a Hindu widow may make an absolute Reversioner con- transfer with the consent of the reversioners, but unless all senting to transfer. the reversioners have joined, such an alienation will not operate beyond conveying the interest of the widow and the consenting reversioners, ⁽⁵⁾ and even when all the existing reversioners have consented, it would not affect an after-born reversioner.⁽⁶⁾ Similarly, a contract between the widow and the then expectant heirs, by which the latter recognize the former as an absolute owner, is not binding on the persons who become heirs when the succession opens out. Thus, where the existing nearest reversioner acknowledged a Hindu widow as entitled absolutely to the property, it would not prevent his successors from claiming the property when the succession opened. "It would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent."⁽⁷⁾

309. A mortgage by a female is valid if the next heir assents to it at the time when the mortgage is made or afterwards. The validity of such an alienation can be contested only by the next heir and not by a remote reversioner unless the former has colluded with the widow or has rendered himself otherwise disqualified. ⁽⁸⁾ In other words, such an alienation is not void, but is only voidable at the option of the reversioner. So in a case where a Hindu widow had granted a *putni* lease the Privy Council held that the *putni* was not void; it was only voidable.⁽⁹⁾ As regards the powers of a Hindu widow to grant a permanent lease, the law appears to be that her power is at least as great as of the manager of a

(1) *Parvati v. Bhikes*, 4 B. H. C. R., (A. C.), 25; *Keshar*, I. L. R., 9 Bom., 94; *Abduram v. Sreeram*, 3 B. L. R. (A. C.), 421; *Matangini v. Jaykati*, 5 B. L. R., 466; *Kery v. Moniram*, 13 B. L. R., 1 F. B., O. A., *Moniram v. Keri*, I. L. R., 5 Cal., 776 P. C.; *Nehalu v. Kishen*, I. L. R. 2 All., 150; *Bhawan v. Multani*, *ib.*, 171 (it is not necessary that she should have acquired possession—vesting is sufficient.)

(2) *Rama Nath v. Rajonimoni*, I. L. R., 17 Cal., 674; *Hanama v. Timannubhat*, I. L. R., 1 Bom., 559; *Valu v. Ganga*, I. L. R., 7 Bom., 84; *Daulta v. Meghu*, I. L. R., 15 All., 382.

(3) *Vishnu v. Manjamma*, I. L. R., 9 Bom., 108.

(4) *Nellaikumar v. Marakathammal*, I. L. R., 1 Mad., 166.

(5) *Ramadin v. Mathura*, I. L. R., 10 All., 407, and cases therein cited. *Bajrangi Singh v. Baksh Singh*, I. L. R., 30 All., 1 P. C.; *Pilu v. Babaji*, I. L. R., 34 Bom., 165; *Rangappa v. Kamti*, I. L. R., 31 Mad., 366 F. B.; *Kattamudy v. Kattamudy*, 23 M. L. J., 363;

Kupier v. Kotta, (1912) M. W. N., 758 consent of reversioners to a transfer is evidence of its propriety—*Vinayak v. Gobind*, I. L. R., 25 Bom., 129 (133); *Hem Chunder v. Sarnamoyi*, I. L. R., 22 Cal., 354 (361); *Pulni v. Bolai*, I. L. R., 35 Cal., 939; *Debi v. Golap*, 19 I. C., F. B.; *Abbesang v. Ransang*, 14 Bom. L. R., 602.

(6) *Duh Singh v. Sundar*, I. L. R., 14 All., 377; *Bahadur Singh v. Mohar Singh*, I. L. R., 24 All., 94 P. C.

(7) *Bahadur Singh v. Mohar Singh*, I. L. R., 24 All., 94, (108) P. C.

(8) *Jhula v. Kunta Prasad*, I. L. R., 9 All., 441; *Bhikaji v. Apaji*, 10 B. H. C. R., 351; *Abmash v. Hari Nath*, I. L. R., 32 Cal., 62; *Govinda v. Thyammal*, 14 M. L. J. R. 209.

(9) *Modhu Sudan v. Roorkee*, I. L. R., 25 Cal., 1 P. C.; *Sadai Naik v. Serai Naik*, I. L. R., 28 Cal., 532; *Bejoy Gopal v. Nilratan*, I. L. R., 30 Cal., 990. O. A. sub nom; *Bijoy Gopal v. Krishna*, I. L. R., 34 Cal., 329 (333) P. C.

minor's property, and that, therefore, she may grant a permanent lease if it is for the benefit of the estate.⁽¹⁾

310. Mahomedan Family.—The Mahomedan Law does not recognize the joint family, but where a number of relations are found to be living together and are supported from the proceeds of the patrimonial estate, it may be safely inferred that they are joint.⁽²⁾ But, strictly speaking, there is no joint family and joint family property under Mahomedan Law in the sense in which these expressions are understood in the Hindu system of law. But in some parts of India Mahomedan families have adopted Hindu customs and usages, and where they have done so, they may be governed by principles of Hindu Law as to joint family property.⁽³⁾ But a special custom of this kind being entirely opposed and unknown to Mahomedan Law, must be alleged and proved before it can be held applicable to any particular case, for the presumption of Hindu Law in favour of joint acquisition and joint family does not arise in the case of Mahomedans.⁽⁴⁾ And hence it follows that in a Mahomedan family, the individual benefited, and not the family, is liable for expenses incurred for the benefit of any particular member.⁽⁵⁾

311. Under Mahomedan Law the mother is not the *de facto* guardian of her minor children, and unless she is appointed *de jure* or is especially authorized by the District Judge, she has no power to bind their estate by mortgage or otherwise, such an act by the mother being entirely void.⁽⁶⁾ In this respect, Mahomedan Law differs from the Hindu Law, inasmuch as though the widowed mother may be a co-heir with her minor children in respect of the property dealt with by her, the Mahomedan Law, unlike the Hindu Law, does not constitute the senior co-heir the managing co-parcener, entitled to administer and manage the estate until partition. Alienations by such a widow cannot, therefore, be upheld by extending to Mahomedans the principle of Hindu Law applicable to the acts of a guardian or managing member of a family. Under Mahomedan Law the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. In this respect it is analogous to, and even stricter than the Hindu Law. The creditors have the right to sue such of the heirs as have taken the estate, but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir.⁽⁷⁾

312. Again, in Mahomedan Law there is no distinction between ancestral and self-acquired property. On death of the ancestor, the shares of all the heirs are clearly carved out, and the sharers thereupon acquire absolute

(1) *Dayamani v. Srinibash*, 1 L.R., 33 Cal., 842; following *Hunooman Pershad Pandey v. Mt. Baboee*, 6 M. I. A., 393; *Kameswar Pershad v. Run Bahadur*, 1 L.R., 6 Cal., 843 P. C.

(2) *Achina v. Ajeerjoon ssa*, 11 W. R., 45

(3) *Abraham v. Abraham*, 9 M. I. A., 195; *Hakim Khan v. Gool Khan*, 1 L. R., 8 Cal., 823; *Jaker Ali v. Rajchunder*, 1 L. R., 8 Cal., 881, note; *Mahomed v. Anarbi*, 1 L. R., 22 Cal., 954 (959); *Amme v. Zia Ahmad*, 1 L. R., 13 All., 282; *Patcha v. Mohidin*, 1 L. R., 15 Mad., 57; *contra* held in Bombay, *Bavasha v. Masumsha*, 1 L. R., 14 Bom., 70.

(4) *Hakim Khan v. Gool Khan*, 1 L. R., 8 Cal., 823; doubting *Rup Chand v. Latu*, 3 C.

L. R., 97; *Jowala Buksh v. Dharum Singh*, 10 M. I. A., 511; *Mahomed v. Ekram*, 14 W. R., 374; *Abdool v. Mahomed*, 1 L. R., 10 Cal., 562; *Mahomed v. Anarbi*, 1 L. R., 22 Cal., 954 (959, 960).

(5) *Alimunnessa v. Hassan*, 8 C. L. R., 375.

(6) *Moyna Bibi v. Banku Behori*, 1 L. R., 29 Cal., 473; following *Bhutnath v. Ahmed*, 1 L. R., 11 Cal., 417; *Baba v. Shivappa*, 1 L. R., 20 Bom., 199; *Nizamuddin v. Anandi*, 1 L. R., 18 All., 37; distinguishing *Ram Chunder v. Brojo Nath*, 1 L. R., 4 Cal., 929; *Pathummabi v. Vittal*, 1 L. R., 26 Mad., 734.

(7) *Pathummabi v. Vittal*, 1 L. R., 26 Mad., 734; followed in *Mafzal v. Basid*, 1 L. R., 34 Cal., 36.

dominion over the property allotted to them. A person then, at any time in possession of his property, has the unfettered power of disposition *inter vivos*, and it is only in dispositions to take effect after his death that his power is limited by the right of his heirs. And in this respect Mahomedan females stand on the same footing as the males, both having the same unqualified power. Similarly, a Mahomedan widow taking a share in her husband's estate acquires an absolute interest and has no fetters put upon her power of alienation as a Hindu widow. In this respect the laws of Islam are more akin to the English than to the Hindu Law of property.

The Mahomedan Law relating to wakfs and gifts will be found set out in a note under section 129.

313. Indian Christians.—An Indian Christian family is not, ordinarily, subject to the law governing the joint Hindu family. The senior member has not then the status of the managing member even if all the members of the family live together and the senior member manages the affairs of the family. An Indian Christian cannot borrow on the credit of others living with him so as to bind their estate without authority or agency. Such an agency cannot be implied by the mere fact of his acting for other members.⁽¹⁾

314. Buddhists.—In families subject to the Buddhist law co-sharers can dispose of their own share, even while the property is undivided,⁽²⁾ but the sale of undivided ancestral property can be effected only with the consent of all the co-heirs.⁽³⁾ The wife or husband has an interest in the property acquired by the other by inheritance after marriage when they are living together⁽⁴⁾: a sale by a Buddhist husband of such joint property made without the wife's consent would, therefore, constitute a valid transfer of only his share and interest in that property.⁽⁵⁾ The same rules apply to an alienation by the wife, though her interest is attachable.⁽⁶⁾ After her husband's death she can validly alienate her share,⁽⁷⁾ but she cannot dispose of the share of her eldest son even in case of necessity.⁽⁸⁾ In cases of other children's share she can sell for family necessity, which it will lie on the purchaser to prove.⁽⁹⁾ There is more of equity than Buddhist law in the rule that the mortgage by the managing member of a Buddhist family is binding other members if they have consented to it.⁽¹⁰⁾

315. Powers of Guardian.—A guardian is a person entrusted with the care of a minor or custody of his estate. Obviously, only a brief reference can be here made to the latter class of guardians who may be either (a) natural (b) certificated or (c) testamentary. The law relating to guardians mainly follows the personal law of the minor, for though modern legislation has made provision for the appointment of a guardian, it merely prescribes the procedure, and where it does more, it does so subject to it.

(1) *Appavu v. Susai Udayan*, 15 M. L. J. R., 235.

(2) *Subramanian v. Maung Shwe*, 11 I. C. 781 (782).

(3) *Mi Te v. Po Maung* (1872-1892), L. B. R., 41.

(4) *Maung Po v. Ma Pwa* (1893-1900), L. B. R., 403.

(5) *Ma Shewe v. Ma Kyu*, 3 L. B. R., 66.

F. B.

(6) *Maung Po v. Maung Pyaung*, 8 I. C. 992 (993).

(7) *Maung Po v. Ma Ba*, 14 Bur. L. R. 57.

(8) *Mi Saw v. Mi Shwe*, 15 I. C. 919.

(9) *Nga Shwe v. Mi San*, (1872-1892) L. B. R., 108; *Chan Tha v. Naw Bai*, 17 I. C., 956.

(10) *Ma Ngwe v. Mang Po*, 11 I. C., 775.

316. In the archaic Hindu law the king is spoken of as the supreme guardian of the property of all minors whether male or female, (1) and this power is now exercised by the Courts (2) who are the guardians of all minors who are universally regarded as the pet of law. But this merely confers on the Court a special duty towards the minor who still remains subject to the power of their guardians.

Under Hindu law the father has the first claim to be the guardian of all his legitimate children males, whether natural or adopted, (3) as well as unmarried females. (4) He is moreover empowered to nominate a guardian of his children which he may do orally or in writing and who will exclude even the mother from the guardianship. After the father, and in the absence of a valid appointment by him, the mother becomes the guardian of her minor children, if the family is divided, and in which case she is enjoined to act under the advice of her husband's relations. But where the minor is a member of a joint family then, of course, the senior male member of the family e.g., the eldest brother, would be its *karta*, and as such he would assume charge of the minor's property. No guardian can be appointed to an individual minor's co-parcenary interest in a joint family (5) though a guardian may validly be appointed where all the co-parceners are minors. (6) On failure of the mother the office devolves on the paternal relations, and failing them, the maternal kinsmen.

The husband is the natural guardian of his wife even though he be himself a minor, (7) unless he is unfit to discharge his duties towards his ward, (8) and which probably means, if he is immoral, extravagant, or otherwise disqualified to act in the interest of his ward.

317. Under Mahomedan Law guardians of minors are divided into two classes—those designated (a) *near* and (b) *remote*. Under (2). **Mahomedan Law.** the former category fall all fathers, their executors, paternal grandfathers their executors and the executors of such executors. *Near guardians* alone are competent to manage the property of a Mahomedan minor; (9) failing them the office devolves upon the king, or his representative the judge, whose duty it is to appoint a guardian. (10) *Remote guardian's* can never act as the guardians of minor's property.

A Mahomedan husband is not the natural guardian of his wife who retains her former guardian until she has attained puberty and is fit to bear the embraces of her husband, (11) when the husband can obtain her custody provided that her dower, if prompt, is paid to her. (12)

(1) Manu ch. 8, v. 27; *Mathureerappa v. Ponnuswami*, 10 M.L.T., 477.

(2) *Ram Bansee v. Soobh Koonwar*, 7 W.R., 325.

(3) *Lakshmi Bai v. Vasudev*, 1 L.R., 3 Bom., 1.

(4) *Soobah Doorgah v. Neelanund*, 7 W.R., 74.

(5) *Bandhu Prasad v. Dhiraji*, 1 L.R., 20 All., 400; *Murlidhar v. Hari Lal*, (1906), P. L.R., 165; *contra In re Manilal*, 1 L.R., 25 Bom., 353.

(6) *Bindajee v. Mathurabai*, 1 L.R., 30 Bom., 162; *Ram Chandra v. Krishna Rao*, 1 L.R., 92 Bom., 259.

(7) *Dhurondhar*, 1 L.R., 17 Cal., 298.

(8) S. 41 (d) Guardians and Wards Act (Act VIII of 1890)

(9) *Bhutnath v. Ahmad Hosain*, 1 L.R., 11 Cal., 417; *Sita Ram v. Amir*, 1 L.R., 8 All., 324 (338).

(10) *Bukshan v. Maldai*, 3 B.L.R., 423; *Rulton v. Dhoomee Khan*, 4 N.W.P.H.C.R., 21.

(11) *Nurkadir v. Zubika*, 1 L.R., 11 Cal., 649; *Khatija (In the matter of)* 5 B.L.R., 557. *Mabin (In the matter of)* 13 B.L.R., 160.

(12) *Bailie's Dig. Pt. I. pp. 54, 125, 126, Kajikar v. Maru Devi*, 1 L.R., 32 Mad., 139, *Jhabbu Singh v. Ganga Bishan*, 1 L.R., 17 All., 529.

318. Under English law, a father is the natural guardian of all his minor children, except that in the case of a daughter the

(3) **Other Laws.**

right determines on her marriage under age. His right to custody is absolute even as against the mother⁽¹⁾ and it will be lost only if he is proved unfit to exercise it, and which would be the case, if he is actually cruel irreligious or immoral⁽²⁾ or it would otherwise be in the interest of the minor.⁽³⁾ The same right belongs to the mother on the death or removal of the father, should the latter have appointed no guardian. Apart from his appointment by the Court a father would seem to be the guardian of his minor children's estate, though this statement would have to be qualified for England where he is usually but not invariably such guardian⁽⁴⁾—the question often depending upon the nature of the estate and customs incident thereto. But it is even there settled that if he enters on the infant's land and receives its usufruct, he will be deemed to do so as his guardian.⁽⁵⁾ But as guardian for nurture and by nature the father is only a guardian of the person of the minor.⁽⁶⁾

319. Certificated Guardian.—A certificated guardian is one appointed under the provisions of the Guardians and Wards Act.⁽⁷⁾ His rights duties and liabilities are then limited by the creation of his office.⁽⁸⁾ Such are also testamentary guardians.

A natural guardian possesses larger powers of alienation than a certificated guardian whose powers are necessarily more circumscribed.⁽⁹⁾ The guardian of a minor is competent to transfer and otherwise dispose of his ward's property if he acts in good faith and in the minor's interest.⁽¹⁰⁾ He may exercise or refuse to exercise the right of pre-emption accruing to the minor, and if he refuses in good faith and in the interest of the minor, the latter is bound by the refusal.⁽¹¹⁾ The Court of Wards in Oudh have no larger powers than those of a guardian, supplemented by certain additional powers given by the statute, and it has no power to make a voluntary alienation of the ward's immoveable property in perpetuity, unless it be to his advantage.⁽¹²⁾ A transfer made by a *de facto* or actual guardian stands on the same footing, and would not be disturbed if it appears to have been made for the minor's benefit.⁽¹³⁾ A voluntary alienation made by the guardian may be challenged by the latter on attaining majority.⁽¹⁴⁾ Indeed, generally speaking, no alienation made by a guardian is valid as against the ward, unless it is shown to have been made for his benefit, or made under circumstances otherwise rendering it binding on

(1) *Agar-Ellis (Re)* 24 Ch., D. 317 (335, 336), *Thomasset v. Thomasset*, [1894] P. 295 (298).

(2) *Shelley v. Westbrook*, Jac. 266.

(3) *Cruise v. Humber*, 2 Bro. C. C. 500; *De Manneville v. De Mannerilla*, 10 Ves., 52; *Wellesley v. Beufort*, (Duke), 2 Russ. 1.

(4) Co. Litt 88 b.; *R. v. Sherrington*, (*Inhabitants of*) 3 B. & Ad., 714.

(5) 1 Black Comm. 453; *Morgan v. Morgan*, 1 At. K. 483.

(6) Per Parke J. in *R. v. Sherrington*, (*Inhabitants of*) 3 B. & Ad. 714 (716); But see S. 17 (4) Guardians and Wards Act (Act VIII of 1890).

(7) Act VIII of 1890.

(8) *Ib.*, Chap., III.

(9) *Shurrut Chunder v. RajKishen*, 15 B. L. R. 350; *Ranjit Singh v. Amullya*, 9 C.W. N., 923 (926).

(10) *Unrao Singh v. Dalip Singh*, I. L. R., 23 All., 129 (130); *Lal Bahadur v. Durga*, I. L. R., 3 All., 437; *Mir Sarwarjan v. Fakhruddin*, I. L. R., 34 Cal., 163, F. B. But the minor may sue to rescind the contract through a next friend if it is not to his advantage; *Abdulla v. Ram Das*, 2 Nag. L. R., 146. Guardians must follow the rules in the Trusts Act. *In re Cassumali*, I. L. R., 30 Bom., 591.

(11) *Lal Bhadur v. Durga*, I. L. R., 3 All., 437; *Unrao Singh v. Dalip Singh*, I. L. R., 23 All., 129.

(12) S. 172, Act XVII of 1876; *Mahomed v. Farhat Ali*, I. L. R., 23 All., 394 (404), P. C.

(13) *Amirbibi v. Abdul*, 3 Bom. L. R., 688 (685).

(14) *Mahomed v. Farhat*, I. L. R., 23 All., 394 (404), P. C.

him.⁽¹⁾ A guardian duly appointed under the Guardian and Wards Act may acknowledge a debt on behalf of his ward,⁽²⁾ and in such a case it is not necessary that the authority should be contractual.⁽³⁾ But the contrary view has been maintained by the Calcutta High Court,⁽⁴⁾ which has held in a case that a certificated guardian may make payments within the meaning of section 20 of the Indian Limitation Act, so as to enlarge time, but he cannot *acknowledge* a debt under section 19 of the said Act, for which he is not a qualified "agent duly authorized" within the meaning of that section.⁽⁵⁾ On the same principle, payments made by a receiver appointed at the instance of the mortgagee in possession, were treated as payments made by the agent of the mortgagor, and as such sufficient to take the case out of the statute of Limitation. ⁽⁶⁾ The guardian mother of a minor is similarly competent to acknowledge a debt, if it is for the benefit of the minor,⁽⁷⁾ and it may then be enforced against the share of the infant. A mortgagee seeking to enforce such a mortgage, is not entitled to recover, although had the minor sued the mortgagees to avoid the mortgage, he might not have been able to succeed, without paying compensation to the mortgagee to the extent to which his property had benefited by the money advanced on the security of the mortgage.⁽⁸⁾

320. Mahomedan Law recognizes two classes of guardians, near and remote—of whom only the former possesses the power to sell immoveable property of their wards. According to that law, in the absence of only appointed testamentary guardians the care of a minor's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administration."⁽⁹⁾ Mahomedan law does not recognize a *de facto* guardian. As was observed in a case: "It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a *de facto* guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."⁽¹⁰⁾ And from which it follows that sale by such a person is not merely voidable but void.⁽¹¹⁾ Under Mahomedan Law the mother is a preferential guardian of her children, if males, till they attain the age of seven, and if females, till they reach the age of puberty,⁽¹²⁾ but under the Shiah law the mother is entitled to the custody of her female children till the age

(1) *Kamaksha v. Ramasami*, 7 M.L. J. R., 131.

(2) *Annappayanda v. Sangadhyapa*, I.L.R., 26 Bom., 221, F. B.

(3) *Chinnery v. Evans*, 11 H. L. C., 115; *Cockburn v. Edwards*, 16 Ch. D., 393; 18 Ch. D., 449 (457); but see *Levin v. Wilson*, 11 App. Cas., 639 (657); explained in *Annappayanda v. Sangadhyapa*, I.L.R., 26 Bom., 221 (228); overruling *Maharana v. Vaaralal*, I. L. R., 20 Bom., 61 (74); *Chhato v. Billo*, I. L. R., 26 Cal., 51; in *Beti v. The Collector*, I. L. R., 17 All., 198, P. C.; the point did not arise, but the view consonant with the English cases was probably assumed, but of course the acknowledgment must be for the benefit of the minor—*Bhulli v. Nanalal*, 4 B. L. R., 812.

(4) *Asuddin v. Lucy*, 13 C. L. R., 112; *Wajibun v. Kodir*, I. L. R., 13 Cal., 292; *Chhato v. Billo*, I. L. R., 26 Cal., 51.

(5) *Narendra v. Rai Ohasan*, I. L. R., 29 Cal., 647.

(6) 3 & 4 Will., IV C., 27; *Cockburn v. Edwards*, 18 Ch. D., 449 (457, 458) explaining *Chinnery v. Evans*, 11 H. L. C., 115; followed in *Annappayanda v. Sangadhyapa*, I. L. R., 26 Bom., 221 (228) F. B.

(7) *Bhulli v. Nandalal*, 4 Bom., I. L. R., 812.

(8) *Mojna Bibi v. Banku Behari*, I. L. R., 29 Cal., 473; *Suvaran v. Amir Begum*, I. L. R., 8 All., 324; *Nizam ud-din v. Anandti*, I. L. R., 18 All., 370 and cases therein cited.

(9) *Mata Din v. Ahmed Ali*, I. L. R., 34 All., 213 (221) P. C.

(10) *Mata Din v. Ahmed Ali*, I. L. R., 34 All., 213 (222) P. C.

(11) *Uttam Singh v. Gurumukhe Singh* (1913) P. R. No. 15; *Sardar Shah v. Haji*, (1908) P. L. R., 182.

(12) *Futteh Ali v. Mahomed*, (1864), W. R., 131; *Raj Begum v. Reza Hossein*, 2 W. R., 76; *In re Tayheb Ally*, 2 Hay., 63; *Alimodcen v. Syfoora*, 6 W. R., (Mis.), 125. *In re Ameeroomissa*, 11 W. R., 297; *Beedhun v. Fuzuloolah*, 20 W. R., 411; *Idu v. Amiran*,

of seven, when the father becomes entitled to her custody.⁽¹⁾ Under Mahomedan law a sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity or clear advantage to the infant. A purchaser from such a guardian cannot defend his title on the ground of the *bona fides* of the transaction.⁽²⁾ But remote guardians, among whom are brothers, can under no circumstance alienate his property, as their guardianship only extends to matters connected with the education of their wards beyond which they have no powers.⁽³⁾ But a near guardian clearly possesses such a power,⁽⁴⁾ which he may exercise in limited cases, as for the payment of the debts of the deceased incumbent, or when its sale becomes necessary for the maintenance of the minor.⁽⁵⁾ The question of legal necessity does not arise in cases of sale under Mahomedan Law, though it may properly be an element for consideration when the conduct of a guardian is called in question. The Mahomedan Law looks to the benefit of the minor, ⁽⁶⁾ and if the alienation is impeached by the ward, the guardian is permitted to show the real nature of the sale, and to prove that it was one beneficial to him. ⁽⁷⁾ It makes no provision with regard to mortgages, as such transactions are, strictly speaking, unlawful as they involve the payment of interest. As, however, mortgages do now exist among Mahomedans, they must be governed by the rules applicable to sales. Absolute necessity, or benefit of the minor, are the two cardinal elements which justify an alienation of the ward's property. ⁽⁸⁾ Where the guardian alienates property belonging to himself and the minor, and such alienation is not for the benefit of the minor or his family, it can be held valid only to the extent of the share of the guardian and not of the minor.⁽⁹⁾

321. A minor is bound by the acts of his guardian done *bona fide* and for

Extent of his power.

his benefit in the management of his estate even though his name does not appear in the transaction. It is only where the guardian's act was not necessary, proper or prudent that any question of ratification or repudiation arises.⁽¹⁰⁾ The power of a guardian to alienate his ward's property is not co-extensive with that of a trustee, the former is more limited than the latter. He cannot release from the mortgage a portion of the secured lands on the grounds that the remainder of the property was sufficient.⁽¹¹⁾ A mortgage of a minor's property, executed by a guardian without the sanction of the Court, is not void, but only voidable. Hence the

I. L. R., 8 All. 322; *Nur Kadir v. Zullikha*, I. L. R., 11 Cal., 449.

(1) *In re Hosseini Begum*, I. L. R., 7 Cal., 434; *In re Mahomed Amir Khan*, I. L. R., 14 Cal., 615.

(2) *Bukshan v. Maldai*, 3 B. L. R., (A.C.), 423; *Durgozi Row v. Fakker Sahib*, I. L. R., 30 Mad., 197 (198); *Fakireuddin v. Abdul Hussain* I. L. R. 35 Bom., 217 (219); *Amba Shankar v. Gangy Singh*, 9 O. C. 97.

(3) *Rutton v. Doomee*, 3 Agra., 21; *Mata Din v. Ahmad Ali*, I. L. R., 34 All., 213 (222) P. C.

(4) *Suedun v. Velayut Ali*, 17 W. R., 239; *Bhutnath v. Ahmed*, I. L. R., 11 Cal., 417; where mortgage of property by co-heirs to pay off the arrears of rent was held to be invalid against the infants.

(5) *Hussain v. Zia-ul-Nisa*, I. L. R., 6 Bom., 467; *Hasan Ali v. Mohdi Hussain*, I. L. R., 1 All., 593; *Kali Dutt v. Abdul Ali*, I. L.

R., 16 Cal., 627, P. C.

(6) *Suedun v. Velayut Ali*, 17 W. R., 239.

(7) *Kali Dutt v. Abdul Ali*, I. L. R., 16 Cal., 627, P. C.; *Mafuzzul Hosain v. Basid*, 4 C. L. J., 485.

(8) *Hurhai v. Hiraji*, I. L. R., 20 Bom., 116; *Majidan v. Ram Narain*, I. L. R., 26 All., 22. The custom of taking interest as between Mahomedans is recognized by the Courts. Act XXVIII of 1855 repealed the Mahomedan law relating to usury; *Mia Khan v. Bibi Bibijan*, 5 B. L. R., 500; dissenting from *Ram Lall v. Haran*, 3 B. L. R. (O.C.), 130; *Soorma v. Attafonnis*, 2 Hay, 210, in which interest on a claim of dower by a Moslem widow was allowed.

(9) *Pullikara v. Mohidin*, 12 I. O. 54 (55).

(10) *Ghasiram v. Mt. Bina*, 1 Nag. L. R., 66; *Murari v. Tayana*, I. L. R., 20 Bom., 286.

(11) *Muthu v. Ranjia*, 7 M. L. J. R., 191.

minor cannot be permitted to avoid the incumbrance so created without restoring to the mortgagee the benefit that he had received thereunder.⁽¹⁾ The policy of the law being to protect minors from being taken at a disadvantage by their guardians, the leave of the Court is required not only in the case of agreements entered into out of Court, but also in the case of agreements which are given effect to by a decree of the Court.⁽²⁾ A sale made by the certificated guardian of his ward's property without complying with the conditions subject to which sanction was given by the Court⁽³⁾ was held to be voidable at the instance of the minor on the ground that the sale was not in accordance with the sanction, the terms of which were known to the purchaser.⁽⁴⁾ A transfer made by a *de facto* or actual guardian on behalf of the minor will not, however, be disturbed if it appears to have been made for the minor's benefit, or for legal necessity.⁽⁵⁾ An alienation made by a certificated guardian who is also the *kurta* of a joint Mitakshara family may be void as made without the sanction of the Court, but it may nevertheless be upheld as made by the *kurta* of a joint family.⁽⁶⁾ An alienation of a minor's estate made by the natural and *de facto* guardian will be valid if for necessity notwithstanding that there was a testamentary guardian in existence, especially if the latter had acquiesced in the alienation.⁽⁷⁾ But if the money so obtained had been paid not as the minor's debts but as the debts of the guardian who claimed adversely to the minor, the alienation would be set aside, though the purchase-money had been applied in payments of debts for which the minor was liable and though he had thereby benefited.⁽⁸⁾ The powers of a guardian are in other respects similar to those of a manager of a joint Hindu family (§ 299). A guardian suing on behalf of his minor ward is, as regards limitation, entitled to the same benefit to which the minor may be entitled.⁽⁹⁾

322. Guardian of a Lunatic.—A lunatic may, as has been observed before (§ 285), transfer property in his lucid intervals. But a lunatic whose estate has been taken possession of by the Court of Wards or by the manager appointed under the Lunatic Estates Act, ⁽¹⁰⁾ is debarred from transferring property of which he is divested for the time being under the provisions of those Acts. In one case the Court of Wards, and in the other case the manager is alone then competent to deal with his property within the scope of their respective authority. The manager of an adjudged lunatic is thus declared incompetent "to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years, without an order of the civil court previously obtained."⁽¹¹⁾ If, therefore, the manager enters into

(1) *Suma v. Mt. Aiyal*, 1 L. R., 22 Mad., 289.

(2) *Lala Majlis v. Mt. Narain*, 7 C.W.N., 90; following *Raja Gopal v. Mattupalem*, 1 L. R., 3 Mad., 103; *Kermali v. Rohumbhoy*, 1 L. R., 13 Bom., 137 (146).

(3) S. 29, Guardian and Wards Act (VIII of 1890).

(4) *Kunja Mal v. Gauri Shankar*, 3 A.L.J.R. 30 (29, 30). Richards, J., dissentiente.

(5) *Gharibullah v. Khalak Singh*, 1 L.R., 25 All., 407, P. C.; *Amurbibi v. Abdul*, 3 Bom. L.R., 658 (665); *Mafazzul v. Basid*, 1 L. R., 34 Cal., 36; *Ramcharan v. Anukul Chandra*, 1 L. R., 34 Cal., 65.

(6) *Gharibullah v. Khalak Singh*, 1 L. R., 25 All., 407, P. C.; *Ram Autar v. Chowdhuri Narsingh*, 3 C. L. J., 12.

(7) *Arunachela v. Chidambara*, 13 M.L.

J.R. 223; *Ram Charan v. Anukul Chandra*, 4 C. L. J., 578, following *Mafuzzul Hosain v. Basid*, ib., 485, disapproving *Moyna Bibi v. Banku Behari*, 1 L. R., 29 Cal., 473.

(8) *Nathu v. Balwantrao*, 1 L. R., 27 Bom., 390.

(9) *Shama Churn v. Kanangai*, 7 C. W. N., 594, following *Phoolbas v. Lala Jogeshwar* 1 L. R., 1 Cal., 226; *Narendra v. Bhupendra*, 1 L. R., 23 Cal., 374; *Mohori Bibee v. Dharmodas*, 1 L. R., 30 Cal., 539, P. C.

(10) Act XXXV of 1858.

(11) S. 114, Act XXXV of 1858; Referring to this section Phear and Morris JJ., held that without the sanction of the Court the manager can pass no good title—*Court of Wards v. Kupalman Singh*, 10 B. L. R., 364 (379).

a contract to sell his ward's property in anticipation of the requisite sanction, it would confer on the purchaser no right to recover damages if the sanction be afterwards refused, though the purchaser would, of course, be entitled to recover any sum paid as earnest-money to the manager.⁽¹⁾

323. Manager appointed by Court.—A manager of property appointed by Court possesses the powers determined by the Court which appoints him, and if within those powers, he can validly grant a lease extending over several years.⁽²⁾

324. Executor and Administrator.—Under Hindu Law, an

executor wields similar powers.⁽³⁾ The powers of an executor are, however, generally defined by the will. Beyond the scope of the will and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of manager during minority, but these are all he can claim.⁽⁴⁾ By the mere appointment of a person as an executor, property under Hindu law does not vest in him, and if he holds the property, he does so only as a manager.⁽⁵⁾ And the probate of a will being a convenient form of establishing the *factum* of the will in Court, has not the effect of vesting the property.⁽⁶⁾ But this view, which takes no note of the Hindu Wills Act, ⁽⁷⁾ could only apply to cases which have to be determined independently of that enactment. The executor of a Hindu will cannot revive a time-barred debt except as against himself, ⁽⁸⁾ but if he has paid it, he will in equity be allowed credit for it.⁽⁹⁾ And so in the absence of any power, express or implied, contained in the will, an executor as such, cannot mortgage the estate of the testator.⁽¹⁰⁾ A clause in the will which authorized the executor to raise money in these terms—"if there be any difficulty in paying off the debts from the money due to me, the executor shall either sell . . . or make any other settlement of the estate such as *patni* or *dar patni*, etc.; and shall pay off my debts from the consideration-money thus acquired" was held to confer upon the executor no power to mortgage any portion of the testator's estate.⁽¹¹⁾ So in a case in which the executor had professing to act under the directions contained in the testator's will to sell his Calcutta property to pay off his debts, mortgaged his house, Sir Barnes Peacock said: "When a testator says that the proceeds of a sale are to be applied in a particular manner, he practically points out very distinctly that the house is not to be mortgaged."⁽¹²⁾ The Probate and Administration Act ⁽¹³⁾ confers upon the executor

(1) *Ramdan v. Mhd. Ikramuddin*, 3 A. L. J. R., 686 (688).

(2) *Hemraj v. Kumla Pershad*, 24 W. R., 253 (254).

(3) *The Administrator-General v. Prem Lal*, I. L. R., 21 Cal., 732 (771).

(4) *Sharobibi v. Baldeo*, 1 B. L. R. (O.C.), 24; *Jaykahi v. Shib Nath*, 2 B. L. R. (O.C.), 1; *Sreemutty Dossee v. Tara Churn*, 3 W. R. (Mis.), 7 note.

(5) *Kherodemoney v. Doorgamoney*, I. L. R., 4 Cal., 445 (468).

(6) *The Administrator-General v. Prem Lal*, I. L. R., 21 Cal., 732 (772); *Sarat Chandra v. Bhupendra Nath*, I. L. R., 25 Cal., 103.

(7) Act XXI of 1870.

(8) *Gopalanarain v. Muddumutty*, 14 B. L. R., 21.

(9) *Tillackchand v. Tilamal*, 10 B.H.C.R.,

206.

(10) *Nilkant v. Perry Mohan*, 3 B. L. R., (O. C.) 7; as to such clauses and the construction thereof, see *Rajani Nath v. Ramanath*, 3 C. W. N., 483; *Eastern Mortgage and Agency Co. v. Rebati Kumar*, 3 C. L. J., 260 (268); *Pis Rahmat Ali v. Mt. Bubu*, 14 I. C. 486 (499).

(11) *Kanti Chandra v. Kristo Churn*, 3 C. W. N., 515.

(12) *Per Sir Barnes Peacock, C.J.*, in *Sreemutty Dossee v. Tarachurn*, 3 W. R. (Mis.), 7 note (8); following *Haldenby v. Spofforth*, Beav., 390; followed in *Kanti Chandra v. Kristo Churn*, 3 C. W. N., 515; *Jugmohan das v. Pallonjee*, I. L. R., 22 Bom., 1 (9).

(13) Act V of 1881, S. 90 has been amended by Act VI of 1889, S. 14.

certain powers to dispose of any property, but which is expressly declared to be subject to any restriction imposed by the will appointing him, in the absence of which his power of disposition is not dependent on the permission of the Court which has no jurisdiction in the matter. (1) But the executor of the will of a Hindu, to which neither the Hindu Wills Act nor the Probate and Administration Act applies, has only such authority to deal with the estate as the terms of the will confers on him. (2) Neither a power to manage the estate as he may deem proper, nor a power to sell it, will authorize an executor to lease any part of it for 999 years, (3) or for any period exceeding 21 years. (4) And it would appear that an executor who has no estate or interest in land, but only a power to sell it, may not grant an easement over it. (5) Where several executors appointed by a will are jointly empowered to alienate any property and to borrow money, for the improvement and preservation of the estate, any one of the executors, who alone has obtained probate to act singly, the others having refused service, may renew the *hatchittas* originally executed by the testator so as to bind the estate. An executor *de son tort* who intermeddles with the estate of a Hindu is liable to account for the assets shown to have been received by him. (6) A rightful executor as such has no right to intermeddle with the assets of the deceased until he has obtained probate, and which is necessary to complete his title, and though the order for it may have been made, until it is actually taken out, he is no better than an executor *de son tort*. (7) And so acts done by a person under a title created by a will declared to be forged are void. (8)

325. The powers of an administrator are identical. (9) A person who is

(2) **Administrator.** both an heir and an administrator selling an estate, not *qua* administrator, but as the heir, would convey the greatest interest he is capable of conveying. For example, if, as the heir, he could only sell a fraction of the estate, and he has disposed of the whole of it, the fact that the vendor had sold the entire estate as the heir would not deprive the vendee of the fruit of his purchase. (10) Where a person is both the *kurta* of a joint family estate as well as its administrator, he cannot exercise the powers as *kurta* which he is directly prevented from exercising as administrator. (11) So while a Hindu widow cannot alienate her husband's property except for legal necessity a widow administratrix has the power to dispose of the family property without any necessity, if she acts under s. 90 of the Probate and Administration Act. (12)

(1) In the goods of *Nundo Lall*, I. L. R., 23 Cal., 908; *Rajani v. Ramanath*, 3 C.W.N. 483; *Purna Chandra v. Nobin Chandra* 8 C.W.N., 362; *The Eastern Mortgage, &c., Co. v. Rebati Kumar* (1906), 3 C.L.J., 260 (266).

(2) *Jugmohandas v. Pallonjee*, I. L. R., 22 Bom., 1 (10).

(3) S. 36, Indian Trusts Act (II of 1882), *Lewin on Trusts* (9th Ed.), 470, 670; *Evans v. Jackson*, 8 Sim., 217; *Hackett v. McNamara*, L. L. & 9 temp. Plun., 283; cited and followed in *Jugmohandas v. Pallonjee*, I. L. R., 22 Bom., 9.

(4) *Satya Prashad v. Motilal*, I. L. R., 27 Cal., 683.

(5) *In re Barrow-in-Furness*, Cor. [1903], 1 Ch., 339.

(6) *Magaluri v. Narayana*, I. L. R., 3 Mad., 359.

(7) *Navazbai v. Pestonji*, I. L. R., 21

Bom., 400.

(8) *Prayag Raj v. Gonkaram*, 6 C. W. N., 787, *Williams on executors* (9th Ed.), 501.

(9) Ss. 267-275 Indian Succession Act (X of 1865), which however does not extend to Hindus, Jains, Sikhs or Buddhists—Act XXI of 1870 as to whom see Ch. VI, Ss. 88-96. Probate and Administration Act (V of 1881).

(10) *Pronath v. Surja Coomar*, I. L. R., 19 Cal., 26 (34). To the same effect *Per Fry, J., West of England &c., Bank v. Murch*, 23 Ch. D., 138 (152) in which the executrix described herself as trustee; *Corser v. Cartwright* L. R., &c., H. L., 731.

(11) *Ranjit Singh v. Amullaya*, 9 C. W. N., 923 (926).

(12) *Kamikhya Nath v. Harichurn*, I. L. R., 26 Cal., 607.

326. Trustee.—The power of transfer of property by a trustee on behalf of the *cestui que trust* stands on the same footing. "The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract."⁽¹⁾ The authority of a trustee as of an executor being limited by the terms of his creations, he is enjoined to strictly conform thereto. Thus a trustee who is simply authorized to sell certain land by public auction, cannot dispose of it by private treaty. ⁽²⁾ If he is authorized to sell within a specified time, he cannot sell beyond it, unless he can show that the beneficiary has not been thereby prejudiced. ⁽³⁾ In case of doubt a trustee may obtain the opinion, advice or direction of the Court, respecting the management and administration of the trust-property, other than questions of detail, difficulty or importance, not proper in the opinion of the Court for summary disposal. A trustee acting upon such opinion is exonerated from his own responsibility in the matter.⁽⁴⁾ The Trusts Act ⁽⁵⁾ further lays down certain rules for the guidance of trustees whose powers to transfer property are also therein defined. In general, they conform to the rules before discussed, and may be summed up by saying that a trustee must discharge his duties faithfully and to the best of his ability and power.

327. In Hindu Law the interposition of trustees is often necessary for the management of endowments. It is a settled rule of Hindu Law that an idol is a juridical person who can take and hold property, and when a suit is instituted in the name of an idol by the *shebait*, the former and not the latter is regarded as a party to the suit, the *shebait* being merely its agent.⁽⁶⁾ A person dedicating his property to the worship of an idol may appoint himself a trustee and make provision for the appointment of a successor in that office.⁽⁷⁾ The trustee of an endowment is subject to the same rules as a secular trustee. But by the terms of the endowment, usage or common consent, a religious trustee generally wields powers which have come to be recognized as a part of his office. But a *shebait* cannot alienate the trust property except on the ground of absolute necessity, which means, for the benefit and preservation of the endowment,⁽⁸⁾ and it has been held, that *bhog* is not such a necessity as to justify an incumbrance.⁽⁹⁾ A trustee appointed in accordance with the terms of the foundation is entitled to maintain a suit for recovery of money advanced out of the profits of the endowment.⁽¹⁰⁾ But the plaintiff in such case has in relation to his suit a distinct capacity. For though nominally the plaintiff, he is only permitted to sue because of the established practice; he is otherwise a stranger to himself in his personal and private capacity in a Court of Law.⁽¹¹⁾

Under the Indian Insolvent Act,⁽¹²⁾ the Official Assignee has full power to sell all property and effects of an insolvent without the sanction of the Court.⁽¹³⁾

(1) S. 11, Indian Trusts Act (II of 1882).

(2) *Ib.*, S. 11, *ill.* (a).

(3) *Ib.*, S. 22.

(4) *Ib.*, S. 34.

(5) S. 36., *post*.

(6) *Manohar v. Lakshmiram*, I. L. R., 12 Bom., 247; *Doorga Pershad v. Sheo Prasad*, 7 C. L. R., 278; *Tulsidas v. Bejoy Kishore*, 6 C. W. N., 178; holding inapplicable; *Lakshmandas v. Jugal Kishore*, I. L. R., 22 Bom., 216; *Thankoti v. Muniappa*, I. L. R., 8 Mad., 496; *Vidyapurna v. Vidyavidhi*, I. L. R., 27 Mad., 435 (446, 447); *Chiddu v. Durga Dei*, I. L. R., 22 All., 382.

(7) *Bishambhar v. Drigvijai Singh*, I. L. R., 27 All., 581 P. C.

(8) *Hossein Ali v. Mahant Bhagwan Das*, I. L. R., 34 Cal., 249; *Nawab v. Mahant Bhagwan Das*, 6 C. L. J., 442 (445).

(9) *Ramkrishna v. Mohant Padma*, 6 C. W. N., 663 (665); *Jnananjan Banerjee v. Adoremoney*, 13 C. W. N., 805.

(10) *Bishambhar v. Drigvijai*, I. L. R., 27 All., 581, P. C.

(11) *Babajirao v. Laxmandas*, I. L. R., 28 Bom., 215.

(12) 41 & 42 Vict. C. 42, S. 31.

(13) *Woomwalla v. Macleod*, 8 Bom. L. R., 470.

328. Life-interest.—A vatandar in Bombay cannot alienate his vatan so as to enure beyond his own lifetime. His heir is not bound by the mortgage executed by his ancestor.⁽¹⁾

An alienation by way of mortgage of vatan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the vatandar, who mortgaged. The mortgage was in its inception void against the heir of the vatandar and had not become validated against the heir by reason of the repeal of the sections in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874. The childless widow of a vatandar, deceased in 1847, was the recognized vatandar in possession in 1865. She mortgaged two villages of the vatan to the father of the respondents. The latter two, after litigation, retained possession in 1886 by order of the Commissioner in the Revenue Department, until there should be a decree of Court to the contrary. The widow, according to the judgment below, had held the vatan adversely to her late husband's son, the plaintiff, who was born in 1848 of her co-widow, and was the true heir entitled from his birth. But the High Court gave effect to the adverse possession of the widow for the period of limitation supporting the mortgage. The plaintiff was the sole heir of the widow, his step mother, who died in 1877. He contended that the vatan as inherited by him was free from the mortgage encumbrance, and that he was entitled to possession. Reversing the decree of the High Court, the Privy Council ruled that the mortgage was void against the heir, and had no force beyond the life of the vatandar who had executed it. They therefore restored the decree of the Subordinate Judge to that effect, and awarded him possession.⁽²⁾

An ascetic is a mere life-tenant and cannot alter the succession to the trust by an act of his own.⁽³⁾ Similarly, debts contracted by the holder of an impartible estate which is not such holder's self-acquired property, are not binding on his successor, who takes by survivorship, when they are contracted for purposes which will not be binding on him if the property was ordinary partible property; and such property is not assets in the hands of the successor for the payment of such debts, because he could not have questioned any alienation of the same by his predecessor.⁽⁴⁾

329. Agent.—An agent, duly empowered, may transfer property in the name of, or on behalf of his principal. An agent, whether acting for a private person or on behalf of the Government, is not personally bound by such a contract, but it must be shown that he was acting within the scope of his agency.

A Government officer as such has no express or implied authority to pledge the credit of Government for all matters necessary to the performance of the duties imposed by Government. Ratification of the acts of a Government officer done beyond the scope of his authority cannot be made by an unauthorized agent; it can only be made by Government itself or with its full knowledge,⁽⁵⁾ and into which the Civil Courts have jurisdiction to enquire.⁽⁶⁾ The paid manager of an estate has ordinarily the same powers as a trustee, and they will

(1) *Padapa v. Swamirao*, I. L. R., 24 Bom., 556, P. C.; approving *Kalu v. Himmappa*, I. L. R., 5 Bom., 435.

(2) *Padapa v. Swamirao*, I. L. R., 24 Bom., 556 P. C.; approving *Kalu Narayan v. Himmappa*, I. L. R., 5 Bom., 435.

(3) *Mohanth v. Lachhu*, 7 C. W. N., 145; following *Mohunt Rumun v. Mohunt Ashbul*, 1 W. R., 160; *Hup Narain v. Junko*, 3 U. L. R., 112.

(4) *Nahippra v. Chinnayasa*, I. L. R., 29 Mad., 451; *Ramisami v. Ramisami*, 17 M. L. J. R., 201.

(5) *The Secretary of State v. Sulemanji*, I. L. R., 26 Bom., 801 (1877, 408); *The Collector v. Cavalry* 2 W. R., 61; *Beir Kishore v. The Government*, 17 W. R., 497; *Sappani v. Collector*, 12 M. L. J. R., 417.

(6) *Secretary of State v. Kasturi*, I. L. R., 26 Mad., 263.

therefore be judged by the same standard. Where the claimant of an estate was also employed as its manager and he incurred charges necessary for the maintenance of the estate, they were held to be binding on the true owner.⁽¹⁾

Partners being agents to another are empowered to mortgage the joint property to secure partnership debts.⁽²⁾

Where a person acting upon the advice of his solicitor signs a document the nature and contents of which he does not understand, and upon such a document the mortgagee acts and makes advances to the solicitor in his capacity as agent for the mortgagor, the latter cannot afterwards be allowed to plead that being a man of not much education he had been overreached by his solicitor, but is, on the other hand, estopped by his conduct from denying the deed and is therefore, liable thereunder.⁽³⁾

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferrer is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim the securities therefor (except where they are also for other debts, or claims not transferred to the transferee) but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

330. Analogous Law.—The provisions of this section closely conform to the corresponding provisions of the English Conveyancing and Law of Property Act, 1881, which in sections 63 and 6 provides :—

“(1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.”

(1) *Narayanasami v. Rangan*, 17 M. L. J., 484 following *Kotta v. Bonqari*, I. L. R., 8 Mad., 145; *Sudindra v. Budan*, I. L. R., 9 Mad., 80.

(2) *Jugjeewandas v. Ramdass*, 2 M. I. A., 84, 87.

(3) *King v. Smith*, [1900], 2 Ch., 125.

"(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

"(3) This section applies only to conveyances made after the commencement of this Act."

"6. (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land, or any part thereof.

"(2) A conveyance of land, having houses, or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed, or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof."

"3. A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerancements, waifs, estrays, chief rents, quit-rents, rents-charge, rents seek, rents of assize, fee, farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel or member thereof."

"4. This section applies only if and as far as contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

"5. This section shall not be construed as giving to any person a better title to any property, right or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties."

"6. This section applies only to conveyances made after the commencement of this Act." (1)

331. Before the English Conveyancing Act (2) it was necessary to insert in each deed under "general words" minute details of the

Previous Law.

property easements and incidents intended to be conveyed, and prolix lengths to which deeds in consequence used to run often rendered them as imperspicuous as insensible.(3) The provisions above quoted have therefore, had the effect of not only cutting down the length of deeds, but of simplifying them by doing away with the "general words" which have now become a thing of the past. The foregoing provisions are of great assistance in interpreting the corresponding provisions of the Indian law as in drafting the Indian Act the English Statute was before the Legislature and its advisers.(4)

(1) The Act came into force on the 31st December, 1888.

(2) 44 & 45 Vict., C. 41.

(3) Hall, V. C., in *Wood v. Saunders*, 44 L. J., Ch. 514 (520); said: "General words we all know are almost always, if not always unmeaning; and you can in fact only lay hold of them to sometimes extend the operation of instruments; as, for example, to easements which have become extinguished by unity of

seisin or enjoyment, or in some other way. They have no operation, and the only wonder is, that they have been allowed to remain so long in the pigeonholes to be put in every deed, when in truth they have no meaning or effect at all."

(4) See Whitley Stokes' introduction to the Act in his *Anglo-Indian Codes*; and *Wutzel v. Sharp*, 1 L. R., 5 All., 270 (235).

The marginal notes⁽¹⁾ appended to the Bill⁽²⁾ show that the principles embodied in the section were recognized in this country from before the Act.⁽³⁾ And so referring to the law in force anterior to the enactment of this section the Privy Council said: "It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that in definite words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts."⁽⁴⁾

332. To begin with, since a transfer depends on a preceding contract and cannot be valid unless the party making it is competent to contract, it follows that the power to convey must depend on the power to contract, since without an antecedent agreement to give and receive, there can be no transfer at all.⁽⁵⁾ A person unable to bind himself with a promise, could not, of course, give away his property. But a person competent to contract is competent to transfer his property, and the section assumes this.⁽⁶⁾ And since a transfer has, moreover, to be supported by collateral agreements and covenants, a person incompetent to be bound by them cannot transfer property of which they are concomitant incidents.

As a part of the same principle, it is provided by the Act that any accession to mortgaged property becomes part of the mortgage to which the mortgagee becomes entitled and which reverts to the mortgagor⁽⁷⁾ on redemption.⁽⁸⁾

333. Principle.—The first paragraph states at once a principle as well as a rule of interpretation. The principle being that the unqualified conveyance must exhaust the interest which the transferor has in the property, for that is the policy of the law which favours transfer, and the rule of interpretation being that if the transferor had intended to reserve any interest to himself he would have done so, in the absence of which it must be presumed that he has conveyed all that he could in the property and the legal incidents which were annexed thereto for its beneficial enjoyment. It is a well known rule of interpretation that a grant should be construed most forcibly against the grantor, the reason for the rule being that the principle of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning, and which affords an effective security against fraud; for men would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them.⁽⁹⁾

(1) The marginal notes cite the following cases as authorities on the section. *Rum Dhone v. Ishin-e*, 2 W. R., 123 (125); *Kishen Gir v. Busgeet Roy*, 14 W. R., 379; *Fiqueer v. Mt Khawerun*, 2 N. W. P. H. C. R., 251 (252); *Mohomet Ali v. Bolakee*, 24 W. R., 330 (tr. es), "everything grown on it," *Morley N.S.*, 259.

(2) 1879.

(3) So a lease given in 1865 "with all rights" was held to comprise the minerals despite S. 104 (o) of this Act, and which shows that the principle had even a wider application before its enactment here. *Megh Lal v. Raj Kumar*, I. L. R., 34 Cal., 354.

(4) *K. Ladas Mullik v. Kanhayalal*, I. L. R., 11 Cal., 121, (181) P.C.

(5) *Sidashiv v. Trimbak*, I. L. R., 23 Bom., 146 (159, 160).

(6) *Madan Mohan v. Ranji Lal*, I. L. R., 23 All., 288 (190).

(7) S. 70, post.

(8) S. 63, post.

(9) *Shep. Touch.* 87, *Cruise Dig.* Tit. 32, Ch., 20, §. 13. "*Quæsetio esset fortissime co. tr. donatorem interpreta d. est*" "Every grant is to be most strongly taken against the grantor." Similarly "*Verba chartarum fortius accipiuntur contra proferentem*" "The words of a charter are to be taken more strongly against the grantor" which is however a maxim now practically exploded, and is not applied until all other rules of construction fail. (*Taylor v. St. Helen's*

The next following five paragraphs describe what is implied by the term "legal incidents," which follow the property. The principle embodied in the section is one of universal application and may be found in the ancient legal maxims which have become a part of the common law of England. These maxims are (i) *cujus est solum, ejus est usque ad cælum ad inferos*.⁽¹⁾ (ii) *Quicquid plantator solo, credit*.⁽²⁾ But in England the principle which now appears to be so simple has had to fight its way to recognition through the tangled mass of heterogeneous devices against allowing the free alienation of property. But at first through subterfuges, and then gradually by the interposition of equity, the right of alienation had had to be recognized and with it became established the sensible doctrine here enunciated.

334. Under the rule embodied in the first maxim it has been laid down that since land in its general signification has an indefinite extent both upwards and downwards, a conveyance of land is sufficient to pass all buildings, growing timber, emblements and water thereon, as also mines and minerals thereunder: and from which it follows that the owner cannot put up erections on his own land so as to project on his neighbour's land, or throw the rain water from his roof on to his neighbour's land, or grow trees so that their bows overhang the adjoining land of another. The right of light and air is similarly traceable to the same rule. The owner of the soil having a right to subterranean springs, can maintain a suit for its diversion under circumstances which would have given him a right of action if the stream had been above-ground.³ On the other hand he cannot dig on his own land, so as to undermine the foundation of his neighbour's building.⁽⁴⁾ The second maxim relates to accessories and things affixed to land, which will have to be presently considered, (§§ 351, 356). In a mortgage or lease, of property "a different intention" is necessarily implied inasmuch as the transferor does not obviously intend to pass his exclusive interest in the property, but only creates a limited interest in the transferee, the extent and nature of which forms the subject of two separate chapters of the Act.⁽⁵⁾ Where the nature of the interest conveyed is defined by the transferor, the question depends upon the construction to be placed upon the document, the terms of which alone must then afford a basis for decision. But the relationship of the parties may also be material, as where a Hindu conveys property to his wife, in which case, it is ordinarily presumed that in the absence of explicit words to the contrary, the intention was to confer on her nothing more than a woman's estate.⁽⁶⁾ In the absence of an

Corporation, 6 Ch. D., 261). Crown grants are to be construed most strictly against the grantee and must beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words. *R. v. Mayor of London* 1 Q. B. 12; *Vann v. The Collector*, 6 B. H. C. R., 191; *Prosunno v. Rim Co m r*, 1 L R., 4 Cal., 53; *Hari Dass v. Mahom d*, 1 L R., 11 Cal., 434. As against the maxim itself, Jessel, M. R., observed that the rule had ceased to have any force at the present day for either the deed is clear or it is not, if the former the maxim is not wanted, if the latter the deed is void for uncertainty. *Taylor v. Cornorat on of St. Helen's*, 6 Ch. D., 270; citing *Grey v. Kerison*, 6 H L. C., 61; *Roddy v Fitzgerald*, 6 H. L. C., 823; *Abbott v. Middleton*, 7 H L. C. 68. But this view is not shared by the

Indian Legislature in the provisions to S. 92 of the Indian Evidence Act (I of 1872). But cf. *ib.*, SS 93-97.

(1) "Whoever has the soil, has it even up to the firmament, and to the middle of the earth."

(2) "Whatever is planted on (or fixed to the soil follows the soil"

(3) S. 17 (d), Indian Easement Act (V of 1892); *Acton v. Blundell*, 12 M & W., 824; *Chasemore v Richards*, 7 H. L. O., 349.

(4) *Findu v Joharbi*, 1 L R., 24 Cal., 260; cf., *Balabhai v. B Iakbidas*, 2 B L. R., 114; *Wamin v. Parasharam*, 2 B. L. R., 698; *Deoki v. Dhian Singh*, 1 L. R., 8 All., 467.

(5) Chs. IV & V.

(6) See discussion on the "Construction of a donation" under S. 192, *post*.

express agreement to the contrary, the Act further provides rules for the construction of presumed intention which depends upon the nature of the interest conveyed.⁽¹⁾

335. Meaning of Words.—"Unless a different intention &c." which must be inconsistent with the passing of all interest of the transferor. Law presumes that the transferor does not reserve what he does not reserve expressly or by necessary implication. The section is of course to be read subject to the other sections of the Act; e.g. s. 54,⁽²⁾ and s. 108 (o)⁽³⁾ though this is by no means clear from it, and its language has been otherwise animadverted upon as being too wide.⁽⁴⁾ "*Passes forthwith*" i.e. one effect of the operation of the transfer is to pass therewith all such interest "*which the transferor is then capable of passing.*" This means the character in which the transfer is made. E.g. owner trustee, agent or the like.

"*In the legal incidents thereof*": Some of these are enumerated below—but they are not all. They will be set out in the ensuing commentary.

"*Where the property is a debt.*"—The word "debt" is not used here in the widest possible sense; it means such debts only as fall within the general category of actionable claims.⁽⁵⁾

336. Operation of ambiguous Deeds.—As has been elsewhere observed, this section merely lays down a rule for the construction of the deeds of transfer which fail to describe fully the property of the *quantum* of interest conveyed therein. The Act contains scattered also other provisions which serve the dual purpose of being the rules of equity as well as interpretation of the instruments of transfer. These have been dealt with in their proper places. But there remain other rules upon which the Act is silent, but which none-the-less form an integral part of the law of transfer, and which might be if at all but devily foreshadowed in this section. One common defect found in the conveyances executed in this country is its ambiguity or uncertainty, and it may then be a question how far and in what respects the deed is operative. It is obvious that in such cases oral evidence is inadmissible to interpret them.⁽⁶⁾ But even this rule has its limits,⁽⁷⁾ the result being that while on the one hand the object of law is to discover the real intention of the executant, it excludes all oral evidence as to intention, since such evidence if permitted would endanger the very purpose, and in not a few cases make the confusion worse confounded. It is therefore settled that (1) in construing a deed the intention must be gathered from the written instrument,⁽⁸⁾ the function of the Court being to ascertain what the parties meant by the words they have used,⁽⁹⁾ "not what it may be surmised on however probable grounds, that he intended only to have written."⁽¹⁰⁾ It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention,⁽¹¹⁾ though in doing so the real inten-

(1) In sale; S. 55, mortgage, S. 65, leases S. 108, exchange, S. 119.

(2) *Nutsaddi Lal v. Muhammad*, 10 A.L.J., 167 (168).

(3) *Megh Lal v. Rajkumar*, I. L. R., 34 Cal., 358 (370).

(4) *Kalidas v. Kanhaya Lal*, I. L. R., 11 Cal., 121 (131) P. C.

(5) *Arunachellam v. Subramanian*, I.L.R., 30 Mad., 285 (239).

(6) Ss. 91, 98, Indian Evidence Act (Act I of 1972).

(7) *Ib.*, Ss. 96-99.

(8) *Per Denman C.J. in Rickman v. Carstairs*, 5 B. & Ad., 651 (663).

(9) *Per Lord Halsbury L.C. in Thames and Mersey Marine Insurance Co. v. Hamilton Fraser & Co.*, 12 App. Cas 484 (491).

(10) *Per Coleridge J. in Shore v. Wilson*, 9 Cl. & Fin. 355 (526) 5 E. R. 518; *Kishori Mohan v. Shib Chandra*, 7 C.L.J., 291 (295); *Durga Prasad v. Gosta Behari*, 17 C. L. J., 53; *Ramasami v. Samirappa*, I. L. R., 4 Mad., 179 (190); *Chapsey v. Ichabhai*, 9 Bom. L. R., 514 (522).

(11) *Smith v. Lucas*, 18 Ch. D. 531 (4. 25).

tion of the parties may in some instances be defeated. Such a course tends to establish a greater degree of certainty in the administration of the law.⁽¹⁾ (ii) For the purpose of ascertaining the real intention of the parties, the Court must take into account the whole instrument, and if there appear a plain intention, effect will be given to it, even though there should be no express words to that effect.⁽²⁾ The words of a written instrument must in general be taken in their ordinary sense, unless it lead to absurdity or contradiction, when it is permissible to resort to other possible constructions.⁽³⁾ Words in a deed must be understood as used in their plain ordinary and popular sense, and not in their etymological usually called literary and primary sense.⁽⁴⁾ (iii) Technical words must be used in their technical sense, unless there is anything in the context to suggest the contrary. (iv) Words and phrases that have acquired a local import must be understood in that sense. (v) Deeds relating to technical business must be presumed to use expressions as understood therein.⁽⁵⁾ (vi) A deed must be so constructed that all its parts agree and harmonize with one another.⁽⁶⁾ (vii) But if there be two parts of a deed, the one repugnant to the other the first should be received and the latter rejected unless there be some special reason to the contrary.⁽⁷⁾ "The general rule is that, if there be a repugnancy, the first words in a deed, and the last words in a will shall prevail."⁽⁸⁾ For instance, if a particular construction of a part of a document renders the contract inoperative, and another renders it operative and is reconcilable with other portions of the document, then the first should give way to the second.⁽⁹⁾ But in a conflict arising between the preamble or recital and the operative part of the deed, the latter stands, the former being ignored.⁽¹⁰⁾ Where the terms are ambiguous, the conduct of the parties immediately after and acting upon the deed is very material.⁽¹¹⁾ Such is the maxim *contemporanea expositio est optima et fortissima in lege*.⁽¹²⁾ But as is observed by the Privy Council "*contemporanea expositio* as a guide to the interpretation of documents is often accompanied with danger, and great care must be taken in its application."⁽¹³⁾ They then used the maxim for the interpretation of the *sanad* ascribing it the sense upon the passing of which the grantors, namely, the Government and its successors and officials from the date of the grant and for a long period of time, proceeded. The construction of an ambiguous stipulation in a written deed may be controlled or qualified by the recital; but if the intention is clearly to be collected from the operative words, that intention is not to be controlled because

(1) Per Pollock C.B. in *Mallan v. May*, 13 M. & W. 511 (517).

(2) Per Sugden L.C. in *Clayton v. Glengall*, (Earl) 1 Dr. & War. 1 (14).

(3) *Mahal-chmi v. Palani*, 6 M.H.C.R., 245; *Re Alma Spinning Co. v. Bottomley's Case*, 16 Ch., D. 681; *Laird v. Tobin*, 1 Mol. 513; *Lloyd v. Lloyd*, 2 My. & Ch., 192.

(4) *Shore v. Wilson* 9 Cal. & Fin., 355, (527); *Secretary of State v. Sir Albert*, 1 L.R., 1 Bom., 513 (520).

(5) *Id.*, p. 555.

(6) S. 93, Indian Evidence Act (Act I of 1872).

(7) *Re Bedson's Trusts*, 28 Ch., D., 523 (525); *Aulia Khan v. Kashi Ram*, 17 I.C., 677 (679).

(8) Per Lords Mansfield, C.J., in *Doedeicester*

v. Biggs, 2 Taunt., 109 (113), II *Maharaja Mahab Chand v. Hudeo Narayan*, 16 W.R., 119 (122); *Sheo Darshan Lal v. Sheo Bhanjan*, 14 O.C., 189.

(9) *Chattarbhaj v. Dwarka Prasad*, I.L.R., 13 All., 388 (393); *Sheo Darshan v. Sheo Bhojra*, 11 I.C. 685 (686).

(10) *Marcar v. Sigg*, I.L.R., 2 Mad., 239, P.C., *Seth Narasingh das v. Seth Tarachand*, 2 N.L.R. 57.

(11) *Chetan Lal v. Chutterdharee*, 19 W.R., 432 (433), *Shunkar Lal v. Poran Mull*, 2 Agra, 150.

(12) "A contemporaneous exposition is the best and most powerful in law."

(13) *Raghojirao v. Lakshman Rao*, I.L.R., 36 Bom., 639 (656) P.C.; *Shunker v. Poorun*, 2 Agra, 150.

it may go beyond what is expressed in the recital.⁽¹⁾ (viii) The name given by the parties to a transfer is material, though not conclusive as to its nature and scope.⁽²⁾ (ix) All ambiguous documents should be construed rather to make them accord with law than to make them conflict with it.⁽³⁾ (x) and so as to make them valid and not invalid.⁽⁴⁾ (xi) A deed of transfer must be construed with reference to the nature of the general rights of the transferor at the time of its execution⁽⁵⁾ and of the circumstances then existing.⁽⁶⁾ It is of course, not allowable to read into an agreement the provisions of an Act subsequently passed.⁽⁷⁾ (xii) A deed executed for valuable consideration is to be construed, as far as it properly may, against the grantor and in favour of the grantee.⁽⁸⁾

337. This does not mean that the grantor is to be penalized for his uncertainty, but what it does mean is, that where two interpretations are possible, each equally plausible, then the Court will receive that favouring the grantee.⁽⁹⁾ (xiii) And as a corollary of which is the rule that where a deed is susceptible of a dual construction, the grantee is put to election to take it the way as shall be most to his advantage. So if a deed operate, alike as a gift, lease confirmation or surrender, it is left to the grantee to elect the kind of transfer he would like it to be.⁽¹⁰⁾ (xiv) An express provision in a deed should be taken to exclude stipulation which would otherwise be implied with regard to the same subject matter: *expressum facit cessare facitum*.⁽¹¹⁾ Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications: the presumption is, that having expressed some, they have expressed all the conditions which they intend to be bound under that instrument.⁽¹²⁾ But great caution is necessary in applying this maxim which is not of universal application, but depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction.⁽¹³⁾ Thus, upon an advance upon a mortgage, if the mortgage deed contains no covenant for payment, a personal obligation to repay the money is implied; but if the deed contains a covenant for payment out of particular funds, the implication of a personal contract is excluded.⁽¹⁴⁾ (xv) Allied to the maxim last considered is the following: *expressio unius est exclusio alterius*,⁽¹⁵⁾ which means that the express mention of certain conditions and covenants would exclude those inconsistent with them. It is said to exclude even all other conditions and covenants though not inconsistent with those mentioned. But in this case the omission may be accidental, while

(1) *Marcus v. Sigg*, I.L.R., 2 Mad., 239 (257); *Abdulla v. Sahas Pande*, (1892), A. W.N., 237.

(2) *Kalabhai v. Secretary of State*, I.L.R., 29 Bom., 19 (28); *Krishna Bai v. Rama Bala*, 8 Bom., L.R., 764.

(3) *Maharaja of Bhatpur v. Rani Kanno Dei*, 3 Bom., L.R., 51 (54); *Smith v. Puckhurst*, 3 At. K. 135; *Buttley Co. v. New Bucknall Colliery Co.* [1909] 1 Ch., 37.

(4) This is covered by the Maxim: *ut res magis valeat quam pereat* ("That an act may avail, rather than perish")... a rule of common law and common sense. *Per Lord Brougham*, L.C. in *Langston v. Lungs*, 2 Cl. & Fin. 194.

(5) *Ganpat Rao v. Ram Chunder*, I.L.R., 11 All., 296. (300).

(6) *Christian v. Tekaitni*, 2 I.C. 641 (643);

Dhondu v. Mehant Daulat Puri, 3 N.L.R., 97.

(7) *Ganesh v. Harihar*, I.L.R., 26 All. 299 P.C.

(8) "*Verba fortius accipiuntur contra proferentem*." "The words of a grant are to be taken more strongly against the grantor."

(9) *Webb v. Plummer*, 2 B. & Ald., 746 (751).

(10) *Shap. Touch*, 83.

(11) "What is expressed, means what is silent to cease."

(12) *Aspin v. Aust*, 5 Q. B., 683.

(13) *Per Lord Campbell* in *Saunders v. Evans*, 8 H. L.C., 729.

(14) *Mithew v. Blackmore*, 1 H. & N. 762 (771, 772).

(15) "The mention of one is the exclusion of another."

in this country regard must also be had to the imperfections of rustic conveyancing in which a good deal is designedly left to be understood, the deed being professedly written between friends to comply with the demands of inexorable law. (xvi) In construing a deed it is not right to compare it with other deeds even though of the same author, much less, deeds executed by others.⁽¹⁾ (xvii) But since *optimus interpret rerum usus*⁽²⁾ words and expressions may by usage acquire a special meaning in which case reference to other deeds would be relevant.⁽³⁾ (xviii) For construing a deed omitted words may be supplied, repugnant words rejected, words transposed: false grammar or incorrect spelling disregarded, provided that it affords a key to the real intention of the parties.⁽⁴⁾ (xix) Cognate to the last is the maxim *Falsa demonstratio non nocet*,⁽⁵⁾ which implies that a mere inaccuracy of description of a person or thing in a written instrument will not affect it if it is otherwise well ascertained. Hence if the description is made up of more than one part, and one part is true, but the other false, then, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the deed; ⁽⁶⁾ the characteristic of cases within the maxim being, that the description so far as it is false, applies to no subject at all, and, so far as it is true applies to one only.⁽⁷⁾ (xx) Lastly, the deed is void for uncertainty if all attempts at interpretation fail, and a patent ambiguity remains either as to the parties or the subject-matter of transfer, or as to its terms.⁽⁸⁾ Where, however, the uncertain clause is not material to the deed the court may reluctantly give effect to it exercising the unintelligible portion.

338. There are a few general rules, round which a considerable body of case-law has clustered, and of which a summary will be found given in the sequel.⁽⁹⁾ In extracting them from a vast body of case law an attempt has been made to reproduce only those that may be regarded as generally applicable, for as the Privy Council have observed: "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses"⁽¹⁰⁾—and which it may be added, is the object of all such rules, though they should be treated as more elastic when applied to the deeds executed in the mofussil by ignorant conveyancers. It has been said that Indian deeds should not be construed according to any fixed rules, but the intention should be gathered from the whole deed; ⁽¹¹⁾ but then this may not be always possible, and it is only then that the rules have to be resorted to as aids to construction.

339. Transfer passes all Transferrer's interest.—Unless, by the terms of the deed, the transfer is limited to the passing of only certain rights, other rights being expressly reserved, a transfer, as such, passes immediately all the interest which the transferrer is capable of passing. This is of the principle that no man can convey a greater interest than what he himself possesses in the

(1) *Nur Jahan v. Faghfur*, 7 Bom. L.R., 850; *Ganesh Prasad v. Birain Singh*, 18 I. C. 461; *Subbaya v. Subbammal*, 1 L.R., 24 Mad. 214 P.O.

(2) "Usage on custom is the best interpreter of things"

(3) *Miers v. Sarl*, 3 El. & El. 306; *Bowes v. Shind*, 2 App. Cas at p. (462 & 468).

(4) *Digest Comyn's*, Art Paroles A. 21.

(5) "False description does not vitiate (a deed)."

(6) *Cowan v. Truefitt*, [1899] 2 Ch. 309.

(7) *Ib*; *Morrell v. Fisher*, 4 Exch. 591.

(8) S. 21 (c) Specific Relief Act. (Act I of 1877).

(9) See S. 51, 58, 105, 122 Comm. post.

(10) *Huruman Prasad Panday v. Mt. Baboo*, 6 M. I. A. 411; followed *Ram Lal v. Kanai Lal*, 1 L.R., 12 C.L., 663 (678).

(11) *Mathura Das v. Raja Nairain Bahadur*, 1 L.R., 19 All., 39 P.O.; *Radha Jee'un v. Bissessur* 2 Hay. 178; *Ramasami v. Samiyappa* 1 L.R., 4 Mad., 179.

property as also that the grantor presumably gives away all but what he expressly or by necessary implication reserves for himself. For this purpose the nature of the transfer is immaterial, since whether it is by sale, exchange, or gift, mortgage or a lease the *quantum* of interest conveyed in each case may be the same though it would necessarily differ as regards its duration and mode of enjoyment. So if the lessor grant to the lessee a village "with all rights," it would suffice to convey to the lessee *first* a permanent interest and *secondly* all the lessor's rights and interests in the land demised including even sub-soil rights in minerals.⁽¹⁾ But if in the case last supposed the lessor were a Hindu widow or other limited owner, then the *quantum* of interest conveyed would be limited by the interest possessed. So again, the interest conveyed may be affected by the *status* of the transferee or the object of the grant; as where a gift is made by or to a Hindu widow the presumption arises that it is merely a life grant.⁽²⁾ And since a life-grant is presumably no more than a grant of rents and profits, it cannot be presumed to carry with it a right to open mines and remove minerals, which are a portion of the soil.⁽³⁾ The interest conveyed may often be determined by the nature of the property and the incidents to which it might be subject. For instance, estates both impartible and inalienable cannot be granted in perpetuity nor can *debutter* property, or property which is dedicated to a deity.⁽⁴⁾ In such cases the rule here enacted is unexceptionable inasmuch as the property transferred is necessarily limited to the interest possessed by the transferor. But in the case of maintenance and other grants it may not be always possible to construe the rule too literally. Where, for instance, on the death of a person his widow, A, executed an agreement in favour of her husband's mother B, conveying to her a share in a certain taluq for her support and performance of religious exercise the Privy Council held "that the indefinite words of gift must be limited by the purpose of the gift" and that it was A's intention that B should take the property only for her life. Then advertent to this section their Lordships observed: "It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention. It is a question to be decided when it arises, whether the framers of the Act have not, consciously or otherwise so expressed themselves as to lay down a more positive rule in favour of absolute gifts. In this case the intention must be collected from the whole of the instrument."⁽⁵⁾ But of course, in this and similar cases it would be permissible to argue that the gift was limited because having regard to its purpose, it was the grantor's intention "necessarily implied." As their Lordships themselves remarked in a later case, the use of expressions such as *hamesha* (always and for ever) are not "inconsistent with limiting the interest given, but the circumstance under which the instrument is made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the court to presume that the grant was perpetual."⁽⁶⁾

(1) *M. G. Lal v. Rajkumar*, 1 L. R., 34 Cal., 358; *Argu-roth Stearns oil and Gas, Co. & Furquharson* [1912] A. C., 864 (869, 870).

(2) See S 122 Comm. Post under heading "Indefinite grants."

(3) *Tituram v. Cohen*, 1 L. R., 33 Cal., 203 (297) P. O.

(4) *Ram Chandra v. Ram Krishna*, 1 L. R.,

33 Cal., 507; *Shama Charan v. Abhiram*, *ib.* 511 (523) in which however the property was not held to be *debutter*; See S. 218.

(5) *Kalidas v. Kanhaya Lal*, 1 L. R., 11 Cal., 121 (131), P. C.

(6) *Aziz-un-nissa v. Tasaddug Husain*, 1 L. R., 23 All., 324 (330) P. O.

340. The rule here enacted is consequently merely a rule of construction, and like all such rules it must be understood as subject to the other rules known to the law for enlarging or diminishing the interest conveyed. It is therefore apprehended that the interest which the transferrer passes by his transfer may not merely be "the interest which the transferrer is then capable of passing," but also the interest which he may acquire subsequently, as in the case supposed in section 43. So where the vendor agrees to sell any property free from incumbrance, the vendee can compel him to do so by either redeeming the mortgage or pay him the amount necessary for redemption. Thus where *A* sold certain property to *B* for Rs. 20,000 which sum was left with *B* to pay off *A*'s creditors, *A*'s agreement being to sell the property free from mortgage; the sum due to *A*'s creditors being a sum larger than the sum held in deposit by *B* and the latter consequently did not pay it even in part satisfaction of the debt: on a suit instituted by *A* against *B* for the recovery of the amount, the Privy Council held that the amount was not left with the vendees as a deposit of the money of the vendor. The vendees were entitled to retain it as a security that the property sold be freed from the incumbrances upon it and that they should have a good title. They were entitled to retain it until the vendor provided the rest of the money necessary for this purpose. It was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay when they were informed by the vendor that he was prepared to pay the balance; without the balance they were not bound to pay or tender to him the amount in hand.⁽¹⁾ On the same principle devise of specific property by a mortgagee in possession is sufficient to pass the beneficial interest in the mortgage-debt.⁽²⁾ And when several persons join in a conveyance and convey "the whole and entire property absolutely," they must be taken to have exercised every power which they possess, and to have parted with their whole interest in possession or expectation. So, while the mortgage of a taluk, in which the mortgagor possessed the superior zemindari right, and also in some of its villages, a subordinate *sarbarakar* rights⁽³⁾ would not ordinarily comprise the latter rights which are distinct from the taluk and form a separate tenure, still where the mortgagor had previously treated the Sarbarakaris as non-existent, those rights would also pass with the mortgage though not expressly mentioned.⁽⁴⁾ So on a transfer of land all the houses and erections standing thereon would pass by necessary implication.⁽⁵⁾ And with the houses would pass the rents and profits derived therefrom.⁽⁶⁾ By the land-law of the country, when a permanent tenure is created, the zemindar, in the absence of express reservation, invests the tenure-holder with every right that can appertain to him short of the quit-rent, and the tenure-holder can do what he likes with the land short of altogether destroying it. The common law of England regarding the mining rights of lessees for a term cannot be made applicable to permanent tenures in the rural parts of Bengal. So where a zemindar had created a permanent tenure in respect of agricultural land at a rental fixed in perpetuity, the tenure-holder would possess all underground rights, unless there was something expressed to the contrary. The

(1) *Mahomed v. Mahomed*, I. L. R., 21 All. 228 P. C.

(2) In re *Carter-Dodds v. Fearson*, [1900], 1 Ch., 801.

(3) The Sarbarakar was really the middleman to whom the rents were directly payable and who retained a portion thereof as his

profits and paid the balance to the Zemindar.

(4) *Gourchandra v. Makunda*, 9 C. W. N., 710

(5) *Asgar v. Mahomed*, I. L. R., 30 Cal., 556 (561); *Macleod v. Kissan*, I. L. R., 80 Bom., 250 (262).

(6) *Ibid*.

provisions of this Act do not apply to such a case, and no restriction having been put on the use of the land, the tenure-holder's use of it would not be limited to agriculture by reason of the fact that the land was agricultural when the tenure was created. A Hindu widow in possession and her reversioner may thus by joining in one conveyance transfer a complete and indefeasible title.⁽¹⁾

341. So it has been held that a grant to a man for an indefinite term, where it can be definitely ascertained by reference to the interest which the grantor himself has in the property and which the grant purports to convey, may enure not only for the life of the grantee but also continue to his heirs.⁽⁴⁾ The intention of the grantor may be ascertained by the other terms in the deed, by the objects or circumstances of the grant, or by the act of the parties.⁽³⁾ Thus a mortgage, stated to be of a certain quantity of land and seams of coal, did not specify that the colliery and the colliery business was mortgaged, but they were held to pass, since the intention was manifestly to pass the colliery with the right of its management, for otherwise "it would be a mockery to a mortgagee of a colliery, whether by assignment or a sub-lease, to tell him he is not to touch the minerals."⁽⁴⁾ But general words in a grant must be restricted to that which the grantor had then power to grant, and will not extend to anything which he might subsequently acquire. A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which interfered with the lights of the demised house, which were not ancient lights. The lessee thereupon sued the lessor to restrain him from building, but he was held to have no right: "If the original owner of the freehold of the adjoining house had raised its height, he could not have been interfered with by the plaintiff, the lights not being ancient; nor could the defendant have been interfered with if he had bought the adjoining property after the house had been raised."⁽⁵⁾ Where intention is to be inferred from a construction of the deed, the whole of it should be read.⁽⁶⁾ According to Hindu law, a gift of property, made without express words of inheritance, conveys an absolute estate⁽⁷⁾ unless the gift is to a woman from her husband,⁽⁸⁾ in which case express words of inheritance are necessary to make the gift absolute.⁽⁹⁾ But the intention of the husband may be expressed in other ways, and is a matter of construction merely.⁽¹⁰⁾ The simple grant of an annuity conveys only a life-interest in favour of the grantee unless the contrary intention is clear.⁽¹¹⁾ Such an intention may be inferred from the nature of the grant as, if it be a bequest, the entire interest would be

(1) *Kishen v. Busgeet*, 14 W. R., 379.

(2) *Lekhranj v. Kunhaya*, I. L. R., 3 Cal., 210, P. C.; *Ram Narain v. Peary*, I. L. R., 9 Cal., 830; *Kalidas v. Kanhaya*, I. L. R., 11 Cal., 135, P. C.

(3) *Tulsi Prasad v. Ram Narain*, I. L. R., 12 Cal., 117, P. C.; *Mohamed v. Husseni Bibi*, I. L. R., 15 Cal., 644, 704, P. C.

(4) *County of Gloucester Bank v. Rudry & Co.* [1805], 1 Ch., 629 (638).

(5) *Booth v. Alcock*, L. R., 8 Ch., 663 (666).

(6) *Kalidas v. Kanhaya*, I. L. R., 11 Cal.,

131, P. C.; *Ugar Chand v. Madappa*, I. L. R., 9 Bom., 324.

(7) *Anundo v. John Doe*, 8 M. I. A., 43; *Tagore v. Tigre*, 9 B. L. R., 377.

(8) *Tagore v. Tagore*, 9 B. L. R., 377.

(9) *Kashyap v. Milim*, I. L. R., 10 All., 495; *Koo j Behari v. Prem Chand*, I. L. R., 5 Cal., 644; and see S. 124 Comm. post.

(10) *Ram Narain v. Peary*, I. L. R., 9 Cal., 830.

(11) *Gopalkrishna v. Ramanath*, 5 Bom., L. R., 749.

deemed to have been conveyed.⁽¹⁾ But its absolute duration cannot be inferred from the mere circumstance of its continuance after the life of the first grantor or from its being charged on the village revenues.⁽²⁾ The gift of the rents and profits or income of property is regarded as equivalent to a gift of the property itself, and the gift of the income of property carries with it the legal and beneficial interest in the property itself.⁽³⁾ A grant may be personal or permanent, conditional or unconditional. Where it is personal and conditional, and the grantee dies before fulfilling the condition, his heirs cannot claim under it.⁽⁴⁾ A maintenance grant, where the grant is by one for the maintenance of another whom he is under a legal or moral obligation to maintain is presumed to be personal and for the life of the grantee, though of course, even such a grant may be made permanent by the use of suitable expressions and where these are lacking, permanency may be inferred from its continuance for several generations.⁽⁵⁾ The same rule holds good as regards service grants, though in this case the grant may be "subject to faithful service" when its personal character determining with the life of the grantee could not be questioned,⁽⁶⁾ but where it is a grant in consideration of past service or partly one and partly the other, then questions of greater complexity arise and which will call for detailed examination later on.⁽⁷⁾ But it may be generally stated here that even these grants are presumed to be for the life of the grantee. Such is a jagir,⁽⁸⁾ and such was also an inam⁽⁹⁾ though it is now treated as permanent.

342. So in the case of a lease the mere word "*mukarari*" alone raises

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no presumption that the tenure was intended to be hereditary, and, therefore, in order to decide whether a *mukarari* lease is hereditary, the court must consider the other terms of the instrument under which it is granted, the circumstances under which it was made, and the intention of the parties.⁽¹⁰⁾ Where from the evidence the origin and particular purpose of the tenancy are known, and the tenant has ceased to use the land for the purpose, the mere fact that the tenant had long continued (from 1798 until 1873) at a low and unvaried rent affords no ground for inference that an agreement had been made between the parties that the tenant should hold a permanent tenure, and a suit to eject him could only be resisted by proving an agreement with the owner of the land that he had something more of a lease than the ordinary tenancy-at-will or from year to year.⁽¹¹⁾ As a lease is a transfer within the meaning of this Act, the incidents here specified will also pass on to the lessee with the creation of the lease. So

(1) *Gopalkrishna v. Ramnath*, 5 Bom. L.R. 729.

(2) *Ibid.*

(3) *Durga v. Dunichand*, 2 A. L. J. R., 568; (as to rents and profits being equivalent to income). See *Shookmoy v. Moharri*, 1 L.R., 11 Cal., 692; *Munoo v. Greer*, L. R., 14 Eq., 456.

(4) *Akund Pangrahi v. Nottobir*, 1 W.R., 82 (83).

(5) *Sri Raja Jaginatha v. Sri Peddr*, I. L. R., 4 Mad. 371 (372); *Rajah Rameshar Baksh v. Ariun Singh*, I. L. R., 23 All., 194 P. O.; *Ramachandra v. Jyotsna*, 4 O. L. J., 399 (400); *Rameshar Koer v. Gohardan*, 7 C. L. J., 202 (212), and see cases *post* under §§. 106 and 122.

(6) *Syed Muhammad Khan v. Maharaja Nam Narain Singh*, 7 O. L. J., 90 (93);

Sunayasi v. Sahar Zemi-dar, I. L. R., 7 Mad., 268; *Beni Pesh d v Dush Nath*, I. L. R., 27 Cal., 156 P. O.; *Maharaja Rameshar v. Babu Tiradas*, I. L. R., 32 Cal., 683.

(7) See S. 106 *Comm. post*.

(8) *Dosib v. Ishwardas*, I. L. R., 15 Bom., 222, P. O.

(9) *Vizumagam v. Suryanarayana*, I. L. R., 9 Mad., 307, P. O.

(10) *Sheo Prasad v. Kollydas*, I. L. R., 5 Cal., 543; *Tulsi Prasad v. Ram Narain*, I. L. R., 12 Cal., 117; *Rokhidas v. Dinomoyi*, I. L. R., 16 Cal., 652; *Raja Ram v. Nirasnga*, I. L. R., 15 Mad., 199; *Lilalchand v. Munoranjun*, 18 B. L. R., 124.

(11) *Secretary of State v. Luchmeshwar*, I. L. R., 16 Cal., 223, P. O.; *Narain v. Daulat*, I. L. R., 15 Bom., 647.

trees standing on the demised land pass with it to the tenant who is then entitled to their usufruct,⁽¹⁾ though as tenant, he cannot commit waste by felling them.⁽²⁾ But the rule does not extend to timber, in which case, the general rule is, that in the absence of an express grant, the lessee has no right to cut it. But the rule is not inflexible and must to a great extent depend upon the purpose and object of the lease and the nature of the timber. Thus the lease of a mansion with adjacent land planted with ornamental timber, could not presumably carry with it the right to cut down the timber. On the other hand, where the property demised is jungle land, the rule could not be strictly enforced. Indeed, the correct rule in such a case would be that the lessee is entitled to cut and remove a reasonable quantity of timber if his lease is for a long term.⁽³⁾ But even then he may only take such forest produce as can be taken without damaging the forest.⁽⁴⁾

343. Since transfer includes a lease, a lease "with all rights" has the effect of conveying all the lessor's rights in the land including rights to minerals.⁽⁵⁾ As regards the rights of the permanent lessee to subjacent mines, quarries and minerals, the law independently of the Act was that in the case of a grantor other than the Crown they passed by implication,⁽⁶⁾ Leases made since the passing of this Act will now be subject to the provisions of section 108 (o), and even in those previously granted the tenant possesses no right to minerals unless it is granted expressly or by necessary implication. A life tenant as such certainly does not possess any right other than those limited by section 108(o).⁽⁷⁾ But where the Crown was the grantor they could only be conveyed by an express grant.⁽⁸⁾

344. The same rule would appear to apply to a mortgagee in possession.⁽⁹⁾

Mortgage.

He must not destroy ornamental or valuable timber, nor cut timber so as to diminish the value of the land. But otherwise, so long as he does not commit wanton destruction, he may clear and cultivate the land. He is entitled to make the most of the property for the purpose of realizing what is due to him, and even when he has to account for the proceeds of the property, his powers are no greater. [For a further discussion, see commentary on S. 76.]

As Sir is comprised in the village a mortgage of a village share will include it by implication as also all other rights which the mortgagor is then capable of passing.⁽¹⁰⁾

(1) *Mohomed Ali v. Bolakee*, 24 W. R., 390; *Mohomed v. Drmodar*, 1 C. P. L. R., 145; *Raghunath v. Dhanraj*, 7 C. P. L. R., 7; *Junal v. Deoki Nandan*, I. L. R., 1 All., 88. *Deoki Nandan v. Dhan Singh*, I. L. R., 8 All., 467; *Ruttonji v. Collector*, I. L. R., 21 All., 297; *Bndam v. Ganga*, I. L. R., 29 All., 494.

(2) *Ram Baran v. Solig Ram*, I. L. R., 2 All., 896; *Ajudhia Nath v. Sital*, I. L. R., 3 All., 567.

(3) *Puna v. Gangji*, 1 C. P. L. R., 151.

(4) See S. 108 (o) post; *Daryao Singh v. Sikri*, 3 C. P. L. R., 18.

(5) *Meghlal v. Rajkumar*, I. L. R., 34 Cal., 358.

(6) *Verr v. Pawson*, 25 Beav., 394 (406); *Williamson v. Woollen*, 3 Drew., 210 (213); *Harris v. Ryding*, 5 M. & W., 60; *Spoor v. Green*, L. R., 9 Exch., 99 (107); *Earl of Jersey v. Guardians, &c., of Poor Law*

Unions, 22 Q. B. D., 555 (559); *Sriram v. Kumar Hari*, 3 C. L. J., 59; *Shyamra v. Abhiram*, 3 C. L. J., 306; *Pitiram v. Cohen*, I. L. R. 33 Cal., 203 (215); *Meghlal v. Raj Kumar*, I. L. R., 34 Cal., 358; *Brojo Nath v. Raja Durga Prasad*, 5 C. L. J. 583 (609, 610).

(7) *Prince Mahomed Buktuar Shah v. Rani Dhrjmani*, 2 C. L. J. 20 (26); *Campbell v. Ward*, 8 App. Cas., 641; *Brojo Nath v. Durga Prasad*, I. L. R., 34 Cal., 753 (785); *O. A. Raja Durga Prasad v. Brojo Nath*, I. L. R., 39 Cal. 696 (703); *Kumar Hari Narain v. Sri Ram*, 6 I. C. 785; *Raja Jyoti Prasad v. Lachpur Coal Co.* 14 C. L. J. 361 (369).

(8) See § 48, ante.

(9) Cf. S. 76, post.

(10) *Sheolal v. Nanhe Lal*, 8 N. L. R., 123 (127) following; *Asghar Resa v. Mahomed*, I. L. R., 30 Cal., 556.

345. The legal incidents of property are easements annexed thereto, the rents and profits, etc., enumerated in the subsequent clauses. All these are included in and pass with the land. All interests and income accruing after the transfer belong to the transferee.

346. Title-deeds, which have been called the sinews of the land, (1)

Title-deeds. naturally pass by necessary implication with the land on transfer. (2) And although they are, strictly speaking, moveable articles, they devolve in the same manner as land itself. Thus in England, where on death of the owner, immoveable property passes to the heir whilst moveable property passes to the executor or administrator, title-deeds follow the estate to the heir and cannot be claimed by the executor or administrator. But such deeds include only those that are material for the maintenance of the title to the land. (3) But should the deeds relate also to any estate other than that conveyed, or the transferrer retains any interest in the property conveyed, he is then entitled to retain them. (4) Thus the holder of a mere equity of redemption is entitled to retain the deeds relating to his property, during the continuance of his interest, and the mortgagee is likewise entitled to hold and retain his mortgage-deed until redemption when he must make it over to the mortgagor. (5) And with the title-deeds pass even the boxes which "have their very creation to be the houses or habitations of deed," (6) that is, such boxes as were designed to hold them.

347. Trees standing on land, being part of it necessarily pass with it, unless they are reserved, (7) which cannot be presumed from

Trees: crops. the fact that prior to the sale they had been already mortgaged to another. (8) Similarly, the garden-wall, and trees growing thereon are appendages of the garden and proof as to possession of the garden would, in the absence of countervailing evidence, include proof as to the wall and trees. Hence where on the right to the produce of certain trees it was found that the plaintiff had not, for twelve years previous to the filing of the suit, done any specific acts indicating directly his possession of the trees, but that they nevertheless grew out of a wall which surrounded a garden in the plaintiff's possession, it was ruled that the possession of the garden imported possession of the garden wall and of the trees springing out of the wall, and that the suit was not barred by limitation. (9) On the other hand, where a plantation standing on land is sold as a plantation, the vendee becomes owner of a part of the freehold, and the residue is in the owner of the land. The owner of a plantation can mortgage or sell it as he likes. A plantation of plantains must be considered to be the same, although the plantains at the time of the sale have all died, and new trees grown out of the shoots of the old ones have taken their place. (10) When an order absolute for foreclosure is made the mortgagee is entitled to possession of the crops standing on the land of the mortgagor. (11)

(1) Co. Litt. 62.

(2) *Harrington v. Price*, 3 B. & Ad., 170; *Phyllis v. Robinson & Bing*, 106, *In re Williams & Duchess of Newcastle's Contract* [1897], 144 (148).

(3) *Buckhurst's case*, 1 Rep., 16.

(4) *Davies v. Vernon*, 6 Q. B., 443 (447).

(5) S. 60 post.

(6) *Wentworth's office of an Executor* (14th Ed.), 157.

(7) *Mahomed Ali v. Bolakee*, 24 W. R., 330; *Faqueer v. Mt. Khuterun*, 2 N. W. P. H. C. R., 251; *Harbans Lal v. The Maharaja*, I. L.

R., 23 All., 126; *Muhammad v. Lente Ram*, I. L. R., 23 All., 291, F. B.; *Narayan v. Bhik*, (1881) B. P. J., 44; *Pandurang v. Bhimrav*, I. L. R., 22 Bom., 610.

(8) *Pandurang v. Bhimrav*, I. L. R., 22 Bom., 610 (612).

(9) *Iqbal Huren v. Nand Kishore*, I. L. R., 24 All., 294.

(10) Unrep. Mad. Case No. 16 of 1901.

(11) *Narbadpur v. Bholanath*, 15 C. P. L. R., 141; following *Ramalinga v. Semirappa*, I. L. R., 13 Mad., 15, *contra* in *Land Mortgage Bank v. Vishnu*, I. L. R., 2 Bom., 670.

But the trees and emblements, cease to be part of the land as soon as they are severed.⁽¹⁾ Where a tenant mortgaged his trees to the Government and subsequently surrendered his tenure to the landlord, the mortgage of the trees would not cease to be operative, but may be enforced and the auction-purchaser in execution of the mortgage-deed would possess right to the trees against the landlord, and in which case there would be severance of the two interests which may then be separately enjoyed.⁽²⁾ It has been held in Madras that a ryot holding land in a zemindari on a permanent tenure, would as regards land on which a money-assessment is paid, be *prima facie* entitled exclusively to the trees thereon. Where, however, the crops are shared between the ryot and the zemindar, they will be jointly interested in such trees, but such presumption may be rebutted by contract or usage to the contrary.⁽³⁾

348. Right on Acquisition of Land.—Acquisition of land passes with it right to ownership not only to the surface but to every thing beneath and above it, unless such ownership is conditioned by the nature of the possession or of the title. The owner of a land has a right to lop off branches of a tree overhanging his property, a right which he may still exercise, although it may be offensive to the religious feelings of a community.⁽⁴⁾ So adverse possession of the surface of land vertically over a railway tunnel gives the disseisor not only a title but also *usque ad cælum*. But such possession will not extend to the tunnel underneath.⁽⁵⁾ But the lease of land in permanency including "all rights of various kinds" with the exception only of homestead would include also the right to minerals.⁽⁶⁾ A liability to pay customary dues known as *hog-i-chaharum* is of the nature of an incident attaching to land and may be enforced against the vendee unless it is limited by a right to claim it from the vendor.⁽⁷⁾ Where a mortgagee in possession of cultivated land converted a portion into a grove, he was bound to surrender it up with the land on extinguishment of his mortgage.⁽⁸⁾ And it would make no difference if he has created buildings thereon.⁽⁹⁾ So on a sale of the plot of land upon which stood the vendor's forefather's tombs, the latter would pass with the plot, and the purchaser may dig them up or demolish them.⁽¹⁰⁾ A permission to bury the dead in a land carries with it the right of entry to perform all customary rights, although the ownership of the soil may be vested in others. This right is founded on a universal sentiment which regards the graveyard as for ever sacred, and which cannot be regarded otherwise from the mere fact that the place was disused for a considerable period, but the right is, of course, subject to the custom of the community.⁽¹¹⁾ But on the sale of a share in zemindari property buildings such as indigo factories,⁽¹²⁾ or dwelling houses⁽¹³⁾ will not ordinarily pass to the vendee along with the zemindari share sold unless there is a distinct evidence of the user of such buildings as part and parcel of, or

(1) *Q.E. v. Keth g du*, I. L. R., 9 Mad. 373, *Faqueer v. Mt. Kundrum*, 2 N. W. P. H. O. R., 251.

(2) *Babu Lal v. Ram Sahai*, I. L. R., 26 All., 540.

(3) *Narayana v. Orr*, I. L. R., 26 Mad., 254; *Kakarla v. Raja Venkata*, I. L. R., 29 Mad., 24.

(4) *Behari Lal v. Ghisa*, I. L. R., 24 All., 499.

(5) *Midland Railway Co. v. Wright* [1901], 1 Ch., 738.

(6) *Shynmocharan v. Abhiram*, 3 O. L. J., 306 (316).

(7) *Dhandia Bibi v. Abdur Rahman*, I. L.

R., 23 All., 209 (210); following *Heeraram v. Raja Deo* (1867), N. W. P. H. O. R., 63 F.B.

(8) *Madho Ram v. Shamsuddin* (1883), A. W. N., 203.

(9) *Ram Dhone v. Ishanee*, 2 W. R., 123 (125).

(10) *Emp. v. Choturully* 4 B. L. R., 163.

(11) *Ramrao v. Rustumkhan*, I. L. R., 26 Bom., 198.

(12) *Durga Singh v. Bisheshar*, I. L. R., 24 All., 218.

(13) *Abdul Rahim v. Abdul Hakim*, 2 A. L. J. R., 165 (S. N.).

as appurtenant to the zemindari. The occupation of a fort by the owner *qua* zemindar (1) or of kottas or other buildings, (2) would, however, create a presumption that the buildings were included in the sale of the zemindari. (3) So where the cultivatory tenants in a village had built houses more than twelve years ago and in which they had been since residing, in an ejectment-suit by the zemindar against the tenants, the court held the houses to be appurtenant to their holdings from which they could not be ejected so long as they were entitled to occupy their lands. (4)

349. An assignee of this subject-matter of a suit has, as a necessary incident of his transfer, the right to continue the suit and with that view to be brought upon the record as a plaintiff. (5) Similarly, a Mitakshara son inherits the estate with the burden of the decree obtained against the father, and is liable to be proceeded against in execution. (6) In an execution-sale of the judgment-debtor's property if his interest is accelerated or enlarged, the increment passes with the *corpus*. (7)

350. An injunction does not run with the land. Hence, if the property regarding which an injunction is granted is sold under a decree, the vendee thereof cannot be made amenable to the injunction. (8) A water-course constructed for the purpose of a mill situate alongside a farm which benefited by it, does not thereby become its incident so as to pass with it. (9) So the franchise of a ferry is not necessarily appurtenant to a land. (10)

The goodwill of a trade or business being of great value passes with the premises, (11) but that alone will not prevent the vendor from setting up a similar business in the immediate proximity of the premises transferred, unless he had entered into a covenant not to set up a rival business within a specified area of the old premises. (12) But apart from such a covenant, the vendor is not entitled to represent that the new business which he has set up is the same, or is the continuation of the business of which he has parted with the goodwill. (13) It has been laid down that where goodwill entirely depends on personal skill or reputation, it does not of necessity follow the property. (14) Similarly, trade-marks and trade-names which have become known as denoting goods of a particular manufacturer, such as "Singer's machines," (15) "Angostura Bitters" (16) would pass with the sale of the business to which they relate. And it has been enacted in England that a trademark shall be assigned and transmitted only in connection with the goodwill of the business concerned, and shall be determinable with that goodwill. (17) A trustee is expressly authorized to sell the

(1) *Abu Hasan v. Raman*, 1 L. R., 4 All., 381.

(2) *Bankelal v. Damodar* (1900), A. W. N., 31.

(3) *Durg Singh v. Bisheshar*, 1 L. R., 24 All., 218 (223).

(4) *Duhri Lal v. Dholu Rai*, 3 A. L. J. R., 619; following *Nasir Hasan v. Shidhr*, 1 L. R., 27 All., 81. The Court's further view that the tenants might be said to have acquired the houses by adverse possession, is scarcely tenable—*Jaikishan v. Moti Chand*, 3 A. L. J. R., 627.

(5) S. 372, Code of Civil Procedure, *Commercial Bank v. Sahju*, 1 L. R., 24 Mad. 252.

(6) *Ram Das v. Tekril*, 6 C. W. N., 879.

(7) *Umesh Chunder v. Zahur*, 1 L. R., 18 Cal., 164, P. O.

(8) *Dabyabhai v. Bapalal*, 3 B. L. R., 564;

Vithal v. Sakharan, 1 B. L. R., 854; *Attorney General v. Birmingham, &c., Drainage Board*, 17 Ch. D., 685.

(9) *Burrows v. Lang* [1901], 2 Ch., 502.

(10) *Nityahari v. Dunne*, 1 L. R., 18 Cal., 652.

(11) *Hall v. Burrows*, 4 D., G. J. & S., 150, *Re David and Matthews* [1899], 1 Ch., 378.

(12) *Cruikwell v. Lye*, 17 Ves., 398; *L'abbouchere v. Duvoson*, L. R., 13 Eq., 322 (324).

(13) *Chyrtin v. Douglas*, Job., 174.

(14) *Cooper v. Metropolitan Board*, 25 Ch. D., 472 (479).

(15) *Singer Manufacturing Co. v. Loog*, App. Cas., 15 (32, 38).

(16) *Steger v. Finlatter*, 7 Ch. D., 801 (909).

(17) The Trade Marks Registration Act, 1875, 39 & 39 Vict. C., 91, S. 2, repealed by the Patents Designs and Trade Marks Act

good-will of the bankrupt's business as part of his property, as also the trademark or trade-name to which he had exclusive right.⁽¹⁾ A tenant in a village usually acquires certain rights with his tenancy,⁽²⁾ such as the right of depasturing his agricultural cattle on the village common, or cutting firewood from the village jungle. But all tenants possess such rights in common and no single tenant can be permitted to arrogate to himself a privilege which would be detrimental to the common enjoyment of the right by the tenantry. So in the absence of a special authority an inamdar cannot enclose a piece of land immemorially used as a pasture-ground by the inhabitants of the inam village.⁽³⁾ The right of pre-emption is an incident of ownership, intended to keep out unwelcome strangers, which may be asserted under certain conditions, specified in the *Wazib-ul-urz*.⁽⁴⁾

351. Incidents.—A transfer passes all things belonging to the transferor

Easement. appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract except collateral contracts, which do not limit or affect the interest of the transferor in the property transferred. The incidents that go with the transfer of land include easements, rents and profits and all things attached to the earth. "An easement is a right which the owner or occupier of a certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own."⁽⁵⁾ It has been held in England under a similar clause that on conveyance of all lights with the land, means only such as the grantor could have granted by express words; it does not operate to convey an easement of light which he had no power to grant expressly.⁽⁶⁾ And all easements do not pass, but only such as are annexed thereto.

352. The term "annexed thereto" has been the subject of judicial interpretation.⁽⁷⁾ In this case the plaintiffs were owners of a hotel, and the defendant of certain adjacent property. The two properties had at one time been united, and at that time the manager of the hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over land which subsequently became the defendant's. There was another, but a smaller and much less convenient path from the hotel to the spring. The plaintiffs became aware of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the above-mentioned road through the defendant's property for the purpose of getting water for the hotel until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly sued the defendant for a declaration of their right of way over the said road; but refused to put in evidence the deed under which they became owners of the hotel property. Although the suit was finally decided upon the unfavourable presumption made against the plaintiffs owing to their non production of their title-deeds, the judgment, which is a very long one—discussed the meaning of the term "Easements annexed thereto." After citing section 8, the Judges state: "What meaning the Indian legislature intended to express

1883, 46 & 47 Vict. C. 57 S. 70. A series of trademarks are assignable only as a whole, *ib.*, S. 81, amended by 51 & 52 Vict. C., 50, S. 20.

(1) *Robson on Bankruptcy* (7th Ed.), 598.

(2) In England the law is the same; *Canham v. Fisk*, 1 L. J. (N. S.), Exch., 61.

(3) *Vishvanath v. Mahadaji*, I. L. R., 3

Bom., 147.

(4) *Subbaji v. Muhammad*, I. L. R., 6 All., 463.

(5) Indian Easements Act (V of 1882), S. 4.

(6) *Quicke v. Chapman* [1908], 1 Ch., 669.

(7) *Wutzler v. Sharpe*, I. L. R., 15 All., 270.

by the use of the word 'annexed' we are unable to ascertain.⁽¹⁾ In the words 'annexed' and 'easements' ⁽²⁾ with the same common meaning in section 8 of Act IV of 1882, and in section 5 of Act V of 1882, we have, in cases not falling within section 9 of Act V of 1882, this extraordinary result that, on a transfer of a house, an easement, whether it was continuous or discontinuous, apparent or non-apparent, so long as it was one of the easements annexed to the house, would, by virtue of section 8 of Act IV of 1882, pass, to the transferee, 'unless a different intention is expressed or necessarily implied,' and yet when we turn to Act V of 1882, which more exclusively and exhaustively deals with easements, we find that the same easement, if it was not continuous and apparent, although it was necessary for enjoying the subject as it was enjoyed when the transfer took effect, and although it was an easement annexed to the house, would not, under section 13 of Act V of 1882, pass to the transferee. Yet we presume that the legislature could not have intended that in cases not falling within section 19 of Act V of 1882, an easement which would not on a transfer of property pass by virtue of section 13 of Act V of 1882, might pass by virtue of section 8 of Act IV of 1882. In section 19 of Act V of 1882, which applies to the transfer or devolution of a heritage which at, and prior to, the time of the transfer or devolution was a dominant heritage, the same generic word 'easement' is used and is, by the illustration to that section, applied to a case in which A has certain land to which a right of way is 'annexed.' The Judges then suggest that by "easements annexed" may mean those considered as appurtenant thereto, as held in England.⁽³⁾ In the former case it was held that, "where a man is occupier of two adjoining pieces of land, and uses both for the convenience of himself as the actual occupier of both, anything that he may do on the one is *prima facie* not a right appurtenant to the other and would not pass as appurtenant....." But in an English case under similar circumstances the right of way as an easement was decreed.⁽⁴⁾ The words "appurtenant" or "belonging to" will ordinarily carry only actual existing easements.⁽⁵⁾

353. Easements pass with the Property.—Under section 19 of the Indian Easements Act, which must be read consistently with the Transfer of Property Act, ⁽⁶⁾ an easement passes to the transferee with the dominant heritage. Thus, if A own certain land to which a right of way is annexed, and which he let to B for twenty years, the right of way would vest in B and his legal representative so long as the lease continues.⁽⁷⁾ An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages,⁽⁸⁾ or when either the dominant or servient heritage is completely destroyed,⁽⁹⁾ and the extinction of the easement extinguishes the rights (if any), accessory thereto.⁽¹⁰⁾ An extinguished easement may, however, be revived under certain circumstances mentioned in section 51 of the Easements Act.

(1) *Wutzler v. Sharpe*, I.L.R. 15 All., 284.

(2) Although the Indian Easements Act (V of 1882) was extended at the time of the ruling to the United Provinces, but since the lights of the parties had been acquired prior to the extension of that enactment, the Judges have interpreted the term as understood prior to its extension (see p 317).

(3) *Kau v. Oxley*, L. R., 10 Q. B., 360.

(4) *Bayley v. G. W. Railway Co.*, 26 Ch. D., 434; *contra* in *Chunder Coomar v. Koylash*

Chunder, I. L. R., 7 Cal., 665.

(5) *Chunder Coomar v. Koylash Chunder*, I. L. R., 7 Cal., 665; *Phillips v. Low*, L. R., 1 Ch., 47 (1892); *Robson v. Edwards*, L. R., 2 Ch., 146 (1893).

(6) *Wutzler v. Sharpe*, I.L.R., 15 All., 270.

(7) Illustration to S. 19.

(8) S. 46.

(9) S. 45.

(10) S. 48.

354. Quasi-Easement.—Easements of necessity are to be distinguished from certain other rights which are classed under Quasi-Easements. A right of way, light and air are instances of the former. Quasi-Easements are more difficult to illustrate. They are apparent continuous easements, whether continuous or discontinuous, which have been visibly enjoyed by the property sold over the property retained, and which pass under the customary general word. (1) Thus, *A* is the owner of a house and adjoining land. The house has windows over-looking the land. *A* simultaneously sells the house to *B*, and the land to *C*. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here *A* impliedly grants *B* a right to the light, and *C* takes the land subject to the restriction that he may not build, so as to obstruct such light. (2) So also a man who sells one of two adjoining houses or plot of land belonging to him impliedly gives his purchaser such rights over the property sold, and reserves such rights as are necessary for the enjoyment of each. Thus, if both the properties have common drains and gutters necessary for the enjoyment of the two properties, the vendee, in respect of the property purchased by him, and the vendor, in respect of the property retained by him, is entitled to the benefit of all the gutters and drains. (3) So in a case where the plaintiff obtained a building in a portion and sued the defendants for a declaration of her right to the passage of light and air through certain doors and windows—there being no express provision in the partition-suit, one way or other, as to any such rights being reserved—it was held that, in the absence of any enactment of the legislature applicable to a case like this, the question will have to be answered with reference to the principle of justice, equity and good conscience, and the courts in this country have considered the English law known as the doctrine of implied grant of easement upon severance of a tenement, as being in accordance with justice, equity and good conscience, though that rule is subject to qualifications and modifications in its application to this country. In the particular case before them the passages for light and air were found necessary for the enjoyment of the property, and were decreed in spite of the presence of “any particular expression” in the partition-decree. (4)

355. Right of Way.—It has been held that a right of way, unless it arises as an easement of necessity, cannot arise by implication of law, because such right is not of a continuous character. (5) It, therefore, follows that in order to create such rights express words of grant must be used in the conveyance. (6) Injunction has been refused, and only damages awarded in a case where “although the plaintiff’s light had been sensibly diminished by the defendant’s new building, there had not been such a large material, and substantial damage as to require interference by injunction.” (7)

356. Rents and Profits.—Rents are benefits arising out of land, and, therefore, within the wording and spirit of the definition of “immoveable

(1) S. 6 of the Conveyancing Act; *Chunder Coomar v. Koylosk*, I. L. R., 7 Cal., 670; *Dart’s Vendors and Purchaser*; see S. 13 of the Easements Act.

(2) S. 13, *illus.* (a).

(3) *Shrimati Kadamhini v. Kali Kumar*, 3 O. W. N., 71. See also *Ratanji v. Edalji*, 8 B. H. C. R., 141; *Amuljal v. Jhemuch Singh*, 24 W. R., 345; *Charu v. Dokowri*, I. L. R., 8 Cal., 957; *Bolye Chunder v. Lalmoni*, I. L. R., 14 Cal., 797.

(4) Illustration (h), S. 13, Easements Act

(V of 1882)

(5) *Morgan v. Kirby*, I. L. R., 2 Mad., 46; *Chunder v. Koylosk* I. L. R., 7 Cal., 670; but see *Burkshire v. Grubb*, 18 Ch. D. 616; *Bygley v. Great Western Railway Co.*, 26 Ch. D., 434.

(6) *Bolye Chunder Sen v. Lalmoni Dasi*, I. L. R., 14 Cal., 797; *Wutsler v. Sharma*, I. L. R., 15 All. 270. See also *Channa Lal v. Manishankar*, I. L. R., 17 Bom., 616.

(7) *Ghanasham v. Moroba Ram*, I. L. R., 18 Bom., 474.

property" contained in sections 3 and 17 of the Registration Act. An assignment of rents must therefore be registered.⁽¹⁾ Rents and profits include everything which the transferee may derive from the land. Rents and profits are used in their generic and wide sense as including all benefits arising out of the land and until the property passes to the buyer, the seller is entitled to receive all the rents and profits therefrom.⁽²⁾ A transfer is to be distinguished from merely an agreement for transfer which by itself does not create any interest in or charge on such property.⁽³⁾ The word "rents and profits" may also include occupation rent.⁽⁴⁾ And in a case where the condition was that the purchaser should be entitled to "possession, or to the receipt of the rents and profits," and the vendor was in actual possession, the latter words were held to be "otiose."⁽⁵⁾ The right to recover rents and mesne profits for past years does not pass with the property, unless the right is expressly conveyed.⁽⁶⁾ So a mortgagee of a ship is not entitled to unpaid freight which became due previously to the date of his taking possession.⁽⁷⁾ But a transfer of property carries with it the right to execute decrees in respect of such property. Hence on the purchase of a village the purchaser is presumably entitled to execute ejectment-decrees obtained by the vendor against its tenants for non-payment of rent, unless, of course, the decrees were personal, as in the case of a decree for pre-emption, or unless they relate to rents and profits which had accrued before the transfer.⁽⁸⁾

357. Things attached to the Earth.—The definition of the term "attached to the earth" has been already given in section 3, *ante*, and as to the meaning of which the commentary thereunder should be referred to (§§ 87-102). The law on the subject has been thus recapitulated by Lord Blackburn⁽⁹⁾:—"Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property to the land; but the nature of the annexation may be such as to show that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land are removeable by the executor as between him and the heir. Lord Ellenborough in *Elwes v Maw*,⁽¹⁰⁾ says, that those cases may be considered as decided mainly on the ground that where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, it should be itself considered as personalty. Even in such a case, the degree and nature of the annexation is an important element for consideration, for where a chattel is so annexed that it cannot be removed, without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land, and as Lord Hardwicke said in *Lawton v. Lawton*,⁽¹¹⁾ 'you shall not destroy the principal thing by taking away the accessory to it, and, therefore, as I think, even if the property in the chattel was not intended to be annexed to the property in the land, the amount of damage to the land by removing it may be so great as to prevent the removal.' So it has been held⁽¹²⁾ that the title-deeds of an estate (§ 345), counterpart leases, account-books

(1) *Venkaji v. Shidrampa*, I. L. R., 19 Bom., 663, at p. 667.

(2) S. 55 (4) (*a post*; see also S. 76 (b)).

(3) S. 54, last clause, *post*.

(4) *Metropolitan Railway Co. v. Defries*, 2 Q.B.D., 387.

(5) *Anker v. Franklin*, 43 L. T., 317. Quoted in *Dal's V. & P.* (6th Ed.), 145.

(6) *Ganesh v. Shamnarain*, I. L. R., 6 Cal., 213.

(7) *Shillito v. Beggart* [1903], 1 K.B., 683.

(8) *Onkardas v. Shahbaz Khan*, 1 Nag. L. R., 48 (51).

(9) *Wyke v. Hall*, 8 App. Cas., 195 (204); *Sharman v. Mason* [1899], 2 Q. B., 679.

(10) 2 S. L. C., (7th Ed.), 178.

(11) 3 A. & K., 15.

(12) *Shri Bhabani v. Debrao*, I. L. R., 11 Bom., 485.

and other documents of the like kind, such as *kabuliats* in India, ought to be regarded as accessory to the estate and pass with it, whether the transfer be made by a conveyance, a decree or a certificate of sale. The rule is, that when the principal thing is awarded, the subsidiary or accessory is implicitly ordered too.⁽¹⁾ Hence doors and windows of a *pucca* building forming, as they do, a part of immoveable property, cannot be separately attached.⁽²⁾ A tenant in agriculture, who erected, at his own expense, and for the mere necessary and convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, was held disentitled to remove the same, even during his term, and though he thereby left the premises in the same state as when he entered.⁽³⁾

358. There appears to be a distinction between annexations to the freehold of the nature last considered (§357) for the purpose of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land in favour of the tenant's right to remove the former; that is, where the superincumbent building is erected as a mere accessory to a personal chattel as an engine; but where it is accessory to the realty it can in no case be removed.⁽⁴⁾ In a recent case, the plaintiffs, who were the purchasers at a revenue-sale, sought to eject the defendant from a piece of land measuring a little over a *bigha*. The defendant pleaded that he had his dwelling-houses, tank and trees on the holding. It was found that the dwelling-houses consisted of certain huts and that the so-called tank was some two or three cubits in extent. As to trees, there was no finding that there was anything in the shape of a plantation or garden. It was held that under the revenue sale law a dwelling-house to be exempt must be a dwelling-house of a permanent character and mere huts would not come within that description. No exemptions were accordingly allowed.⁽⁵⁾ So also it has been held that a landlord, by merely not objecting to his tenants raising a *pucca* building does not confer on them a permanent right to remain on the land. But long possession coupled with this fact may raise a presumption in favour of a permanency.⁽⁶⁾ Trees and emblements being things attached to the earth pass with it.⁽⁷⁾ Trees being attached to the earth are included in the legal incidents of the land and pass with it, unless a different intention is expressed or necessarily implied. But no such intention is necessarily implied because the trees are mortgaged prior to the sale, and no mention of the mortgage is made in the sale-deed.⁽⁸⁾ The nature of the incidents conveyed would often depend upon the nature of the interest conveyed in the property. An agricultural tenant, for instance, is not entitled to dig up and appropriate to his own use shells from the earth, unless he is entitled to it by local custom,⁽⁹⁾ otherwise the property in the shells remains with the landlord

(1) *Per West, J., in Shri Bhavani v. Devrao*, 1 L. R., 15 Bom., 485 (487).

(2) S. 54, last clause, *post*.

(3) *Elwes v. Maw*, 3 East 38; *Williams v. Williams*, 12 East. 209

(4) *Elwes v. Maw*, 3 East. 38; 6 R.R., 523; 2 S. L. C. (7th Ed.), 153.

(5) *Makar Ali v. Shyama Charan*, 3 C.W. N., 212.

(6) *Krishna v. Mir Mahomed*, 3 C. W. N., 5.

(7) *Harbans Lal v. The Maharaja of Benares*, 1 L. R., 23 All., 126 (127); *Land Mortgage Bank v. Vishnu*, 1 L. R., 2 Bom., 670; *Ramalinga v. Samiappa*, 1 L. R., 13 Mad., 15; *Norbadapuri v. Bholanath*, 15 C. P. L. R., 141; *Robb Mort.*, 672.

(8) *Pandurang v. Bhimrav*, 1 L. R., 22 Bom., 610.

(9) *Challadom v. Kalkath*, 1 L. R., 25 Mad., 669; following *Tucker v. Linger*, 8 App. Cas., 508.

and would pass to his assignee.⁽¹⁾ The purchaser of lands irrigated by a tank acquires the right to use the water in the tank for the purpose of irrigation.⁽²⁾ So, a well passes with the land in which it is embedded as a legal incident thereof.⁽³⁾ But a grant of a village "with all wells, tanks and waters" within its boundaries have not necessarily the effect of passing to the grantee an artificial channel running through that and two other villages and in the enjoyment of which those villagers were equally interested.⁽⁴⁾ In this case the grant was of the village as *inam* by the Government, and the Court naturally laid stress upon the presumption that since the conservation and control of works of irrigation have from the earliest times been the especial function and duty of Government of India, it could not be supposed that such a valuable right in the enjoyment of which the public was equally concerned would be assigned away by a mere implication. If therefore the grantor had not been the Government but a private owner, the grant of "waters" might conceivably have included such a channel unless it was reserved by express words or necessary implication.

359. As water stands on land, transfer of the latter necessarily conveys the former and all things contained and growing therein such as fish, water-nuts and the like.⁽⁵⁾ "If land adjoining a highway or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurements of the property which is granted can be satisfied without including half of the bed of the river; and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include half of the river or the road."⁽⁶⁾

360. A grant of land, either absolutely or on a permanent tenure carries with it a right to minerals, unless that right was expressly reserved.⁽⁷⁾ (§ 343). The grant of surface land without the minerals, or of minerals without the surface land implies reservation of the power necessary to enjoy the interest withheld as a necessary incident. So Lord Everslydale observed: "The rights of the grantee to the mineral by whomsoever granted must depend upon the terms of the deeds by which they are conveyed or reserved. When the surface is conveyed, *prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident."⁽⁸⁾ This incidental power of using the surface would, however, warrant nothing beyond what is strictly necessary, for the convenient working of the mineral: it would allow no use of the surface, no deposit upon it to a greater extent or for a longer duration than should be necessary, no attendance upon the land of unnecessary persons. It would not authorize a deposit upon the

(1) *Tucker v. Linger*, 8 App. Cas., 508; *Elwes v. Briggs Gas Co.*, 33 Ch. D., 562; *Chalban v. Kunhambu*, 12 M. L. J. R., 406.

(2) *Venkata v. The Secretary of State*, 12 M. L. J. R., 432.

(3) *Harichund v. Bala*, (1888), B. P. J., 125.

(4) *Ambalavana v. Secretary of State*, 1 L. R., 28 Mad., 539. See § 53 and *Ravji Narayan v. Dadaji*, 1 L. R., 1 Bom., 523.

(5) *Saxab Chandra v. Jabudra*, 1 L. R., 35 Cal., 614 (717).

(6) *Per Lopes, L. J.*, in *Micklethwaite v. Newley Bridge Co.* 33 Ch. D., 133 (145); *Balbir Singh v. Secretary of State*, 1 L. R., 22 All., 96, (100).

(7) *Sriram v. Kumar Hari*, 3 C. L. J., 59; *Shyama v. Abhiram*, 3 C. L. J., 306; *Tituram v. Cohen*, 1 L. R., 33 Cal., 203 (215); *Meghlal v. Rajkumar*, 1 L. R., 34 Cal., 358; *Brojo v. Raja Durga*, 5 C. L. J., 583 (609, 610); *Ali Quardar v. Jogendra*, 16 I. C. 441 (442).

(8) *Rowbotham v. Wilson*, 8 H. L. C., 349 (360).

land for the purpose of sale, nor would it justify the introduction of purchasers to view the mineral.⁽¹⁾ Where, however, a liberty to dig pits is expressly granted, the owner of the minerals has, as incident to the liberty, the right *prima facie* of erecting steam engines and other necessary machinery for draining the mines and drawing the coals from the pits.⁽²⁾ So it has been held that the original lessor of the surface land in excepting the coal and other minerals impliedly reserved himself as a necessary incident the right to dig for and win the coal.⁽³⁾ But this is no right of property but rather in the nature of "privilege, servitude, or easement."⁽⁴⁾ When the grantor reserves to himself the right to underground coal etc., he is entitled to egress and ingress to work his mine but he must safeguard the grantee's right to support.⁽⁵⁾

361. Tenants having permanent occupancy-rights in a zemindari village are entitled to the ownership of the trees standing in their patta lands and the landlord claiming any such right shews that it exists by reason of any special or local custom.⁽⁶⁾ But in this respect a different rule would appear to prevail in Allahabad.⁽⁷⁾ In any case a tenant who is not permanent has no such right,⁽⁸⁾ but even in such a case the prohibition would not extend to shrubs and small trees which are usually at the disposal of the tenant for the purposes of his holding.⁽⁹⁾ When a street is vested in a Municipal Council, such vesting does not transfer to the municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad cælum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street.⁽¹⁰⁾

362. Machinery attached to the Earth.—In a case,⁽¹¹⁾ miners working under customs established by the High Peak Mining Customs and Minerals Courts Act, 1851, lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to others. The buildings were attached so as to be a part of the soil, and so that they could not be removed without some disturbance which would not amount to the destruction of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to show that the property in them was intended to be irrevocably annexed to the soil. It was held that the maxim *quicquid plantatur solo cedit* was not applicable, and that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and that they were not liable to the surface owner for so doing. In a suit for damages for the removal of oil and flour mills and a steam engine and boiler seized in execution of a decree of the Calcutta Court of Small Causes, it was held that such things were fixtures and not goods and chattels and could not be seized in execution.⁽¹²⁾ So in an English

(1) *Cadigan (Earl of) v. Armitage*, 2 B. & C., 211; *Marshall v. Borrowdale Plumbago & Co., Ltd.* (1892), 8 T. L. R., 275.

(2) *Hayles v. Pease and Partners Ltd.*, [1899], 1 Ch., 567.

(3) *Rameswar v. Ram Nath*, I. L. R., 33 Cal., 462 (472).

(4) *Ramsay v. Blair*, 1 App. Cas., 701 (706).

(5) *Gandoo v. Nilmonce*, 1 C. L. J., 526 (530, 531).

(6) *Narayana v. Orr*, 12 M. L. J. R., 449.

(7) *Tanki v. Sheoadhar*, I. L. R., 20 All., 211.

(8) *Appa v. Ratnam*, I. L. R., 13 Mad., 249; *Appa v. Narasanna*, I. L. R., 15 Mad., 47; *Narayana v. Orr*, 12 M. L. J. R., 449 (452).

(9) *Appa v. Ratnam* I. L. R., 13 Mad., 249.

(10) *Sundaram v. The Municipal Council*, I. L. R., 25 Mad., 635.

(11) *Wake v. Hall*, 7 Q. B. D., 295; O. A. 8 App. Cas., 195.

(12) *Miller v. Brindaban*, I. L. R., 4 Cal., 946.

case it has been held that a gas engine affixed to the land by means of screws and bolts so as to prevent it from rocking became a fixture, i.e., part of the soil from which it could not be separated.⁽¹⁾ As a rule an article which is affixed to the land even slightly is to be considered as a part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel. But an article not otherwise attached to the land than by its own weight is not to be so considered unless the circumstances are such as to shew that it was so intended, the burden of proof being on those who assert that it had ceased to be a chattel. Where a certain machinery which had been supplied by the plaintiff on the hire-purchase system was affixed to the premises by means of upright bolts let into the floor, and by the terms of the hire-purchase it was not to become his property until the whole of the purchase-money was paid and the premises were mortgaged by the purchaser to the mortgagee before the hire-purchase agreement, but the mortgagee allowed the mortgagor to remain in possession of the premises. It was held that the machinery was fixed and passed with the land, and that the vendor was not entitled to remove the fixtures on default of payment after the mortgagee entitled into possession.⁽²⁾

363. Debt—Actionable Claim—Securities.—If the debt is transferred, the securities for the debt follow the transfer. So where a person absolutely purchased a plantain plantation and got a lease of the land on which the plantation was standing, a mortgagee of the plantation from such purchaser would be entitled to the security of the plantain trees, notwithstanding that the lease of land to his mortgagor might have been determined.⁽³⁾ A debt secured by a charge upon immoveable property was formerly regarded a *chose in action*, and the assignee was, as indeed, he would be now, entitled to a personal decree for the debt as well as to the charge.⁽⁴⁾ But the case would be otherwise if the purchaser buys up the decree and not the debt upon which it is based. If, therefore, the vendee purchases only a money-decree he cannot go behind it and call upon the seller to assign to him the original securities.⁽⁵⁾ In the case of guaranteed debts the law is laid down in section 140 of the Indian Contract Act, according to which the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. So also the assignee of a mortgage cannot stand in any different character or hold any different position from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. Every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due on the mortgage, and the mortgagee is charged with the duty of making such reconveyance upon such payment being made. Where therefore, a mortgagee, besides the mortgaged property, possessed certain promissory notes executed by the mortgagor as a collateral security for his debt, and he transferred the mortgage without assigning the collateral securities, it was held that he was not entitled to so sever the debt from the security, and an injunction was granted against his proceeding at law to recover the amount of one of the notes, pending a suit instituted by the mortgagor to redeem and to settle the equities of the parties.⁽⁶⁾ But in another case where the mortgagor besides executing a mortgage also gave the mortgagee a promissory note, and

(1) *Hobson v. Gorringe* [1897], 1 Ch., 182.

(2) *Reynolds v. Ashby & Son, Ltd* [1903], 1 K. B., 37.

(3) *Ragasami v. Sellaperumal*, 13 M. L. J. R., 3.

(4) *Subramaniam v. Perumal*, 1 L. R., 18 Mad., 454.

(5) *Ganpat v. Sarupi*, 1 All., 446 (447).

(6) *Walker v. Jones*, L. R., 1 P. O., 50 ; *Jones v. Gibbons*, 9 Ves., 410.

the mortgagee assigned the mortgage to one person, recovering from him the amount of his debt, and assigned the promissory note to another, and the latter instituted a suit on his note, it was held that being a *bona fide* indorsee for the note for value he was entitled to recover. (1) Of course, such cases depend upon the negotiable character of the security and its transfer to a *bona fide* transferee without notice. In such a case, whatever may be the equities between the original parties to the contract, they do not follow the transfer to a person in due course.

364. A collateral agreement by a person who obtains a permanent lease to pay the lessor a monthly allowance sometime before the permanent lease takes effect creates only a personal obligation, and does not pass with the assignment by the lessor of all his property. (2)

365. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person, to whom it has been indorsed for value without knowledge that it has been paid, from suing. (3) In another case, (4) it was held that where a man gives his creditor a cheque or a promissory note for his debt, and he is afterwards given notice that the debt, which is the consideration for the instrument, has been assigned apart from it, he can disregard that notice: for to bind him with such a notice would be to put on him obligations which the law does not recognize and would enable persons to assign the consideration of a negotiable instrument in such a way that the debtor is not to pay the holder of the instrument. To hold the contrary, their Lordships held, would be commercially disastrous. In this case, *A*, a commission agent, negotiated the sale of a public house belonging to *B*. *C* was the purchaser. *B* had agreed to pay *A* the commission of £175. *A* was indebted to *C* in the same amount, and he accordingly executed a stamped agreement transferring his right to receive the commission from *B*. *C* paid the price of the house to *B* who gave a cheque for the £175 to *A*. Thereupon *C* informed *B* of the assignment of the amount by *A* in his favour. *B* however refused to pay the sum to *C* and on suit by *C* against *B*, the Court of Appeal dismissed the suit on the grounds above stated. A similar case was also decided in the same way in Madras, (5) where it was held that a promissory note may be affirmed by the holder just like any other chose in action without indorsement. (6) The benefit of an insurance policy against fire being a contract of personal indemnity does not pass with the transfer of the insured property. (7)

366. Interest.—On transfer of bonds, promissory notes, debentures shares in a Company, etc., interest, and dividend, accruing due after the date of the transfer, pass to the transferee. But in order to convey those rights the transfer must have taken effect, since a mere contract or even an inchoate transfer does not give rise to the right. In an account, interest cannot be allowed on items that are barred by limitation. Interest is but an accessory, and when the principal is barred the accessory fails along with it. (8) A stipulation for payment of interest upon arrears of rent is an ordinary incident of tenancy in India, unless

(1) *Per Escher, M. R.*, in *Glasscock v. Balls*, 24 Q. B. D., 13.

(2) *Subramanian v. Arumachalam*, 12 M. L. J. R., 479 (530). P. C.

(3) *Per Escher, M. R.*, in *Glasscock v. Balls*, 24 Q. B. D., 13 (15).

(4) *Benet v. Shearman* [1898], 2 Ch., 528.

(5) *Ramchandra v. Kuppasawmy*, 3 M. L.

J. R., 262; distinguishing *Pallat v. Krishnan*, 1 I. L. R., 11 Mad., 290; following *Whister v. Forster*, 32 L. J. C. B., 163.

(6) To the same effect, *Sarat Chandra v. Kedarnath*, 2 C. W. N., 286.

(7) *Rayner v. Preston*, 18 Ch. D., 1.

(8) *Dhondiram v. Taba*, I. L. R., 27 Bom., 330.

there is something unusual in the stipulation, and as a rule it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation.⁽¹⁾ Interest as between the transferrer and the transferee is deemed to become due from day to day and to be apportionable accordingly.⁽²⁾

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

367. Analogous Law.—The marginal note appended to the Bill⁽³⁾ shows that this section is adapted from the New York Code. By Hindu Law a verbal grant of immoveable property is good if followed by delivery of possession to the grantee⁽⁴⁾. Indeed, in no case does the Hindu Law appear absolutely to require writing, though as evidence it regards and inculcates writing as of additional force and value.⁽⁵⁾ But under Mahomedan Law seisin is the pre-requisite of a valid gift,⁽⁶⁾ which is invalid unless it is accompanied by delivery of immediate possession,⁽⁷⁾ unless indeed, the gift was for consideration in which case possession is not necessary. But in cases in which possession is a pre-requisite, it cannot be dispensed with even if the deed has been registered.⁽⁸⁾ So by Mahomedan Law an agreement to pay an annuity though signed and registered, has not the effect of a deed in English Law, but requires a valuable consideration to support it.⁽⁹⁾ By English Law, among other things, contract of sale of lands, tenements or hereditaments, or any interest in or concerning them is required to be in writing, otherwise it is not legally enforceable.⁽¹⁰⁾ Formerly writing was unnecessary to a feoffment with livery of seisin,⁽¹¹⁾ and nothing but deeds were then designated writings.⁽¹²⁾ Now, however, writing is required to convey freehold estates and incorporeal property. Contracts for the sale of hereditaments are also required to be in writing, a provision which is stricter than the corresponding rule enacted for this country. Assignments of leases, trusts of hereditaments and bargain and sale for a year are all by the English statute required to be in writing. In this respect it may be generally observed that in ancient times, whether in English, Hindu, or Mahomedan jurisprudence possession was literally regarded as the nine points of the law, and transfer of possession, therefore, symbolized the transfer of ownership and was thus regarded as its essential element. But since the diffusion of learning,⁽¹³⁾ writing has practically superseded the old method of transfer, and in India not only writing but registration has become the necessary mode of conveyance without which no property above a certain value can legally vest in the transferee. On a transfer of property writing now serves two purposes: it affords indelible

(1) *Raj Narain v. Panna*, I.L.R., 30 Cal., 213.

(2) S. 36, *post*.

(3) N. Y. Code, S. 453, 7 Exch., 581.

(4) *Doel Seeb Kristo v. East India Co.*, 6 M. I. A., 267; *Hurriah Chunder v. Rajender*, 18 W. R., 293, Anonymous, 1 I. J. (O. S.), 135.

(5) *Mantena v. Chelkuri*, 1 M. H. C. R., 100; *Palaniappa v. Arumugam*, 2 M. H. C. R., 26; *Criniva v. Vijayammal*, ib., 37; *Krishna v. Rayappa*, 4 M. H. C. R., 98; *Ro kho v. Madho*, 1 N. W. P. C. R., (Ed. 1473, 59; *Hurpurshad v. Sheo Dyal*, 26 W. R., 55 P. C.

(6) *Ahedoonissa v. Ameeroonissa*, 9 W. R.,

557; *Obedur v. Mahomed*, 16 W. R., 88.

(7) *Rosbur v. Enaut Hossein*, 5 W. R., 4 O. A.; *Khajooroonis-a v. Roushan*, I. L. R., 2 Cal., 184 P. C.; *Eusuf v. Collector*, I. L. R., 9 Cal., 138; and cases cited in note under S. 129, *post*.

(8) *Ismal v. Ramji*, I. L. R., 23 Bom., 682.

(9) *Jafar v. Ahmad*, 5 B. H. C. R., 37.

(10) Statute of Frauds, 29 Car. II. C. 3, S. 4.

(11) Glauv. VII., 1 Co., Litt., 9a, 48a.

(12) Co. Litt. 9, 49a, 85a.

(13) In the middle ages very few of even the landed gentry in England were able to sign their own names—3 Hallam's Middle Ages, 329, 2 Black Comm., 305, 306.

record of the transfer, and it secures titles by defining the nature of the interest conveyed. As an immutable memorial of the transaction, writing must necessarily conform to certain statutory requirements to be presently noticed, and but for which the very purpose for which it is required may be defeated.

368. Principle.—The object of writing has been clearly thus explained by an eminent French jurist: "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollections of things past, and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. The agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fixed and immutable law for them. So wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heir and legatees. In like manner are written sentences, decrees, edicts, ordinances, and everything intended to have the effect of title, or of law, etc. The writing preserves unchangeably what is entrusted to it, and expresses the intention of the parties by their own testimony."⁽¹⁾ Generally speaking, whenever the law has prescribed that a transfer shall be made in a particular manner, it cannot be made otherwise. Thus where a transfer can only be made by means of a registered instrument, it cannot be made by filing a petition to the Collector, admitting the transfer, or by an admission recorded in a registered mortgage not being itself the deed of transfer or by causing the mutation of names to be made in favour of the transferee. Such acts may constitute good evidence of the transferor's intention, but they have not any further effect. And while such acts may even constitute a contract to transfer, if the party calls upon the other party to implement it, he must do so in the first Court, for he will not be permitted to set up the plea in appeal.⁽²⁾ But the court will not give effect to an invalid transfer even though its invalidity may not have been the subject of an issue.⁽³⁾ But where the invalidity is not obvious, the party affirming it must prove it, the *onus* of proving a transfer being upon the party who relies upon it,⁽⁴⁾ and the *onus* of establishing its invalidity is then on him who so avers. There can be no valid transfer of ownership, otherwise than under the provisions of the Act.⁽⁵⁾ Thus the mutation of names does not amount to a conveyance and confers no right on the party in whose favour an order is passed.⁽⁶⁾

369. Meaning of Words.—"Made without writing": expressions referring to "writing" according to the General Clauses Act,⁽⁷⁾ "include printing, lithography, photography, and other modes of representing or reproducing words in a visible form." It, of course, includes typewriting which may be regarded as a species of printing.

370. What writing must contain.—Having regard to the object which Law has in view in requiring certain transfers to be in writing, it is easy to understand its provisions as to what a valid deed of transfer must contain. In the

(1) Domat Lois Civiles pt. 1 lin. 3 tit., 6 S. 2.

(2) *Partabi v. Mohamed*, 4 A. L. J. 121; *Immadipattam v. Peria Dorasami*, I. L. R., 24 Mad., 10, P.C.

(3) *Ib.*, p. 384.

(4) *Ib.*, 384.

(5) *Bishan Lal v. Ghaziuddin*, I. L. R., 23 All., 175 (180, 181).

(6) *Bishan Lal v. Ghaziuddin*, I. L. R., 23 All., 175 (180, 181); *Khulroo v. Saraswati*, 5

C. P. L. R., 58, followed in *Act*; *Rukma v. Pancho*, unrep. C. P., No. 495 of 1894; cf. *Williams v. Williams*, L. J., 36 Ch., 419.

(7) Act X of 1897, S. 3 (58); which is obviously taken from the language used in the English Interpretation Act, 1889 (51 & 53 Vict., C. 93), S. 20. This definition does not, however, of its own force apply to this Act, *ib.*, S. 4 (2).

first place, a conveyance must be exhaustive and must embody all the terms which the parties have agreed to, except only those which law attributes to the parties in the absence of an explicit agreement. For it is provided that when the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of the Indian Evidence Act.⁽¹⁾ Actual deeds of transfer, apart from mere memoranda of agreements or contracts, must then clearly and fully set out the contract failing which the whole transaction may become void for uncertainty,⁽²⁾ for the provisions of law in this respect are stringent, and indeed they could not be otherwise, for if parol agreements were permitted to vary a written deed, the mischief which the latter were intended to avert would become only too palpably evident. And the contract must show who are the parties, for otherwise the contract may become inoperative.⁽³⁾ Where the transfer has to be signed and attested by a specified number of witnesses, it must be so signed and attested, failing which the deed will fail of its effect. A transfer need not be contained in a single document, but may be made out on several documents, if they can be connected together without parol evidence.⁽⁴⁾ An instrument written upon paper stamped with an impressed stamp must be written in such a manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument.⁽⁵⁾ No second instrument chargeable with duty should be written upon a piece of stamped paper upon which an instrument chargeable with duty has already been written.⁽⁶⁾ These are, however, directions of the fiscal law, non-compliance with which does not invalidate the document, but renders it liable to the same penalty as if it had been unstamped.⁽⁷⁾

371. A document should not be altered after its execution, except with the consent of the other party. A material alteration without such consent renders the whole document void.⁽⁸⁾ But the rule does not apply to the alteration of a document which is not the foundation of the plaintiff's claim and the source of the defendant's obligation or liability. An acknowledgment by the debtor of his liability being made merely to save limitation is therefore not within the rule.⁽⁹⁾ And even the altered document may be looked at under certain circumstances to discover the real terms of the contract.⁽¹⁰⁾

372. Writing necessary.—All contracts and transfers may, according to this section, be made without writing except where the Legislature has expressly provided for contracts and transfers to be in writing. Writing is

(1) S. 91 (Act I of 1872).

(2) *Ib* S. 93.

(3) *Williams v. Lake*, 2 E. & E., 349; *Rosier v. Miller*, 3 App. Cas., 1124 (1141); *Potter v. Duffield*, L. R., 18 Eq., 4; *Jarrett v. Hunter*, 34 Ch. D., 182.

(4) S. 4, Indian Stamp Act (II of 1899); *Ridgway v. Wharton*, 6 H. L. C., 238; *Studd v. Watson*, 28 Ch. D., 305; *Oliver v. Hunting*, 44 Ch. D., 305; *Pearce v. Gardner* [1897], 1 Q. B., 688.

(5) S. 13, Indian Stamp Act (II of 1899).

(6) *Ib*, S. 14.

(7) *Ib*, S. 15.

(8) *Pigot's case*, 9 Rep., 266, 11 Rep. f. 27-a;

Agricultural Cattle, &c., Co. v. Fitzgerald, 16 Q. B., 432 (446); *Earl of Falmouth v. Roberts*, 9 M. & W., 469; *Gardner v. Walsh*, 24 L. J. Q. B., 285 (224); *Master v. Miller*, 1 S. L. C. (10th Ed.), 777; *Gopi Kishen v. Brindabanchunder*, 13 M. I. A., 37; followed in *Atmaram v. Umedram*, I. L. R., 25 Bom., 616 (621).

(9) *Atmaram v. Umedram*, I. L. R., 25 Bom. 616 (621); following *Gopi Kishen v. Brindabanchunder*, 13 M. I. A., 37.

(10) *Atmaram v. Umedram*, I. L. R., 25 Bom., 616 (621); *Pattison v. Luckley*, L. R., 10 Ex., 330.

required in the following forms of transfers : A mortgage,⁽¹⁾ exchange⁽²⁾ or sale⁽³⁾ of immoveable property of the value of Rs. 100 or upwards : leases from year to year or for any term exceeding one year or reserving a yearly rent;⁽⁴⁾ gifts;⁽⁵⁾ transfer of an actionable claim,⁽⁶⁾ notice of the assignment of an actionable claim⁽⁷⁾; trust of immoveable property ;⁽⁸⁾ and of moveable property except where ownership is transferred to the trustee.⁽⁹⁾ A transfer which must be registered must, of course, be also in writing. It is not necessary that a conveyance be written on paper only, for it may be engraved on metal, stone, or wood, or etched on wax-tablets, or written on parchment or paper which is the more usual course. And the term "writing" is comprehensive enough to include not only any language but pictorial devices as well. Enigmatical or cypher writing is out of the question unless it is accompanied by an intelligible key to decipher it. And inasmuch as writing implies visible signs, letters, and characters recording the ideas, words preserved in a phonograph or other mechanical contrivance do not constitute writing.

Where a dispute was referred to an arbitrator who delivered an award ordering that the parties should transfer one to the other different portions of the property which was in dispute, it was held that the award was not a transfer nor could it dispense with the execution of appropriate deeds of transfer.⁽¹⁰⁾

373. By section 117, leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may declare otherwise, need not be in writing. But under the Indian Registration Act,⁽¹¹⁾ all leases from year to year, or for any term exceeding one year, or reserving a yearly rent require registration save and except only those exempted by the Local Government to the extent and in the manner therein prescribed. All transfers, except those enumerated above and where writing is necessary, may, of course, be oral. A will and a partition⁽¹²⁾ requires no writing.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan, or Buddhist),⁽¹³⁾ so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

(1) S. 59, *post*.

(2) S. 118, *post*.

(3) S. 54, *post*.

(4) S. 107, *post*.

(5) S. 122, *post*.

(6) S. 130, *post*.

(7) S. 131.

(8) S. 5, Trusts Act (II of 1882).

(9) *Ib.*, S. 5, para 2.

(10) *Talewar Singh v. Bahori*, I. L. R., 26

All., 497.

(11) S. 17 (d), Act XVI of 1908.

(12) *P. Chockalingam v. Maung Ni*, 6 L. B. R., 170.

(13) The words enclosed within brackets did not exist in the Bill as settled by the Law Commissioners in 1879 and were subsequently added to save the rules of Hindu, Muhammadan, and Buddhist laws.

374. Analogous Law.—The rule here propounded is one of universal application (§ 375) and is thus enunciated in Coke upon Littleton: "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void; because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void.⁽¹⁾ But if the condition be such that the feoffee shall not alien to such an one, naming his name, or to any of his heirs, or of the issues of such an one, etc., or the like, which conditions do not take away all power of alienation from the feoffee, etc., then such condition is good."⁽²⁾ This clause enunciates an exception to the rule previously laid down. The rule is founded on a consideration of repugnancy to the prior transfer, the exception being dictated by policy. Just as a general restraint of marriage was always held to be bad, but a restraint of marriage to a particular individual was held to be good, so in the same way, although a restraint of alienation in general was decided to be bad, it seems to have been thought that a restraint of alienation to one individual or his issue was not bad.⁽³⁾

375. The section in the Bill cited two English precedents⁽⁴⁾ for its authority. In the first of those cases, it has been laid down by Malins, V. C., that one could not give an annuity with a provision for its going over in case of alienation,⁽⁴⁾ and in support, the learned Judge quoted the opinion of Lord Brougham who said: "If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee and create a new interest in another. There is no gift over in the present case, which is that of a naked prohibition, not guarded by any clause of forfeiture."⁽⁵⁾ He had previously observed: "Where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it as to create in the donee a life-estate which he may not alien. Although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done . . . and upon the happening of the event or the doing of the act a new and distinct estate accrues to a different individual." And so in another case⁽⁶⁾ where a gift made by the testator to his son was made on condition that if he attempted to dispose of the principal of the Bank Stock given to him and his heirs, it was laid down as a rule long established, that where there is a gift, with a condition inconsistent with and repugnant to such gift, the condition was wholly void. But the transfer should have been made *absolutely*, otherwise the rule will not apply. But once a testator makes an absolute gift by will to an individual, he cannot take it away in a subsequent part of the will, unless he uses clear and distinct language to that effect. Thus where a testatrix gave a sum of money to be laid out by the trustees of her will in the purchase of a Government annuity in the name of and for the benefit of her grandson for the term of his natural life, and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of her residuary estate, and the trustees

(1) Co. Litt., S. 360.

(2) *Id.*, S. 361.

(3) *Daniel v. Ubley Jones*, 137; *Doe v. Pearson*, 6 East., 173; *Attwater v. Attwater*, 18 Beav., 830.

(4) *Halton v. May*, 8 Ch D., 148; *Hunt-Poulston v. Foulston*, *ib.*, 285.

(5) *Woodmeston v. Walker*, Russ. & My., 197 (204).

(6) *Bradley v. Peizoto*, 3 Ves., 324.

purchased an annuity in the name, and payable during the life, of the annuitant which he contracted to dispose of, it was held that the annuitant, being absolutely entitled to the annuity, had the power of disposition: "No doubt there was an intention to prevent the annuitant from selling the annuity, and also an attempt to make the fund form part of the residuary estate, but there being a previous absolute gift, the latter intention is inconsistent with the gift itself. The testatrix directed the trustees to purchase the annuity in the name of the annuitant, and that they have done; and the attempt to fasten a trust upon him fails. The trust created by the testatrix was at an end as soon as the trustees discharged the duty of purchasing the annuity in the name of the annuitant."⁽¹⁾ It will thus be seen that the section is a mere paraphrase of these cases, and the two exceptions made in favour of a lessor and a person making a marriage-settlement are also in perfect harmony with the English law. For it has been laid down that in a gift to a tenant for life, until a certain event should happen, with a proviso that it shall cease on the happening of a particular event, the restriction is effectual.⁽²⁾

376. Although the section, as such, does not apply to Hindus and Muham-

Rule universally applied.

madans,⁽³⁾ its principles do not conflict with their laws and have been equally applied both to Hindus⁽⁴⁾ and Muham-madans⁽⁵⁾; and being a rule founded on equity, the section itself has been applied to cases arising before the Act and to those not governed by the Act, as those arising out of transaction before its enactment⁽⁶⁾ or in a Province to which it has not been yet extended.⁽⁷⁾ And so it has been observed by the Privy Council, who said: "It is, therefore, almost conceded, that no effect can be given to the last sentence in the second clause, which denies to the sons and other remoter descendants the power of alienation, and seeks to withdraw the property from liability to their debts, even though incurred in carrying on the trade authorized, if not enjoined by the testator. Such provisions are obviously inconsistent with the nature of the interest in the property given, and with the use to be made of it."⁽⁸⁾

The second exception in favour of marriage-settlements is founded on the rule enunciated in the Indian Trusts Act.⁽⁹⁾ Another exception in favour of charities appears to have been overlooked, for the section finds no place in section 17 which however recognizes the exception. This section has not been repealed by implication by sections 10 and 11 of the Bengal Tenancy Act⁽¹⁰⁾ nor is it affected by section 8 of the Married Women's Property Act.⁽¹¹⁾

(1) *Per Hall, V. C.*, in *Hunt-Foulton v. Furber* 3 Ch. D., 285 (287).

(2) *Per Malins, V. C.*, in *Hutton v. May*, 3 Ch. D., 148 (155); explaining his judgment in *Power v. Haque*, L. R., 8 Eq., 262 (in which the contrary view taken by Kindersley, V. C., in *Day v. Day*, 1 Drew 569, was dis-sented from—*ib.*, p. 270.)

(3) S. 2 (2).

(4) *Krishna v. Shanmuga*, 6 M. H. C. R., 248; *Sona'un v. Sreemutti Juggut Soondree*, 8 M. I. A., 66 (76); *Raja Chunder v. Koor Gobindnath* 11 B. L. R., 86. P. C. (12); *Tagore v. T'gore*, 9 B. L. R., 371; *Pudmanun'ia v. Hayes* 1 I. R., 28 Cal., 720 (738), P. C., in which the Privy Council have held that a condition attaching to an estate of inheritance against alienation is void according to Hindu law as repugnant to the nature of the

interest created. *Bhairon v. Parmeshri*, 1 L. R., 7 All., 516; *Mahram v. Ajudhia*, 1 L. R., 8 All., 452; *Anantha v. Nagamuthu*, 1 L. R., 4 Mad., 200.

(5) *Nobat Amirudaula v. Nateri*, 6 M. H. C. R., 356; *Kuldip v. Khetrani*, 1 L. R., 25 Cal., 869.

(6) *Parameshri v. Vittappa*, 1 L. R., 26 Mad., 157; *Jagdeo Baksh v. Jwala Prashad* 15 I. C. 244 (246).

(7) *Mt. Bhagwan Dei v. The Secretary of State* (1902), P. L. R., 518.

(8) *Sona'un v. Sreemutti Juggutsoondree*, 8 M. I. A., 66 (76, 77).

(9) SS. 56, 59, Act II of 1882.

(10) Act VIII of 1885. *K. Sri Lal v. Harasi Ghose* 12 O. L. J., 126 (128, 129).

(11) *Mrs. Gordoni v. Venkatesa*, 1 L. R., 30 Mad., 378 (380).

377. Principle.—The principle upon which this and the next seven sections are based is founded on the public policy of allowing free alienation and circulation of property and on the inexpediency of vitiating entire transfers simply because there may happen to be inserted therein a clause repugnant to the free conveyance and circulation of property. Power of alienation is the legal incident of the estate⁽¹⁾ and to restrain it, would be repugnant to the nature of an estate in fee.⁽²⁾ “A right of alienation,” says Dart, “is generally incidental to and inseparable from the beneficial ownership of property.” It should be noted that this section invalidates a condition *absolutely* restraining transfers. There may be, and are cases where even limited and temporary transfers are subjected to certain regulations. But in the present section attention is confined only to those cases of alienations which are made subject to a limitation absolutely restraining the alienee from parting with his interest in the property. Thus if *A* transfers his property to *B* and imposes a condition agreed to by *B* that he would not alienate it, the condition is void and *B* would take absolutely.⁽³⁾ A restraint on alienation qualified as to time may be valid. A conditional limitation upon alienation of a contingent interest before it vests is good,⁽⁴⁾ but a conditional limitation upon alienation limited in time is bad when attached to a vested interest.⁽⁵⁾ The provisions of this section only relate, of course, to transfers made by act of parties and not to sales, as for example, under the Indian Companies Act.⁽⁶⁾ It is clear law in India as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum* as a sale under execution.⁽⁷⁾

378. What constitutes an Absolute Restraint.—The question whether a condition or limitation has the effect of restraining a given transfer absolutely so as to call in the aid of the rule enunciated in the section is one of intention which has to be primarily gathered from the nature of the document and the expressed intention of the transferor, which, again, in case of doubt may have to be construed in the light of the recognized canons of construction, which are the integral part of every system of jurisprudence. And in judging of the validity of the restraint, the court not only sees whether it is absolute but also whether the right to cancel the transfer is based upon some reason or upon a purely capricious exercise of the transferor's will, in the effectuation of which he has no conceivable interest. Hence it was laid down by the Privy Council in an appeal from Lower Canada that where a testator devised and bequeathed his moveable and immovable property in specified portions to his children, and directed that they should not in any manner alienate the immovables for twenty years from his death, it was held that such a restriction was invalid both by the old law of France, as by the general principles of jurisprudence.⁽⁸⁾ Such a restriction, depending on a condition subsequent would, even if there had been a gift over, be invalid.⁽⁹⁾ An absolute prohibition against sale or alienation is void, placing as it does unnecessary

(1) *Venkatramanna v. Bramanna*, 4 M.H. C.R., 345.

(2) *Rosher v. Rosher*, 26 Ch. D., 801. See also *Krishna v. Shannmuga*, 6 M.H.C.R. at p. 255; *Renaud v. Guillet*, L.R., 2 P.C., 4; *Dart's V. & P.* (6th ed.), 22.

(3) *Amiruddaula v. Nateri*, 6 M.H.C.R., 356.

(4) *Chamaru v. Sona*, 14 O.L.J., 303 (306).

(5) *Ib.*, p. 307.

(6) *Madhub v. Narattam*, I.L.R., 17 Cal.,

826; In the matter of the *West Hopetown Tea Co., Ltd.*, 1 L.R., 12 All., 192.

(7) *Golak Nath v. Mathura*, I.L.R., 20 Cal., 273

(8) *Renaud v. Tourangean*, L.R., 2 P.C., 4 (18).

(9) *Holmes v. Godson*, 8 D.M. & G., 152; *Saunders v. Vantier*, Cr. & Ph., 241; *Doe d. Mitchinson v. Carter*, 8 T.R., 57 and 300. Ex parte *Dickson's Trusts*, 1 Sim. (N.S.), 37; *Egerton v. Earl of Brownlow*, 4 H.L.O., 1.

fetters upon the free disposition of property. But a prohibition coupled with a beneficial condition, as where the donor says: "If you sell, you shall give me the first offer," or "You shall not alienate so as to destroy the rights of your son" would be perfectly valid, provided of course, that the form necessary to effectuate the limitation is observed.⁽¹⁾ On this principle, subject to the limitations to be presently discussed, the right of pre-emption reserved by the transferrer, in case of the sale by the transferee,⁽²⁾ or stipulation that the purchaser of a part of a land laid out upon a building scheme shall not authorize other purchasers to use the rest of the land in violation of the building scheme is perfectly justifiable,⁽³⁾ and would bind all subsequent purchasers with notice, "for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."⁽⁴⁾ Such a covenant is not obnoxious to the rule against perpetuities.⁽⁵⁾

379. On a similar principle an agreement to retain a courtyard undivided for the convenience of the adjacent dwellings is intelligible.⁽⁶⁾ Similarly, where a Hindu widow executed an agreement in respect of her husband's property to her husband's cousins, by which she agreed not to lease the property without obtaining their signatures, adding, that if the document be not signed and consented to by both the parties, it shall be null and void; it was held that the agreement was valid, there being nothing in law to render the provision invalid.⁽⁷⁾ So again, where a house conveyed to the transferee, subject to a covenant on his part not to use it for any purpose other than a private residence, and the transferee conveyed it to another who converted it into a boarding house, the covenant not to use the house for any other purposes was held not repugnant to the nature of an estate, and might be enforced by an injunction.⁽⁸⁾ So the settlement of an annuity with the direction that it should from time to time be paid to *himself only*, and that a receipt under his own signature and no other shall be a sufficient discharge, was construed to point to the intention on the part of the testator that the annuity should cease if it is alienated, and it was held to have ceased on the bankruptcy of the annuitant.⁽⁹⁾ A similar intention may be gathered from the direction to pay a sum of money to an individual named, *but not to his assigns*, for his natural life for his *sole* use, with a limitation over if the devisee should alienate.⁽¹⁰⁾ An attempt to vest in a person an interest which shall adhere to him in spite of his own voluntary acts of alienation, is no less nugatory and unavailing than is the endeavour to create an interest which shall be inalienable, except in the case of married women under coverture who may be restrained from anticipation.⁽¹¹⁾

380. A condition in absolute restraint of alienation is none the less absolute because its operation is limited to a particular time, *e.g.*,
Limited in time. to the life of another living person. A testator devised an estate to his son in fee, providing that if the son, his heirs or devisees should desire

(1) *Kristna v. Shanmuga*, 6 M. H. C. R., 248 (256).

(2) *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D., 562.

(3) *Mackenzie v. Childers*, 43 Ch. D., 265 (273).

(4) Lord Cottenham in *Tulk v. Moxhay*, 2 Ph., 778; cited *per* Kay, J., in *Mackenzie v. Childers*, 43 Ch. D., 265 (279).

(5) *Coles v. Sims*, 5 D. M. & G., 1.

(6) *Gopnlacharya v. Keshav*, (1876), B. P. J., 244; *Ramalinga v. Virupakshi*, I. L. R., 7 Bom., 538 (541); *Western v. Macdermot*,

L. R., 6 Ch., A., 72; *Maclean v. Mackay*, L. R., 5 P. C., 327; Sudg., 596.

(7) *Kuldip v. Khetrain*, I. L. R., 25 Cal., 869.

(8) *Hobson v. Tulloch*, [1898], 1 Ch., 424.

(9) *Donmelt v. Bedford*, 3 Ves., 149.

(10) *Cooper v. Wyatt*, 5 Mad., 482. (The bankruptcy of the devisee was held to determine the interest, considering that the expressions of the testator denoted that the interest was to cease when the property could be no longer personally enjoyed by him).

(11) 2 Jarman on Wills (4th Ed.), 97, 88.

to sell the estate during the lifetime of the testator's wife, she should have the option to purchase it at a fixed price named which was one-fifth of the real purchasing value of the estate at the date of the will and at the time of the testator's death. It was held that the prohibition to sell at a fixed price much below its real value, during a given period, was equivalent to an absolute prohibition, and as such void.⁽¹⁾ And the result would be no different if the transferrer provide that if the transferee alien he shall pay £10 to the transferrer, for such a condition if permitted may have the effect of evading the rule by fixing the fine as would effectually prohibit all alienation.⁽²⁾ For the same reason a restraint which, though apparently not absolute, has in reality that effect, would be regarded as equally repugnant. Thus a lease for successive terms of sixty years was held to be a sale within the condition.⁽³⁾ The question really is not how the transfer was designated, but what was really its effect, the true test being whether the condition takes away substantially the whole power of alienation: it is a question of substance and not of mere form.⁽⁴⁾ If the condition deprives the transferee of the power of alienation, it is void, but if it only so restrains it that in effect he still has the power, it is valid.⁽⁵⁾

381. But in India as regards pre-emption the contrary view has often

Covenant for pre-emption.

been maintained; a covenant for pre-emption being regarded as a covenant of only a personal character, which is valid only if it is limited to any specific period, it being otherwise void for remoteness. So in one case it was said: "If we hold that she (i.e., the widow of the original covenantor), was bound by it, we must then hold that every person to whom the land may pass by inheritance will also be bound by it. But that would be to create a perpetual covenant, as to the disposition of the land, for which we have not been shown any precedent."⁽⁶⁾ Indeed a covenant expressly made to include the representatives and assigns of the covenantor is held to fall into the same category, unless it is limited to a definite period of time within which it is to have effect.⁽⁷⁾ In this view the question of notice becomes immaterial. For, if the covenant does not run with the land, and is void for remoteness, it is immaterial that the purchaser had taken with the notice of the covenant.⁽⁸⁾ But this view has not been accepted in Madras where covenants not to alienate have been held to run with the land.⁽⁹⁾

382. Covenants against Partition.—All property that is the

When void.

subject of ownership is presumed to be partible, but its impartibility may be established from the terms of the original grant, or of the subsequent orders of the ruling power, or by

(1) *Rosher v. Rosher*, 26 Ch. D., 801 (811).

(2) *Billing v. Welch*, L. R., 6 C. P., 88; *Rosher v. Rosher*, 26 Ch. D., 801 (811). Per Fearson, J., dissenting from the contrary held in *Bragg & Tanner's case*, 19 Fac., 1. Sheppard's Touchstone (7th Ed.), 130.

(3) *Large's case*, 2 Leon, 82, 3 Leon, 182. This case is often cited as an authority for holding that a restraint on alienation during a given life is valid. But this is certainly not the *ratio decidendi* of the case where the limitation being by way of contingent remainder was a conditional one, to a person who should answer a particular character at a particular time if he should be then alive and had not aliened. There was no condition in diminution of a prior absolute devise in fee. Cf. *Ferne on Contingent Remainders* (7th Ed.), 272.

(4) *In re Mackay*, L. R., 20 Eq., 186 (189), a part of whose judgment was, however, annulled upon appeal by Pearson, J., in *Rosher v. Rosher*, 26 Ch. D., 801 (817, 818).

(5) *McLean v. McKay*, L. R., 5 P. C., 327 (London and S. W. Ry. Co. v. Gomm, 20 Ch. D., 562, and S. 10, ante).

(6) Per Markby, J., in *Tripura v. Jugger Nath*, 24 W. R., 321; citing *Stoker v. Dean*, 16 Beav., 165.

(7) *Nobin Chandra v. Nabab Ali*, 5 C. W. N. 343; citing *Trevelyan v. Trevelyan*, 53 L. T., 853; *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D., 562.

(8) *Nobin Chandra v. Nabab Ali*, 5 C. W. N., 343.

(9) *Parameshwari v. Vittirappa*, 12 M. L. J. R., 189 (193); following *McEacharn v. Cotton* [1902], A. C., 104.

family custom or by adverse possession.⁽¹⁾ An agreement amongst co-sharers entered into by them against the severance of their interests is in no case binding on the transferees and descendants of the parties, who cannot be prevented from alienating their interests on that account.⁽²⁾ Thus where the members of a joint Hindu family entered into an agreement not to partition their estate, which was to "continue in one joint undivided occupation as at present," it was held that a purchaser at a Sheriff's sale of the share of one of the contracting parties was not bound by the agreement.⁽³⁾ So in another case in which five brothers, who formed a joint Hindu family agreed that neither they "nor their representatives, nor any person should be able to divide the real and personal property belonging to the family into shares," it was held that the general scheme of the arrangement between the brothers being such as could only be binding upon the actual parties to it, it was not binding upon a purchaser from one of the parties and *a fortiori* not upon a purchaser from the heir of one of the parties. It was further laid down that an owner of property cannot, by mere contract during his life, prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee of the heir.⁽⁴⁾ Similarly, in another case, where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years the restriction was ruled to be void as being a condition repugnant to the gift, and the sons were held entitled to partition at once.⁽⁵⁾ On the same principle the Government claiming land dedicated to a family idol, by right of escheat, was held to be at liberty to put an end to the agreement entered into amongst the co-parceners to set it apart for the maintenance of the family idol and never to alienate.⁽⁶⁾ It may then be taken as settled, that as against parties not actually covenanting, a restriction against partition is void and unenforceable.

383. But the question still remains whether the parties themselves are

Effect of agreement inter partes

bound by it. On this point the authorities are by no means unanimous. It has been held in Calcutta that as between the immediate parties to it, the covenant is binding.⁽⁷⁾

But a different note was struck by Phear, J., in a case recently reported,⁽⁸⁾ in which the learned judge said: "It is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance, in this particular case, to say that the joint-property shall remain the joint-property of the joint-family in perpetuity but shall not possess the incidents which the law of the country attaches to property in such condition, namely, that every independent parcener is entitled at any time to his share divided of the rest. No doubt any one member of the family and therefore all might, for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose, by a contract which could be enforced against them

(1) *Semble* in *Vinayak v. Gopal*, 1 L. R., 27 Bom., 353, P. C.

(2) *Mokoondo v. Gonesh*, 1 L. R., 1 Cal., 104; *Venkatramanna v. Brammanna*, 4 M. H. C. R., 345; *Jeebun v. Romanath* 23, W. R., 294; *Abu Muhammad v. Kanif Fizza*, 1 L. R., 28 All., 185. *Chandar Shekhar v. Kundan Lal*, 1 L. R., 31 All., 3.

(3) *Anand v. Pran Kristo*, 3 B. L. R. (O. C.), 14.

(4) *Rajender v. Sham Chund*, 1 L. R., 6

Cal., 106; following *Anath Nath v. Mackintosh*, 8 B. L. R., 60.

(5) *Mokoondo v. Gonesh*, 1 L. R., 1 Cal., 104.

(6) *Mallan v. Purushothama*, 1 L. R., 12 Mad., 287.

(7) *Ramdhun v. Anund*, 2 Hyde, 93; *Rajender v. Sham Chund*, 1 L. R., 6 Cal., 106.

(8) *Radhanath v. Tarrucknath*, 3 C.W.N., 126 (128). The case was decided in 1874.

personally.”⁽¹⁾ The Bombay High Court has similarly held that an agreement between co-parceners never to divide certain property is invalid as tending to create a perpetuity,⁽²⁾ and the same view has been taken in Allahabad⁽³⁾ and Madras where the introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is the essence of the grant.⁽⁴⁾ So where parties to a division agree that the property of any one of the parties to the agreement of their heirs dying issueless, should not be sold or transferred as a gift, but should on his death be divided by the other shareholders, and where subsequently the property was sold in contravention of this agreement and a party to the original agreement sued to recover, it was held that the condition was null and void and the transferee could not be molested.⁽⁵⁾ A recent decision of the Privy Council tends to the same conclusion.⁽⁶⁾ Such cases are, of course, widely different to those personal grants in which the grantor is at liberty to reserve such interest for himself as he pleases. He may even stipulate that the gift shall be heritable and descendible to the natural heirs of the grantee, but that should the latter die without issue then the property should revert to the grantor.⁽⁷⁾

384. The question whether a condition or limitation has the effect of restraining a transfer *absolutely* is generally one of intention which has to be principally gathered from the nature of the document and the expressions used therein, which in case of doubt may have to be construed in the light of the recognized canons of construction, which have become the integral part of every system of jurisprudence. These rules will be self-evident in the ensuing discussion in which the illustrative cases are grouped according to the nature of the conditions found inserted in cases of (i) Grants; (ii) Sale; (iii) Mortgage; (iv) Lease; (v) Involuntary alienations; (vi) Married Women and (vii) Charities—after which cases where alienations have been held to be good, will be discussed.

385. Grants.—A grant of any interest in land, whether limited or unlimited would be subject to this rule. But then it must be the grant of land and not merely of its profits. The adopted son of a Hindu widow granted to her for her maintenance, the usufruct of certain land, she being expressly warned by the terms of the grant “not to mortgage, make a gift of, sell or assign the land in any way to any person.” Her judgement-creditor sought to attach the land, but his application was rejected on the ground that what was granted to the widow was the usufruct and no interest in the *corpus* which, therefore, could not be attached.⁽⁸⁾ A will containing clear words of inheritance, but

(1) *Radhanath v. Terrucknath*, 3 C.W. N., 126 (128).

(2) *Ramalinga v. Virupakshi*, I. L. R., 7 Bom., 538; citing *Rajender v. Sham Chund*, I. L. R., 6 Cal., 106; *Anantha v. Nagamuthu* I. L. R., 4 Mad., 200; *Ashutosh v. Doorga*, I. L. R. 5 Cal., 438, P. C.; *Chimmarao v. Rambhau*, 4 Bom. L. R., 508; *Chandar Shekhar v. Kundan Lal*, I. L. R., 31 All., 3.

(3) *Chandar Shekhar v. Kundan Lal*, I.L. R., 31 All., 3.

(4) *Anantha v. Nagamuthu*, I. L. R., 4 Mad., 200 (202); *Venkataramanna v. Brammanna*, 4 M. H. C. R., 345; *Promotho v.*

Radlika, 14 B. L. R., 175; *Parameshwri v. Vuttappa*, 12 M. L. J. R., 189 (193); *McEac-harn v. Cotton*, [1902], A. C., 104.

(5) *Venkataramanna v. Brammanna*, 4 M. H. C. R., 345.

(6) *Padmanund v. Hayes*, I. L. R., 28 Cal., 720 (733), P. C.

(7) *Sham Shivendra v. Maharani Janki koer*, I. L. R., 36 Cal., 811 P. C.

(8) *Dwali v. Apaji*, I. L. R., 10 Bom., 342 (345) distinguished in *Golak Nath v. Mathura Nath*, I L.R., 20 Cal., 273; *Singai Parmanand Seo v. Baji Rao*, 14 C.P.L.R., 114.

containing a clause forbidding alienation, will take effect as if the clause did not exist.⁽¹⁾ So also where a testator left his property to *A* for life with remainders, showing that *A* should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, it was ruled that *A* could not be declared entitled to more than a life-estate. Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid, and that as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.⁽²⁾ The devise of land in the words, "I give after my decease to my son Rambhan and to the sons and grandsons that may hereafter be born to him" has the effect of conferring an absolute estate on the donee, which was not abridged by the following words "as to the property mentioned above which I have given as recited above to my son Rambhan, his wives Manjulabai and Taibai and their lineal sons and grandsons alone shall be entitled to the said property after the death of the said Rambhan. No one else besides these shall be entitled."⁽³⁾ So a gift of land made to Brahmins, cannot, according to Hindu law, be restricted against alienation.⁽⁴⁾ But where in the sale-deed the vendor provided that the vendee should pay him a certain sum annually as *malikana*, and the vendee mortgaged the property to another who refused to pay the *malikana*, it was held that the stipulation in the sale-deed could not be treated as a surplusage, the amount being treated as annual charge upon the property, and that the use of these words (as *malikana*) was intended to reserve and create a perpetual and heritable charge upon the property which was enforced.⁽⁵⁾

386. Gift and Sale.—It has been held that a gift subject to the power of revocation was not repugnant to this section.⁽⁶⁾ In that case *A* had sold their village to *B* whereupon *B* granted *A* some land for his maintenance stipulating that it would be liable to resumption if *A* transferred it. *A*'s transferee sued for a declaration that he was a tenant of the land, but *Banerji, J.* held the plaintiff's assignor's gift to be subject to the power of revocation, and therefore not necessarily repugnant to the provisions of this section. Reference was also made to section 126, but reference to section 6 (*d*) would have been more apposite. Such grants are, necessarily, excluded from the rule. In a grant with condition that it would be null and void on the birth of an heir to the grantor, the condition⁽⁷⁾ was *not* construed as a restraint on alienation on the ground, as observed by their Lordships of Privy Council, that "it may have been added to express the absolute and irrevocable nature of the gift." A grant was made by the father to his daughter demising an estate to her for life, and on her death to her son, should she adopt one, for life, and on the latter's death to his sons and grandsons etc., succession to continue in the male line, and no one was to possess the power to transfer by sale gift or will or otherwise. The grantee adopted a son and gifted the estate to him. It was held that as the grantor had restricted the grantees from alienating the property, the gift by the grantee was void, though it did not entail forfeiture of the

(1) *Kannu Pillay v. Chellathammal*, 10 M.L.J. R., 203.

(2) *Tagore v. Tagore*, 9 B. L. R., 377 (409) P. C.

(3) *Chimanrao v. Rambhan*, 4 B. L. R., 508.

(4) *Anantha v. Nagamuthu*, I. L. R., 4

Mad., 200.

(5) *Churaman v. Balli*, I. L. R., 9 All., 591.

(6) *Makund Prasad v. Rajrup Singh*, 4 A. L. J., 708

(7) *Raja Chundernath v. Kuar Gobindnath*, I. L. R., 11 Cal., 112, P. C.

estate so as to confer on the grantor the right of re-entry.⁽¹⁾ Probably the condition might be justified on the ground stated in section 126, namely, that in the case of a gift it is perfectly competent to the grantor to make it conditional provided that the condition does not depend upon the will of the donor. The latter may, for instance, make a gift subject to the condition that it shall be revoked on the donee transferring it, in which case, the covenant would be enforced as valid under section 126, and therefore not void under this section.⁽²⁾ But where a gift is made postponing its enjoyment for twenty years the latter clause is void.⁽³⁾ So a condition in the compromise that the transferee's shares shall not be sold by auction or transferred in any shape by him is equally void.⁽⁴⁾ Similarly, in another case, where the vendor sued his vendee for damages on account of the latter having broken his agreement by which he had agreed not to collect rents etc., of the share of the village purchased by him, the Court, dismissing the suit, held that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed, the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of this and the next section; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.⁽⁵⁾

387. Restraint upon Grantor.—Similarly, it is clear that if the transferor cannot impose restrictions upon the transferee he cannot do so upon himself. Thus a Hindu owner cannot make a conditional grant of a future interest in property in favour of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint, contrary to the principles of Hindu law, upon his power of alienating his estates discharged of such future interest, is a reason for the invalidity of such a grant.⁽⁶⁾ But where five Hindu brothers agree not to divide their joint property and provide that "none of the parties nor their representatives, nor any person" should be able to divide it on one of the brother's sons selling his share, it was held that the general scheme of the management between the brothers was such as could only be binding upon the actual parties to it. The object of the arrangement was to settle the family property upon trust for the maintenance of the members of the family born and to be born. This could not be done by a gift, and what cannot be done by gift, cannot be done by the intervention of a trust. The owner of property cannot by a mere contract during his life prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee of the heir.⁽⁷⁾ But where according to law an alienation to be valid requires the sanction of a third person, all transfers made without such sanction would not only be voidable but void. Thus, where the trustees of a certain mosque, without obtaining the sanction of the Judge, sold the lands

(1) *Dharmi Kanta v. Siba Sundari*, I. L. R., 35 Cal., 1069.

(2) *Makund v. Rajrup*, 4 A. L. J., 708.

(3) *Mookondolall v. Gonesh*, I. L. R., 1 Cal., 104.

(4) *Bhairon v. Parmeshri*, I. L. R., 7 All., 516.

(5) *Mahram v. Ajudhia*, I. L. R., 8 All.,

452; *Ali Hasan v. Dhiraj*, I. L. R., 4 All., 518; *Allmuddy v. Brahan*, I. L. R., 4 Cal., 140.

(6) *Chandi v. Sidheswari*, I. L. R., 16 Cal., 71, P. C.

(7) *Rajender v. Sham Chand*, I. L. R., 6 Cal., 106; *Abu Mahammad Khan v. Kanis Fizza* (1905), A.W.N., 240.

in dispute, which formed a part of the trust-property, to the plaintiffs in order to raise money to meet the expenses of litigation and the repair of the mosque, it was held that the sale was void, being made without the sanction of the *Kazi*, in other words, the Judge.⁽¹⁾

388. Condition against Alienation by Mortgagor.—It is quite customary in Indian conveyancing for the mortgagor to insert a clause in his mortgage-deed to the effect that the mortgagor will not, pending the mortgage, execute another mortgage or otherwise alienate, or charge the property with another incumbrance. Such a covenant standing by itself does not amount to a mortgage.⁽²⁾ But supposing that it does not, what is its effect upon the rights of the parties and of the subsequent alienee? It has been held that a transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable only in so far as it is in defeasance of the mortgagee's rights. Where in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless he desired its continuance.⁽³⁾ But it was again held by the same High Court that a transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee,⁽⁴⁾ specially if the transfer was made for the *bona fide* purpose of paying off the mortgage,⁽⁵⁾ in which case a condition not to alienate cannot operate to annul it⁽⁶⁾; but the debt must be at once discharged by the transfer.⁽⁷⁾ Now it has been held⁽⁸⁾ that a similar covenant on the part of the alienee is absolutely void, then why should it be otherwise in the case of transferor? The rule thus laid down by the Allahabad High Court has been considerably relaxed, and the Calcutta and Bombay High Courts have expressly held otherwise.

389. In Calcutta it was held that the covenant in the mortgage-bond only created a personal liability between the contractual parties, and any lease made in contravention thereof could not be set aside, but that the lessee could redeem.⁽⁹⁾ So again in Bombay it has been held that a stipulation in the mortgage that the mortgagor only should be entitled to redeem was invalid, and no defence to a suit for redemption by the assignee of the mortgagor.⁽¹⁰⁾ In a Madras case⁽¹¹⁾ the conflicting decisions of the Allahabad and Calcutta High Courts were sought to be reconciled by Turner, C. J., who said: "In *Radha Pershad v. Munohar Das*⁽¹²⁾ it is stated by the learned Chief Justice that such a covenant, *i.e.*, an agreement restrictive of alienation, creates only a personal liability as between the mortgagor and the mortgagee. On the other hand, it was held in *Chunni*

(1) *Shyama Churn v. Abdul Kabir*, 3 C. W.N., 158.

(2) *Gumoo v. Lataful*, I.L.R., 3 Cal., 336. For numerous other similar cases see notes to S. 58, *post*.

(3) *Chunni v. Thakurdas*, I. L. R., 1 All., 126; *Mulchand v. Balgabind*, I.L.R., 1 All., 610; *Lachmi v. Kotesbar*, I. L. R., 2 All., 826.

(4) *Ali Hasan v. Dhirja*, I. L. R., 4 All., 518.

(5) *Ram Saran v. Amrita*, I. L. R., 3 All., 69; and see the commentary under S. 60.

(6) *Dookhechore v. Haji Hidayatoolah* (1866-67). N. W. P. H. C. R., F. B., p. 7.

(7) *Mahomed v. Baneer*, (1869). N. W. P. H. C. R., 135, cited in *Chunni v. Thakurdas*, I. L. R., 1 All., 126 (128), footnote.

(8) *Mehram v. Ajudhia*, I. L. R., 8 All., 452.

(9) *Radha v. Manohar*, I. L. R., 6 Cal., 317.

(10) *Trimbak v. Sakharani*, I. L. R., 16 Bom., 599.

(11) *Venkata v. Kannam*, I. L. R., 5 Mad., 184 (186, 187).

(12) I. L. R., 6 Cal., 319.

v. Thakur Das,⁽¹⁾ that such a condition is operative to the extent and for the purpose contemplated by the parties, and that a transfer of the interests of the mortgagor is voidable in so far as it is in defeasance of the rights of the mortgagee, and the decision accords with what is declared to be the general rule by Mr. Justice Macpherson.⁽²⁾ This decision may be reconciled if it be held, that the condition binds a purchaser for value only when he has notice of it, and that in the one case the purchaser had, and in the other he had not such notice."⁽³⁾ In an appeal to the Privy Council from the Cape of Good Hope, that tribunal had to interpret the operation of the words "the said ground shall never be sold or disposed of to a stranger, but shall continue to remain among the legal heirs," and it was held that the prohibition did not embrace a mortgage before its enforcement by a judicial sale, for it may be, that till then it may be satisfied out of the assets of the mortgagor.⁽⁴⁾

390. Restraint on Alienation by Lessees.—Exception has been made in this section in favour of restraint where it is for the benefit of the lessor or those claiming under him, and which applies equally to all leases including those saved by the Act.⁽⁵⁾ The same right is recognized also in section 108 (c) (1), and section 111 (g) (1). Under these sections the lessor can stipulate to determine the lease in case of alienation by the lessee,⁽⁶⁾ even though the latter may hold it permanently.⁽⁷⁾ Accordingly, it has been held that a covenant in a lease restraining the lessee from alienating his interest "to any body in any manner whatever" must be deemed to be a condition intended for the benefit of the lessor, and, as such, it is valid and not void,⁽⁸⁾ but its violation by the lessee would not entail forfeiture of the term unless there is an express condition to that effect. The contrary view taken in a Calcutta case⁽⁹⁾ that "the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void" under the present section, appears to have been founded upon an assumption that unless the lease contains a clause "giving the lessors a right of entry or providing that the lease shall become void in case of a breach of the covenant against alienation," benefit to the lessor cannot be supposed.⁽¹⁰⁾ But if it were so, why should the lessor have got the clause entered in the lease at all? In a more recent case, the view taken appears to be that the mere insertion of a clause against alienation was valid, but that its violation could be redressed by award of damages, so that a transfer made in contravention of the covenant could not be set aside on that ground.⁽¹¹⁾ Assuming now, that the stipulation against alienation is valid, the real question in such a case then is, whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, in the absence of an express condition providing that on breach of the stipulation against alienation, the lessor may

(1) I. L. R., 1 All., 126.

(2) On mortgagees (6th ed.), p. 126.

(3) *Ib.*, 194.

(4) *Josef v. Mulder* [1903], A. C., 190 (199).

(5) By S. 2 (c) & S. 17, *post*; *Parameshri v. Vittappa*, I. L. R., 26 Mad., 157.

(6) *Vyankatraya v. Shivrani*, I. L. R., 7 Bom., 256.

(7) *Sutbraya v. Krishna*, I. L. R., 6 Mad., 159.

(8) *Parameshri v. Vittappa*, I. L. R., 26 Mad., 157 (160, 161) following *Vyankatraya v. Shivrani*, I. L. R., 7 Bom., 256; dissenting from *Nilmadhav v. Narottam*, I. L. R., 17

Cal., 826.

(9) *Nilmadhav v. Narottam*, I. L. R., 17 Cal., 826, followed in *Netrapal v. Kalyan Das*, I. L. R., 29 All., 400; followed in *Mahananda Roy v. Saratmani*, 14 C. L. J., 585; not followed in *Basarat Ali v. Manirulla*, I. L. R., 36 Cal., 745 (748).

(10) It was expressly so held in *Netrapal v. Kalyan Das*, I. L. R., 28 All., 400; *Mahananda Roy v. Saratmani*, 14 C. L. J., 585 (587); doubted in *Basarat v. Manirulla*, I. L. R., 36 Cal., 745 (748).

(11) *Basarat Ali v. Manirulla*, I. L. R., 36 Cal., 745 (748).

re-enter, or the lease shall become void. On this point the authorities are clear that in the absence of some such express condition there can be no forfeiture of the lease.⁽¹⁾ The lessor may enforce the covenant by suing for damages for its breach and by obtaining an injunction to restrain the lessee, from making an assignment in breach of the same.⁽²⁾ The case would, however, be different where non-transferability is shown to be one of the incidents of the lease in which case ejectment would follow on transfer, a clause for re-entry being immaterial.⁽³⁾

391. A covenant not to alienate runs with the land. But such a covenant should be distinguished from one which dispenses with the express right of re-entry in the event of breach.⁽⁴⁾ But the restriction against alienation does not go further than to prohibit alienation *by the act of the parties themselves*, and has no application to an alienation *by act of law*; as by attachment and sale in execution of a decree. In such a case the lessor may, however, sue for breach of the covenant for damages.⁽⁵⁾ But where the usufruct of land is assigned to a Hindu widow for her maintenance, her interest cannot be attached even in execution of a decree against her.⁽⁶⁾ Although this section does not except it, still it has been held that a grant made to a religious foundation cannot be aliened or incumbered,⁽⁷⁾ except under special circumstances.⁽⁸⁾

392. The effect of these rulings seems to be that where the lessor covenanted expressly against alienation in execution or attachment, the lessee will hold subject to these restrictions, and effect will be given to them, but where an express covenant cannot be proved, the property can be alienated only by operation of law, but not otherwise. It has been so laid down by the Calcutta High Court in which the Judges said: "We take it to be clear law in India, as in England, that a *general* restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution."⁽⁹⁾ This view does not controvert the view taken by the Bombay High Court that where not *general* but explicit prohibition is made against alienation in execution, alienation by operation of law can be effected. Thus, where there was a clause in the lease which forbade "the lessee letting it be sold, or attached and sold in satisfaction of judgment-debts." Sargent, C. J., observed: "We

(1) *Tamaya v. Timapa*, I. L. R., 7 Bom., 262; *Nimalkub v. Narottam*, I. L. R., 17 Cal., 826; *Narayan v. Ali Saiba*, I. L. R., 18 Bom., 603; *Madar Sahib v. Nahaw* *Gujrانشاه*, I. L. R., 21 Bom., 195; *Parameshri v. Vittappa*, I. L. R., 26 Mad., 157; *Mahananda Roy v. Sarotmani*, 14 C. L. J. 585 (587); *Basarat v. Manrullu*, I. L. R., 36 Cal., 745 (748); Woodfall's L. & T. (16th ed.), 192, 328; Foaon L. & T. (2d ed.), 237, 238.

(2) *Mohan v. Sheikh Sadudin*, 7 B. H. C. R. (A. C.), 69; *Tamaya v. Timapa*, I. L. R., 7 Bom., 262 (265); *McEachron v. Cotton* [1902], A. C. 104; *Parameshri v. Vittappa*, I. L. R., 26 Mad., 157.

(3) 8 (i) ante; *Achutha v. Sankaran*, 12 I. C. 1007.

(4) Woodfall's L. & T. (16th ed.), 102, 193; *Shaw v. Coffin*, 14 C. B. N. S., 372; *Crawley v. Price*, L. R., 10 Q. B., 302; *Doe v. Watt*, 8 B. & C., 308; *Madar Sahib v. Nahaw*

Gujrانشاه, I. L. R., 21 Bom., 195 (197).

(5) *Jamzyabin v. Knapa*, I. L. R., 7 Bom., 262; *Subraya v. Krishna*, I. J. R., 6 Mad., 152; *Nil Madhab v. Narottam*, I. L. R., 17 Cal., 826; *Re West Hoptown Tea Co.*, I. L. R., 12 All., 182; *Golak Nath v. Mathura* I. L. R., 20 Cal., 273.

(6) *Diwali v. Apaji*, I. L. R., 10 Bom., 342.

(7) *Krishnarao v. Rangrao*, 4 B. H. C. R., J. (A. C.), 1 (7); *Narayan, v. Chintaman*, I. L. R., 5 Bom., 396; *Shri Ganesh v. Keshavrao*, I. L. R., 15 Bom., 625 (635).

(8) *Shri Ganesh v. Keshavrao*, I. L. R., 15 Bom., 625 (635, 637).

(9) *Golak Nath v. Mathura Nath*, I. L. R., 20 Cal., 273, (278). The quotation is from Davidson's Conveyancing, p. 177, followed in *Parmanand Seo v. Baji Rao*, 14 C. P. L. R., 114.

think that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment-debt, there would be a breach, both according to the letter and spirit of the proviso in the lease."⁽¹⁾ An attempt to alienate does not, however, occasion forfeiture.⁽²⁾ And since such a covenant is an exception to the general rule it will be strictly construed, consequently, a clause against transfer by "Sale" or "Gift" would not be used to interdict a simple mortgage unless such a mortgage by the lessee culminates in a sale, when the voluntary act of the lessee in executing the mortgage would bring the transaction within the operation of the clause.⁽³⁾

393. Married Women.—This clause excepts the case of a married woman and provides that a condition as to restraint upon anticipation (*i. e.*, alienation) of property settled upon a woman can be enforced; or in other words, a woman holding such property cannot alien or charge it. A provision similar to this is also to be found in the Trusts Act,⁽⁴⁾ which was passed in the same year as this Act. The Calcutta and Bombay High Courts are, however, at variance as to whether this clause is not inoperative in view of section 8 of the Married Women's Property Act,⁽⁵⁾ which runs as follows: "If a married woman (whether married before or after the first day of January 1866)⁽⁶⁾ possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and to the extent of her separate property, to recover against her whatever he might have recovered in such suit, had she been unmarried at the date of the contract and continued unmarried at the execution of the decree." Now the Calcutta High Court has held that this section extends to the separate property of a married woman subject to a restraint upon anticipation. And the section under reference merely excepts from its general rule this particular case (*i. e.*, of a married woman). It does not give to a restraint on alienation any greater force than it had before, but merely preserves to it the effect it had previously. It, therefore, leaves the Married Women's Property Act, and the decisions upon it untouched.⁽⁷⁾ With great deference to the authority of the Calcutta High Court, it may be said that the view that the insertion of this clause "does not give any greater force to a restraint on alienation," is a mere assumption, and if it be true that this clause preserves to it the effect it had previously, the same might be said of any other section, or indeed, the whole Act. Now the provisions of the Indian Married Women's Property Act closely resemble the corresponding provisions of the English Act,⁽⁸⁾ a fact admitted by the Judges, and we have several leading English cases against the view maintained by the Calcutta High Court. Thus Watkin, J., said:⁽⁹⁾ "If this form of execution could be maintained...the restraint on anticipation could always be evaded...to allow this sum of money to be attached would in substance be allowing her to anticipate,⁽¹⁰⁾ notwithstanding the restraint of anticipation."⁽¹¹⁾ "The High Courts at Madras and Bombay

(1) *Vyankatraya v. Shivarambhai*, I. L. R., 7 Bom., 256 (262). (This case was decided with reference to S. 10, although the Act had not then been extended to the Bombay Presidency.) See also notes to S. 12, *post*.

(2) *Ib.* at p. 262; In *re Wormald*, 43 Ch. D., 630.

(3) *Narendra v. Banku*, 14 I. C. 293 (294, 295).

(4) See Ss. 56 & 58, para. 2.

(5) Act III of 1874.

(6) See S. 331, Indian Succession Act (X of 1865).

(7) *Hippolite v. Stuart*, I. L. R., 12 Cal., 522 (532, 533).

(8) 45 & 46 Vict., C. 45.

(9) *Chapman v. Biggs*, 11 Q. B. D., 27; *Stanley v. Stanley*, 7 Ch. D., 589; *Roberts v. Watkins*, 46 L.J. Q. B., 552.

(10) *Chapman v. Biggs*, 11 Q. B. D., 27 (29).

(11) *Chapman v. Biggs*, 11 Q. B. D., 27 (30).

have both dissented from the view taken by the Calcutta High Court." As Shephard, J., observed: "The decision has been questioned in Bombay, and, as it appears to me with good reason, I fully concur in the observations of Farran, J., in that case.⁽¹⁾ To enact that a married woman may contract with reference to her property settled to her separate use without power of anticipation, and bind it by the contract, is tantamount to saying that the restraint on the power of anticipation is inoperative, and that cannot have been intended. Moreover, it is inconsistent with the provision of section 10 of the Transfer of Property Act which provides that property may be so settled on a married woman as to prevent her from charging it. Full meaning can be given to section 8 of the Married Women's Property Act without importing to the Legislature an intention to ignore conditions in restraint of alienation which are distinctly recognized in the later Act. I cannot find in the English case anything to support the view which has been taken in Calcutta. The authority is, as far as I can see, all the other way."⁽²⁾ In Bombay, too, although Farran, J., sitting as an Original Court, felt constrained to follow the Calcutta decision, he, at the same time, expressed himself strongly against it. It may then be taken that there is nothing in the Married Women's Property Act to render invalid a restraint on alienation on property settled upon a woman. And this is the law made in favour of married women not being Hindus, Muhammadans, or Buddhists. It will operate during *any* marriage⁽³⁾ during coverture,⁽⁴⁾ and apply equally to persons having either a British or Indian domicile.⁽⁵⁾

394. Charities.—Both under English as well as Indian law property dedicated to religious and charitable uses is exempt from the rule against perpetuities. Such property is, as a rule, inalienable, and where it belongs to an idol and has been improperly alienated, any worshipper may sue to set aside the improper alienation and for removal of the trustee if he has acted in breach of the trust.⁽⁶⁾ But where a grantor creates a secular estate with a religious motive, the grant does not stand on the same footing with a religious endowment, and is not then exempt from the rule as to perpetuities.⁽⁷⁾ Hence where the beneficial interest was given to a donee subject to a religious trust, it was held to be governed by the ordinary Hindu law, and the provision for restraining the alienation was therefore held void, though the alienee was held to take the property subject to the trust.⁽⁸⁾

395. Involuntary Alienations.—A covenant against alienation does not extend to an alienation otherwise than by the act of parties, as for example, by operation of law.⁽⁹⁾ Where, however, the terms of a compromise were embodied in a decree, the legality of a covenant inserted therein was judged by the

(1) *Cursetji v. Rustomji*, I.L.R., 11 Bom., 348.

(2) *In re Mantel and Mantel*, I. L. R., 18 Mad., 19 (20 21), followed in *Goudon (Mrs) v. Venkatesa*, I.L.R., 30 Mad., 378 (380).

(3) *Hawkes v. Hubback*, L. R., 11 Eq., 5; *Tullett v. Armstrong*, 4 M. & C., 377.

(4) *Pike v. Filze Gibbon*, 17 Ch. D., 454; *Smith v. Lucas*, 18 Ch. D., 531; *Peters v. Manuk*, 13 B.L.R., 383. See also *Asfort v. Read*, 22 Q. B. D., 548; approving *Sanger v. Sanger*, 11 Eq., 470; *Stanley v. Stanley*, 7 Ch. D., 589.

(5) *Allmuddy v. Braham*, I. L. R., 3 Cal., 140.

(6) *Per Telang, J.*, in *Sri Ganesh v. Keshavn*, I.L.R., 15 Bom., 625 (636, 637); explaining *Manohlal v. Manchersh*, I. L. R., 1 Bom., 269.

(7) *Anantha v. Naganuthu*, I. L. R., 4 Mad., 200.

(8) *Promotho v. Radlika*, 14 B.L.R., 175.

(9) *Preamble—ante*. *Nil Madhab v. Narayan*, I.L.R., 17 Cal. 826; *Golak Nath v. Mathura Nath*, I.L.R., 20 Cal., 273; *Subbaraya v. Krishna*, I.L.R., 6, Mad 159. *In re Hopetown v. Tea Co.*, I.L.R., 12 All., 192; *Tomoya v. Timapa*, I.L.R., 7 Bom., 262 (265).

test of the rule here formulated. Where, therefore, in a partition-suit the parties entered into a compromise whereby the defendant transferred a house to the plaintiff on condition that though he should be thenceforward its owner, he could not transfer it to another without the defendant's consent, and the plaintiff afterwards sold the house without his consent, it was held that the clause restraining alienation was repugnant to the grant, and was therefore void, though its terms had been embodied in a decree.⁽¹⁾

11. Where on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Restrictions repugnant to interest created.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

396. Analogous Law.—This section closely corresponds to section 125 of the Succession Act which enacts as follows :—

Direction that funds be employed in particular manner following absolute bequest of same to or for benefit of any person.

"125. Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction."

Illustration.

A sum of money is bequeathed towards purchasing a country-residence for A, or to purchase an annuity for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so.

397. Principle.—The difference between this and the last section is this, that, while in the first, the restriction is directed against the transfer of the interest, the restriction in this section is directed against its free enjoyment. A transferee can no more be trammelled with a condition limiting his enjoyment than he can be with a condition restricting his power of alienation, and as the power of alienation is one mode of the enjoyment of rights in property, the terms of this section somewhat overlap those of the last; but cardinal distinctions between the two rules still remain: for while the one invalidates all absolute prohibitions against transfer of property by the transferee of any interest, the other secures full enjoyment of the interest transferred. As the general restraint is inoperative for reasons given under the last section,⁽²⁾ it follows that partial restraint would be equally inoperative. Thus in *Coke upon Littleton*, it is argued: "If a man makes a feoffment in fee upon condition that the feoffee shall not take the profits of the land, this condition is repugnant and against law, and the estate is absolute."⁽³⁾ Upon the same ground a man cannot create a new species of estate, or subject his estate to incidents unknown to law. In *Littleton*⁽⁴⁾ it is argued:—"If a

(1) *Khiali Ram v. Raghunath*, 3 A. L. J. R., 631; *Gayadin v. Syed Mumtaz*, (1907) 10 O.C., 136.

(2) § 289.

(3) Co. Litt., 206.

(4) S. 360.

feoffment is made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is feoffed of land and tene-ments, he has power to alien them to any person by the law, for, if such a condition should be good, then the condition should oust him (*i.e.*, the owner for the time being) of all the power which the law gives him, which should be against reason, and, therefore, such a condition is void."⁽¹⁾

398. Where the main object of the grant is clear, conditions clearly inconsistent with that object cannot be held valid. There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction, and to ask what the parties mean by first saying that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but if no reconciliation is possible, the courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void. The second way of dealing with the question is to see whether the clause so far detracts from the enjoyment conveyed that to uphold it would be contrary to public policy. It is to be noted that, while the preceding section, applies to all transfers this section applies only to transfers in which an interest is *absolutely* created in favour of any person. Thus, then, if the interest created is not absolute as in the case of leases, the provisions of this section, as such, ought not to apply (§ 304). But, on the other hand, where the transfer is absolute and its provisions are applicable, the transferrer cannot be heard to say that the covenant as to the mode of enjoyment was for the benefit of the transferee, of which he is no judge, or that he had made it with his eyes open, or had acted up to it. For as Lord Mansfield said: "It is not for his sake that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff."⁽²⁾

The only exception then made is in favour of the restriction for the benefit of the dominant tenement.

399. There are covenants sometimes entered into by owners of land with the purchasers of other adjoining land, that the former shall not be built upon or planted, or so dealt with as to impose other restrictions upon the mode of enjoyment of land in favour of persons taking no property in such land. Such a contract binds the land in the view of a court of equity, and in cases where the court can properly interfere. Thus, where a person buys with notice of the covenant, although it may not run with the land at law, a specific performance of it will be enforced, or, what amounts to the same thing, the owner of the land will be restrained against committing a breach of the covenant; and it is not open to the objection of creating a perpetuity. But where property is sold subject to restrictive covenants, which are not disclosed to the purchaser, the court cannot decree specific performance with compensation, the reason being that such covenants are incapable of valuation.⁽³⁾

400. Repugnant Restrictions.—Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by

(1) *Kumara v. Kumara*, 2 B. L. R. (O. J.), 11 (25), where in all the earlier cases are cited and commented upon; *Chamaru v. Sona*, 14

C. L. J., 303 (308).

(2) *Holman v. Johnson*, 1 Cowp., 543.

(3) *Rudd v. Lanchelles* [1900], 1 Ch., 815.

a clause that they should not make any division for twenty years, it was held that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.⁽¹⁾ In an earlier case where by a trust-deed it was provided that a dwelling house dedicated to the worship of the deities should not be aliened for twenty years, the court gave effect to the prohibition.⁽²⁾ This case was referred to and commented upon in another case⁽³⁾ in which Wilson, J., said: "That case decided, I think, no more than this, that there was a valid trust for the performance of certain worship in the dwelling-house, and as incidental to that trust, a restraint upon partition or alienation during the period of the trust, and that a mortgagee with notice was bound by it."⁽⁴⁾ The owner of property cannot by a mere contract during his life prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee or the heir, nor can he by gift *inter vivos* or by will, give property absolutely to another, and yet control his mode of his enjoyment in respect of partition or otherwise.⁽⁵⁾ So the agreement whereby the vendee binds himself not to collect rents, or ever demand partition, or that he will not alienate or mortgage it, or otherwise exercise proprietary rights over the share purchased by him is void.⁽⁶⁾ In this case, a co-sharer of a village had transferred to another co-sharer a two-annas share by a deed of sale, the vendee having, by an agreement simultaneously executed, promised never to collect rents of the share, demand its portion or alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that, in the event of the vendee committing any breach of covenant, the sale should be avoided, and the proprietary rights in the share shall re-vest in the vendor. The latter having sued on the covenant, the court held that for the purpose of understanding the transaction both the sale-deed and the contemporaneous agreement should be read together, and that since the agreement disabled the vendee for ever from either alienating or enjoying the interest conveyed to him it was void as being opposed both to public policy and the clear provisions of this section.⁽⁷⁾ The same view was taken in another case, in which the lessor demised his land in permanency to the lessee for the purpose of agriculture, but stipulated with him that should he decide to take to cultivation after twelve years, then the lessee was to vacate it, but the court refused to give effect to the covenant holding it void for remoteness as well as because it contravened section 178 of the Bengal Tenancy Act.⁽⁸⁾ A covenant in the partition-proceedings that if any co-sharer's *sir* fell into another mahal or portion, the former *sir*-holder should give up both the *sir* and its cultivation is unenforceable at law.⁽⁹⁾ So also a condition that the property should be let at a fixed rent for ever, though a stipulation that the rents of the *existing* tenants should not be raised is valid being a reservation in favour of the tenants, and the interest created is not absolute.⁽¹⁰⁾ Since the right of alienation is generally incidental to and

(1) *Bhagbutti v. Bholanath*, 1 I. L. R., 1 Cal., 104.

(2) *Ananth v. A. B. Mackintosh*, 8 B. L. R., 60.

(3) *Rajender v. Sham Chund*, 1 I. L. R., 6 Cal., 106 (116).

(4) *Ib.* p. 117.

(5) *Rajender v. Sham Chund*, 1 I. L. R., 6 Cal., 106 (116).

(6) *Mahram v. Ajudhia*, 1 I. L. R., 8 All., 458.

(7) *Mahram v. Ajudhia*, 1 I. L. R., 8 All., 452 (455); following *Sital v. Luchni*, 1 I. L. R., 10 Cal., 30 P. C. (for reading contempora-

neous deeds together).

(8) *Sanamali v. Ram Kinkar*, 15 I. C. 557; following *London & S. W. Ry. Co. v. Gomen*, 20 Ch. D., 562; *Gosavi v. Rivett Carnac*, 1 I. L. R., 13 Bom., 463; *Ray v. Walker*, (1892), 2 Q. B. 88.

(9) *Indar v. Khushhi* [1886], A. W. N. 88. The exproprietary tenancy of such land is also mandatorily secured by S. 125 of the N. W. P., Land Revenue Act (XIX of 1873); *Hanuman v. Kariman* [1888], A. W. N., 185.

(10) *Tibbits v. Tibbits*, 19 Ves., 656, Lord Eldon's final decision in 1 Jac., 317.

inseparable from the beneficial ownership of property,⁽¹⁾ it follows that if, upon a division of family property, the parties to the division enter into an agreement that the property of any one of the parties to the agreement, on their heirs dying leaving no issue, should not be sold or transferred by way of a gift, but should, on his death, be divided by the other shareholders, the agreement is void, since an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents and the power of disposition being a legal incident of the estate cannot be taken away by any agreement.⁽²⁾ In another case a dispute between two Hindu widows and their reversionary heirs was amicably settled by a compromise-deed under which the properties vested in the reversioners, though the widows were to be paid a certain monthly allowance therefrom; and it was provided that during their life-time the reversioners were to possess no right of transfer of any immoveable property left by their husbands. The reversioner mortgaged one such property and whereupon one of the two widows sued for a declaration of its invalidity as made in contravention of the compromise. The defence was that the restraint upon alienation was void under this and the last section, and the defence was upheld and though the Court declined the declaration asked for, it substituted therefor another declaration safeguarding the plaintiff's right of maintenance by holding it to be unaffected by the defendant's mortgage who was deemed to have taken with notice of the plaintiff's right.⁽³⁾ The question whether the terms of a covenant not to carry on a business go beyond what is reasonably necessary for the protection of the covenantee under the circumstances of the case is a question of law and not of fact.⁽⁴⁾

401. Equitable Extension of the Rule.—The rule here formulated being consonant with justice and equity has been held to be applicable alike to transfers by way of sale as to grants short of absolute transfer, *e.g.*, to mortgages or leases.⁽⁵⁾ The law thus enunciated is consistent with the English cases,⁽³⁾ as well as with the Hindu⁽⁷⁾ and Mahomedan Laws.⁽⁸⁾

402. Hindu Law the same.—It is a sound principle and one from its very nature of general application that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents, and there is nothing in the Hindu law which would permit of a departure from that principle.⁽⁹⁾ A Hindu testator made a will whereby he appointed his wife as his executor and heir, and provided that if a son be born to him, that son should be the owner of the residue, and if no son be born then his wife should be the owner, it was held that the wife acquired under the will an absolute estate in the property bequeathed to her, and which she could herself dispose of by will. The use of the term "heir" in the will was by itself sufficient to convey an absolute estate, which could not be qualified by subsequent declarations.⁽¹⁰⁾ So in a devise where the testator willed his thirteen houses to his

(1) *Dart's V. & P.* (6th Ed.), p. 22.

(2) *Venkataramanna v. Brammanna*, 4 M. H. C. R., 345.

(3) *Chamaru v. Sona Koer*, 14 C. L. J., 303 (308, 309).

(4) *Dowden & Pook, Ltd. v. Pook* [1904], 1 K. B., 45 (50, 51); *Mitchel v. Reynolds*, 1 P. Wms., 161.

(5) *Per Mahmud, J.*, in *Mahram v. Ajudhia*, 1 L. R., 8 All., 452 (459); citing *Anantha v. Nagamuthu*, 1 L. R., 4 Mad., 200;

Bradley v. Peizoto, T.L.C., 908; *Amiruddaula v. Nateri*, 6 M. H. C. R., 356.

(6) *Bradley v. Peizoto*, T. L. C., 908.

(7) See *post*.

(8) *Amiruddaula v. Nateri* 6 M. H. C. R., 356. followed by *Mahmud, J.*, in *Mahram v. Ajudhia*, 1 L. R., 8 All., 452 (459).

(9) *Ib.*, 345.

(10) *Jairam v. Kessowjee*, 4 Bom. L. R., 555.

four sons subject to the condition that none of the houses be disposed of either by division, assignment, transfer or sale, without the written consent⁽¹⁾ of each and every of his four sons, their heirs, assigns, or representatives, it was held that the condition fettering the power of alienation was void.⁽²⁾ A clause postponing partition for twenty years was similarly relieved against.⁽³⁾ But where parties to a dispute, regarding the property of a deceased relative, agreed that, if either of the parties should want to execute a lease jointly or individually, "it would be executed and delivered by mutual consultation of both the parties," and, if "the document be not signed and consented to by both parties, it shall be null and void," it was held that there was nothing in any statute law which rendered such a provision inoperative; neither the last section nor section 15, nor any principle underlying them was applicable to it; it was not an unreasonable provision; there was no absence of equity in the arrangement and effect should be given to it.⁽⁴⁾ Property dedicated to religious purposes cannot be used for any other purpose. Thus, a dedicated *ghat*, to which persons on the point of death were removed, and where certain ceremonies were gone through, could not be used for the purpose of landing goods.⁽⁵⁾

403. Mahomedan Law.—The rule here enacted being based on the general principle of jurisprudence⁽⁶⁾ is equally consistent with Mahomedan Law. According to the Hanafi law, if the intention to give to the donee the entire subject-matter of the gift be clear, subsequent conditions derogating from the donee's right are held null and void.⁽⁷⁾ A Mahomedan husband executed a sale deed of some land in favour of his wife in lieu of her dower with the condition that he would remain in possession of it during his own lifetime during which his wife should not be free to alienate it. The husband then executed another sale in favour of the defendant with possession, and the plaintiff who was the landlord having purchased it in execution of his rent decree against the wife, sued the defendant in ejectment who attacked the validity of the husband's transfer in favour of his wife which, however, the Court upheld observing that though the restriction therein contained was possibly invalid, still it did not invalidate the entire transfer.⁽⁸⁾ There can be no doubt that if the sale was good, then the restriction was clearly void.

404. Negative Covenants.—The second paragraph is an equitable exposition of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct it. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes unless its hand is stayed on the ground of greater inconvenience. The doctrine so considered is an exception to the rules against remoteness, which have long been established as regards easements and charities. This clause confers the same rights as is conferred by section 40, and the

(1) *Venkatramanna v. Brammanna*, 4 M. H. C. R., 345 (348, 349). See also cases under S. 10.

(2) *Shaw v. Fold*, 7 Ch. D., 669.

(3) *Mokond Lall v. Ganesh Chunder*, I. L. R., 1 Cal., 104; see also *Kumara v. Kumara*, 2 B. L. R. (O. C.), 11; *Ramdhona v. Anund Chunder*, 2 Hyd., 97; *Anund v. Pran Kristo*, 3 B. L. R. (O. C.), 14; *Ananth Nath v. Mackintosh*, 8 B. L. R., 60; *Satcowrie v. Gobind*, 2

L. J. (N. S.), 56.

(4) *Kuldip v. Khetrain*, I. L. R., 25 Cal., 869.

(5) *Jaggamoni v. Nilmoni*, I. L. R., 9 Cal., 75.

(6) *Renaud v. Tourangeaw*, L. R. 2 P. O., 4 (18); *Chamaru v. Sonar Koer*, 14 C. L. J., 303 (306).

(7) *Lalijan v. Mahomed*, 9 A. L. J., 798.

(8) *Moula Bux v. Ajahat*, 13 Ind. Cas. 689.

provision is enacted for the convenient enjoyment of adjacent properties. Thus it has been held that a covenant between vendor and purchaser on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice independently of the question, whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.⁽¹⁾ So where the owner of a plot of land sold a part of it to another and covenanted that the land "should never be hereafter sold, but let for the common benefit of both parties and their successors," it was held that the agreement to keep the land open was binding between the parties and their representatives, and that therefore the person who might hold the vendee's land, had the right to enforce the obligation against the person who might hold the vendor's land.⁽²⁾

405. In a leading case on the subject, *Jessel, M. R.*, laid down the doctrine as follows: "Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds."⁽³⁾ "This is an equitable doctrine, establishing an exception to the rules of common law, which did not treat such a covenant as running with the land; and it does not matter whether it proceeds on analogy to a covenant running with the land, or on analogy to an easement. The purchaser took the estate subject to the equitable burden with the qualification that if he acquired the legal estate for value without notice, he was freed from the burden. This qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right; and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." It is here distinctly laid down,—and it is conceived with perfect accuracy,—that the question of notice to the purchaser has nothing whatever to do with the question whether the covenant binds him, except in so far as the absence of notice may enable him to raise the plea of purchase for valuable consideration without notice.⁽⁴⁾ The value of these covenants is not affected by the rule against perpetuities.⁽⁵⁾ Where, however, a restriction on alienation and a covenant for mutual enjoyment are separable, effect may be given to the latter holding the former to be invalid.⁽⁶⁾ It is not necessary that the benefit to the property should be expressly stated in the deed of transfer, for the court will enforce the equity if the object and intention of the parties in making the covenant can be otherwise gathered.⁽⁷⁾ A covenant to repair is not restrictive and could not be enforced against the land. Thus, where land has been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, the assignee of the grantee of the land is not liable, either at law or in equity, on the ground of notice, to the assignee of the grantee of the rent-charge on the covenant to repair. "I think," said *Cotton, L. J.*, "that a mere covenant that land shall be improved does not run with the land within the rule in *Spencer's case*⁽⁸⁾ so as to give the plaintiff a right to sue at law or in equity."⁽⁹⁾ Only restrictive covenants have been invariably enforced. So Lord

(1) *Tulk v. Moxay*, 2 Phill., 774.

(2) *McLean v. McKay*, L. R., 5 P. C., 327.

(3) *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562 (583).

(4) *Dart, V. & P.* (6th Ed.), pp. 863, 864.

(5) *London & S. W. Ry. Co. v. Gomm*, 20 Ch. D. 562.

(6) *McLean v. McKay*, L. R., 5 P. C. 327; following *Tulk v. Moxay*, 2 Phill., 774; *Mann*

v. Stephens, 15 Sim., 377; *Patching v. Dubbins*, Kay, 1.

(7) *Mann v. Stephens*, 15 Sim., 377; *Patching v. Dubbins*, Kay, 1, explained in *McLean v. McKay*, L. R., 5 P. C., 327 (335).

(8) 1 Sm. L. C. (8th Ed.), 89.

(9) *Haywood v. Brunswick Building Society*, 8 Q. B. D., 403 (408).

Cottenham observed: (1) "If an equity is attached to property by the owner no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. This lays down the real principle that an equity attaches to the land. . . . The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going that length." (2) On the same principle (3) a covenant not to use a house as a beer-shop was enforced against a purchaser's tenant from year to year.

406. Relief Discretionary.—Where the owner of land granted leases on condition that the lessees were not to erect a hotel without the consent of himself, his heirs, or assigns, the restriction being required in consequence of the lessor having covenanted with another lessee not to let any land or house for that purpose, the covenant was enforced, as against a purchaser of the leasehold. (4) But where the owner of the waterworks sold a piece of land with a well thereon to the purchaser who covenanted for himself, his heirs and assigns, not to sell the water from the well to the injury of the proprietor of the waterworks, his heirs, executors, administrators, and assigns, (5) Lord Eldon refused a prayer for injunction on the ground that the covenant being infused with words against selling water to the injury of the proprietor, the question was one of fact which would have to be determined each time the covenant was broken, and that an injunction could not therefore be enforced: "Many cases may be supposed, in which the water might be sold without any injury to them; and it is accordingly contended, that the injunction which is the object, ought to go, not to prevent their selling water to the inhabitants of Gasport and Portsmouth, or the Navy, but to prevent their doing so to the injury of the plaintiff's waterworks. Observe the situation of the defendant, upon every application to commit for breach of the injunction, the only mode of giving effect to the decree, a trial must in each instance be directed, to ascertain whether that act, which might be done without injury to the plaintiffs, has been done without injury." (6) But repeated violation of an established right cannot in ordinary cases be adequately met by damages, and in such a case, howsoever inconvenient, the Court will grant an injunction. (7) Similarly, where the vendee of several plots charged with covenants, sells them to different persons, it is seldom that the covenants can be enforced otherwise than by an action for damages. But where this course would lead to positive injustice the restriction would then be specifically enforced. (8) The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the Court, and in exercising that discretion the court of equity will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages

(1) *Tulk v. Moxay*, 4 Phill., 774.

(2) *Per Cotton, L.J.*, in *Haywood v. Brunswick Building Society*, 8 Q. B. D., 403 (409). See also *Wilson v. Hart*, 1 Ch., 463; *Cox v. Bishop*, 26 L. J. (Ch.), 389.

(3) *Wilson v. Hart*, 1 Ch., 463; *Cooke v. Chilcott*, 3 Ch. D., 694, was overruled by the judgment in the case: *Haywood v. Brunswick Building Society*, 8 Q. B. D., 403 (408). (In *Cooke v. Chilcott*, vendee had agreed to construct a pump and reservoir on the land, and an injunction was granted restraining

him from allowing the work to remain unperformed).

(4) *Jay v. Richardson*, 31 L. J. N. S., 398.

(5) *Collins v. Plumb*, 16 Ves., 454 (460, 461).

(6) *Stevenson v. Lambard*, 2 East, 575; *Curtis v. Spilly*, 1 Bing. N.C. 756; *West London Ry. Co. v. L. and N. W. Ry. Co.* 11 C. B., 354; *Badeley v. Bickers*, 4 E. & B., 71.

(7) *Apai v. Apa*, 1 L. R., 26 Bom., 735.

(8) *Per Lord Cairns, L. C.*, in *Doherty v. Allman*, L. R., 3 App. Cas., 709 (720).

must be sought in successive suits, or could be obtained once for all. One circumstance in such cases which always weighs with Courts is, whether the benefit conferred on one party would counterbalance the inconvenience and injury occasioned by the enforcement of the covenant. And if the injury complained of can be adequately atoned for by the payment of damages, the Courts as a rule do not decree specific performance.⁽¹⁾ Thus, where in a long lease for 999 years the lessee covenanted that he, his executors, etc., will, "during the term hereby granted, shall preserve the said demised premises in good and sufficient order, repair, and condition," and where the premises hitherto used as corn-stores, and latterly as artillery barracks for married soldiers, having fallen into disrepair, the lessee was proceeding to rebuild them with a view to convert them into dwelling-houses, on a suit for injunction against the lessee, the Court held that "this was not the case of enforcing a negative covenant, where the words of contract were clear and indisputable: that the waste alleged was meliorating waste, and that, under the circumstances, the Court below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction."⁽²⁾

407. Indeed, as remarked by the Privy Council in exercising the discretion given to the Court in these matters, it should exercise it in deciding a case on its merits, without regarding strictly the precise terms of the pleadings.⁽³⁾ Hence, where the circumstances have so changed by time that it is unjust and unreasonable to enforce a covenant it will not be enforced.⁽⁴⁾

12. Where property is transferred subject to a condition or limitation making any interest therein reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

408. **Analogous Law.**—This section enunciates what is an exception to the general rule enacted in sections 31 and 32 which provide that an interest may be created with the condition superadded that it shall cease to exist on the happening of an uncertain event. In this respect the section departs from the English rule which sanctions such grants and indeed, which is a common forfeiture clause in English conveyances.⁽⁵⁾ But a man cannot settle property on himself determinable on bankruptcy. A settlement so made is void, it being fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors.⁽⁶⁾ A similar view was taken in a case decided on

(1) *Per* Lord Cairns, L. C., in *Doherty v. Allman*, L. R., 3 App. Cas., 709 (720).

(2) *Doherty v. Allman*, L. R., 3 App. Cas., 709.

(3) *Per* Sir Montague E. Smith in *McLean v. Mc Kay*, L. R., 5 P. C., 327 (337).

(4) *The Duke of Bedford v. The Trustees of the British Museum* 2 My. & K., 552; *Bailey v. Stephens*, 12 C. B. (N. S.), 91; *Clayton v. Corby*, 5 Q. B., 415; *Doherty v. Allman*, 3

App. Cas. 709 (732).

(5) *Brandon v. Robinson*, 18 Ves., 429; *Halton v. May*, 3 Ch. D., 148 (152); *In re Machu*, 21 Ch. D., 838; *In re Bedson's Trusts*, 28 Ch. D., 523; *Metcalfe v. Metcalfe*, 43 Ch. D., 633 O. A. [1891], 1 Ch., 1. *Distinguishing*, *White v. Chitty*, L. R., Eq., 372; *Lloyd v. Lloyd*, L. R., 2 Eq., 722.

(6) *Ib.*, Illus. (g).

the original side of the Bombay High Court, but in which this distinction was overlooked.⁽¹⁾

The law is, however, otherwise under the Indian Succession Act⁽²⁾ where, if "an estate is bequeathed to A, until he shall take advantage of the Act for the relief of insolvent debtors, and after that event to B, B's interest in the bequest is declared to be contingent until A takes advantage of the Act."⁽²⁾

409. "A settlement," said North, J., "by a man of his own property upon himself for life, with a clause forfeiting his interest in the event of alienation, or attempted alienation, has never, so far as I know, been defeated in favour of a particular alienee; it has only been defeated in favour of the settler's creditors generally, on the ground that it would be a fraud on the bankrupt law."⁽³⁾ It would thus appear that, although the same result is attained in English law, the English rule is considerably narrower than that enacted in the section which renders the condition as *ab initio* void. In England much depends upon the intention of the settler at the time of the alienation. If it can be reasonably inferred that the settlement was made with a view to future bankruptcy, it is void, but not otherwise.⁽⁴⁾ In India apart from intention the same result ensues. And apart from the insolvency of the transferee a condition in a grant terminable on the grantee "endeavouring to transfer or dispose of the same" is also repugnant to the nature of the interest created rendering the condition ineffectual and as non-existent. An interest created for the benefit of the person, as through the intervention of a trustee, is equally within the rule.

410. Principle.—This section lays down an exception to the general principle enunciated in section 31, which enacts in favour of a transfer "with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen." It is manifestly unjust that the transferee should enjoy and possess all the *indicia* of absolute dominion over property, and yet be deprived of the right of alienation incidental to such ownership; and it is equally unjust that creditors, who may have made advances on the strength of the property, should be deprived of its security on account of a clause in the transfer, which none but the transferor and transferee may know anything about. Under this section, if the transfer is subject to such a covenant, it will be ignored and the property will pass to the assignee in insolvency or the transferee in case of voluntary assignment.

411. Meaning of Words:—"Interest . . . reserved or given to, or for the benefit of any person:" "means whether the interest is conveyed directly to, or in trust for any person;" "To cease on his becoming insolvent:" "A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them."⁽⁵⁾ And insolvency is the estate of one who has not property sufficient for the full payment of his debts. In English law, an insolvent as distinguished from a bankrupt, was an insolvent, who was not

(1) *Hormusji v. Dadabhoy*, I.L.R., 20 Bom. 310. (The case was decided on 30th September, 1895, after the Act had been extended to the Bombay Presidency on 1st January 1893.)

(2) Act X of 1865, S. 107, Illus. (g).*

(3) *Detmold v. Detmold*, 40 Ch. D., 385 (1887). See also *Brooke v. Pearson*, 27 Beav.,

181; *Knight v. Browne*, 9 W.R. (Eng.), 515; *Wilson v. Greenwood*, 1 Swanst., 471, 481 *Higginbotham v. Holme*, 19 Ves., 88.

(4) *Higginbotham v. Holme*, 19 Ves. 88.

(5) S. 96, Indian Contract Act (IX of 1872). See also S. 4, Provincial Insolvency Act (III of 1907).

a trader; for originally only a trader could be made bankrupt, in the sense of obtaining an absolute discharge from his debts, while the future estate of an insolvent remained liable for his debts even after his discharge. No such distinction is to be found in the Indian law which has sanctioned the same designation to both classes of persons. "*Or endeavouring to transfer.*" Mere opening of negotiations is not an endeavour.⁽¹⁾

412. Transfer revocable on Bankruptcy.—It has been before mentioned that a conditional grant defeasible on the bankruptcy of the transferee is valid in England. But in practice this statement would have to be differently stated. Both in England ⁽²⁾ as well as in this country ⁽³⁾ a testamentary bequest to a person defeasible on his becoming insolvent is valid. But in a transfer *inter vivos* whilst the section declares an absolute rule making the condition as to forfeiture on insolvency or attempted alienation void, the English precedents do not reprobate such a condition as *per se* illegal, but regard it as a factor in determining the validity of a transfer. Hence, if a property belonging to the beneficiary has been settled by him upon himself on condition that his interest therein is to terminate upon his bankruptcy or voluntary or involuntary alienation, law regards the settlement as fraudulent and as such void against his assignee.⁽⁴⁾ And the same suspicion would attach to a transfer made by a man in favour of his sons. So where the father bequeathed to his son a leasehold estate, and declared it to be "entirely free from any claim, charge, demand, or lien of my son's creditors, or any or either of them, or of any person claiming under him (the son), either in law or in equity," and the son became bankrupt soon after the father's death, it was held that the assignees were entitled to the estate.⁽⁵⁾ The provisions of the Bankruptcy Act in England further render transfers invalid which are calculated to, and have the effect of, defeating the claims of the creditors,⁽⁶⁾ and the same rule is now enacted by the Indian Insolvency Acts.⁽⁷⁾ A provision in a deed of partnership, that in the event of the bankruptcy or in insolvency of a partner, his share in mining lease, forming part of the partnership property shall go over to his co-partners, is void, as being in fraud of the bankruptcy laws.⁽⁸⁾ Similarly, a provision in articles of partnership, that on bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation and payable by instalments in course of years is void.⁽⁹⁾ But where property has been settled on trust out of an annuity payable to a person on his own receipt, it would cease on bankruptcy of the annuitant.⁽¹⁰⁾ A similar view has been taken in other cases decided with reference to the provisions of the Bankruptcy laws. Thus, in 1858, a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a sum of £ 1,000. The trusts of the deed were a life-estate to himself determinable on bankruptcy, then a life-estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settler. In 1873, he, for the first time, engaged in trade. In

(1) *Graham v. Lee*, 22 Beav. 388; *Jones v. Wyse*, 2 Keen 285.

(2) § 312, *ante*.

(3) S. 107 (g), Indian Succession Act (X of 1865).

(4) *Foley v. Burnell*, 1 Br. C. C. 274, explained by Lord Eldon in *Brandon v. Robinson*, 18 Ves 429 (434).

(5) *Harvey v. Palmer*, 15 Jur. 982.

(6) See Comm. on s. 53, *post*.

(7) For Presidency towns see 11 & 12 Vict. c. 21. For the rest see S. 4 (b). Provincial Insolvency Act (III of 1907).

(8) *Whitmore v. Mason*, 31 L. J. Ch. 433.

(9) *Wilson v. Greenwood*, 1 Swans, 471.

(10) *Dommett v. Bedford*, 3 Ves., 149. But otherwise for his personal support *Graves v. Dolphin*, 5 L.J. Ch. 46; cf. *Re v. Robinson*, Wightw., 386; *Godden v. Crowhurst*, 11 L. J. (N. S.), Ch. 145.

1875 he was adjudicated a bankrupt. The trustee in the bankruptcy having applied to the Court for an order declaring the settlement void as against the creditors, the Court declared the settlement-deed void, Bacon, C. J., observing, "that the settlement was plainly fraudulent, for the law says, that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors."⁽¹⁾ A post nuptial settlement made by the husband of property to which he was entitled *jure mariti*, containing a clause to the effect that his beneficial interest should continue only until he should become a bankrupt, or assign or attempt, or affect to assign, is not by reason of the claim *ipso facto* fraudulent. On the other hand, such a settlement is *prima facie* good, in the absence of proof of his indebtedness at the time, and if it is made upon such consideration as would prevail against creditors.⁽²⁾ So also where a marriage settlement of the settler's own property was made on trust to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign, charge, or incur the said income, or shall do or suffer something whereby the same, or some part thereof, would throw his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person or persons;" and from and after the determination of the trust in favour of the settler, upon trust to pay the income to his wife during her life, it was held that the limitation over to the wife was valid in the event of an involuntary alienation by process of law of the income in favour of a judgment-creditor of the husband.⁽³⁾ So, where a testator devised an estate in favour of his daughter voidable in case of her bankruptcy, it was held that the daughter was entitled to an absolute estate, and that the condition was void for repugnancy.⁽⁴⁾

413. Restriction Valid in Qualified Transfer.—But where the transfer is not absolute, a proviso that a gift shall cease on the happening of a particular event is clearly effectual.⁽⁵⁾ Thus an annuity may be given with a restriction against its alienation.⁽⁶⁾ And it has been held that a man may so settle his property as to give the trustees a discretion to divide it between himself and his wife and children, with absolute power of selection, and to exercise this power even after his bankruptcy.⁽⁷⁾

414. Proviso in a Lease when Valid.—The rule here enacted specifies two conditions subject to which no transfer can be made, and which being illegal and void are ignored if they are found in any transfer. But the case of a lease is excepted, and the effect of which is that in a contract of lease the lessor may validly stipulate with the lessee, that the interest carved out by him in favour of the lessee is determinable upon (a) the lessee's insolvency; and (b) upon his endeavouring to transfer or dispose of it—which, in other words means that the tenancy is personal and liable to forfeiture upon an attempt being made to alien it. These conditions may be reserved by the lessor not only for himself but also "those claiming under him," i.e., his heirs legal representatives and assigns. Where the lease contains such a covenant, it must be for the benefit of the lessor, that is to say, it must on breach of the condition reserve to the lessor a right of re-entry otherwise the condition being

(1) *In re Pearson, Ex parte Stephens*, 3 Ch. D., 307, at p. 810.

(2) *In re Holland; Glegg v. Holland* [1902] 2 Ch., 360; overruling *In re Pearson*, 3 Ch. D., 307.

(3) *Detmold v. Detmold*, 40 Ch. D. 585;

Brandon v. Robinson, 18 Ves. 429.

(4) *In re Machu*, 21 Ch. D. 898.

(5) *Hatton v. May*, 3 Ch. D. 148 (155); *Power v. Hague*, L. R., 8 Eq., 262.

(6) *Lloyd v. Branton*, 3 Mer., 108 (117); *Shree v. Hale*, 13 Ves., 404; *Power v. Hague*, L. R., 8 Eq., 262; *contra*, however, in *Day v. Day*, 1 Drew, 569; 22 L. J. (Ch.), 878; *Woodmeston v. Walker*, 2 Russ. & My., 197, 204.

(7) *Holmes v. Penny*, 3 R. & J., 90.

subject to the general prohibition will not be enforced. Thus, where the lessee stipulated that he would not transfer the land leased to him in any way to any person adding—"If I do so, it (*i.e.*, the transfer) shall become void," it was held that the restriction, not being for the benefit of the lessor, since it did not give the lessors a right of re-entry in case of a breach of covenant against alienation, was void under section 10 of the Act.⁽¹⁾ Again, a covenant against alienation would not cover the case of an alienation by an act of law and not that of the lessee, *e.g.*, in execution of a decree.⁽²⁾

415. Proviso in a Lease when Void.—The proviso in favour of the lessor or his representatives is in accordance with the established English rule which regards a covenant for re-entry on bankruptcy of the lessee as perfectly legitimate.⁽³⁾ The landlord having the *jus disponendi* is entitled to annex whatever conditions he pleases to his grant, provided they are not illegal or unreasonable. And as Ashhurst, J., said: "It is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases, ejectments are everyday brought on a breach of such covenant, the landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment or by any act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present, because the consequence of the bankruptcy is an assignment of the property into other hands. Perhaps it may be necessary for the landlord to guard against this latter event, as there is greater danger to be apprehended by him in this than in the former case. Persons who are put into possession under a commission are still less likely to take proper care of the land than a private assignee of the first tenant."⁽⁴⁾ A proviso for re-entry is therefore commonly inserted in all except building leases,⁽⁵⁾ and it may be enforced, without notice, as soon as the lessee has presented his petition.⁽⁶⁾ But the right being a personal one against the lessee or his representatives, would not avail against the assignee, if the lessee became bankrupt after assignment, for the bankruptcy contemplated is the bankruptcy of him who has the term, and would not affect a stranger.⁽⁷⁾ In England no relief is given to the lessee himself against the forfeiture of the term thus occasioned,⁽⁸⁾ but the Court may protect the interest of a sub-lessee "upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."⁽⁹⁾ The same rule would, it is apprehended, hold good in this country.⁽¹⁰⁾

(1) *Nilmadhab v. Nivrattam*, 1 L. R., 17 Cal., 826; *Sonet Koer v. Himma*, 1 L. R., 1 Cal., 391, P. C.

(2) *Vyankatraya v. Shivrambhat*, 1 L. R., 7 Bom. 256; *Tamaya v. Timapa*, 1 L. R., 7 Bom. 261.

(3) *Doe d. Hunter v. Galliers*, 2 T. R., 133; 1 R. R., 445.

(4) *Doe d. Hunter v. Galliers*, T. R., 133 (137).

(5) *Haines v. Burnett*, 27 Reav., 500 (Hote Case); *Holkinson v. Crows*, L. R., 19 Eq., 591 mining lease in which condition not usual; *Hyde v. Warden*, 3 Ex. D., 72 (so in a

farming lease). In England it would appear that such a proviso is not usually inserted in leases except in those of certain descriptions of property.

(6) *In re Gould*, 13 Q. B. D., 454; S. 14, Conveyancing Act, 1881 (44 & 45 Vict., c. 41).

(7) *Smith v. Gronow*, [1891] 2 Q. B., 394.

(8) S. 2 (6) (i), Conveyancing Act, 1881 (44 & 45 Vict., c. 41).

(9) S. 4, Conveyancing Act, 1892 (55 & 56, Vict., c. 13). *Hghgate School v. Sewell*, (1893), 2 Q. B., 254 (but the Court cannot raise rent).

(10) *Of. S. 114, post.*

416. In a lease of a house for a term of years, there was a covenant by the lessee not to assign the premises without the consent of the lessor, and a *proviso* for re-entry if (*inter alia*) "the lessee, his executors, administrators, or assigns should become bankrupt." The lessee assigned the lease, with the consent of the lessor, and subsequently to such assignment became bankrupt. In a suit to enforce the covenant for re-entry, it was held that the *proviso* for re-entry referred only to the bankruptcy of the person, who for the time being was possessed of the lease, and that, consequently, no forfeiture had been incurred.⁽¹⁾ In the case last cited, Wright, J., observed: "I am of opinion that the *proviso* refers only to the bankruptcy of the person holding the estate, that is, the bankruptcy of the lessee, his executors or administrators, if there has been no assignment, or if there has been an assignment then the bankruptcy of the assign. After the assignment by the original lessee Duncan, no privity of estate continued between the lessor and lessee. The only liability under which Duncan remained towards his lessor, was his contractual liability under his express covenants. The only right of the lessor, which was endangered by the original lessee's bankruptcy after the assignment had taken place, was his right to enforce against the original lessee that contractual liability; and the power of re-entry in aid of that right after assignment made, appears to me more than the subject-matter required, and more than ought to be understood in the absence of any words expressing an intention to apply that remedy for the protection of merely personal rights against a stranger to the term... Suppose the original lessee assigned a part of the estate to one approved person, and the residue to another on the plaintiff's construction, the bankruptcy of one of the assigns would give the lessor the right of re-entry on both parts of the estate."⁽²⁾ The restriction against alienation must be sufficiently peremptory. The words "you are to enjoy, you and your sons, grandsons, from generation to generation" do not or themselves have that effect.⁽³⁾

417. Interest Determinable on Attempted Alienation.—The two conditions in favour of the lessee, when otherwise valid, would be given effect to only on the insolvency of the lessee, that is, as soon as he commits any of the acts of insolvency⁽⁴⁾ or "endeavours to transfer or dispose of" his leasehold. *Prima facie* these words refer only to a voluntary transfer or disposal by the lessee excluding a transfer by operation of law, as in execution of a decree obtained against the lessee.⁽⁵⁾ But if the latter is merely a contrivance resorted to by the lessee to circumvent his own covenant then the fact that the transfer was by act of law and not of the lessee would be probably regarded as immaterial. By English law, a clause in a lease is valid which gives a right of re-entry by the landlord in case the term be taken in execution⁽⁶⁾ and the same would appear to be the law of this country.

It should be added, that a covenant against attempted alienation is not broken by the mere opening of negotiations with an intending purchaser, or inviting an appraiser to value the estate.⁽⁷⁾ But the making of an offer in breach of the covenant though it may not have been taken up would be a

(1) *Smith v. Gronow*, 2 Q. B. D., 394.

(2) *Smith v. Gronow*, 2 Q. B. D., 397.

(3) *Rajah Nursing v. Roy Koylusnath*, 9 M. I. A., 55; *Vinayak v. Baba*, I. L. R., 13 Bom., (375).

(4) S. 4. In Provincial Insolvency Act (Act III of 1907).

(5) *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256; *Tamaya v. Tamaya*, I. L. R., 7 Bom., 261.

(6) *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256 (261).

(7) *Graham v. Lee*, 23 Beav., 388; *Jones v. Wyse*, 2 Keen, 285.

sufficient breach to let in the right of re-entry, since the lessee may endeavour to sell his term without finding any one willing to purchase it; and at all events, an actual agreement for sale or disposal is not the *sine qua non* of such an endeavour. Where a clause in a lease forbade "the lessee letting it to be sold, or attached and sold in satisfaction of judgment-debts" the court construed the words to extend as much to a passive attitude as to active assistance on the part of the lessee, whilst the process of execution was going on, and it therefore held "that if the lessee allowed the land to be attached and sold by not taking measures to satisfy the judgment-debt, there would be a breach, both according to the letter and spirit of the proviso in the lease."⁽¹⁾

418. The right to enforce a forfeiture on the bankruptcy of the lessee is not effected by an annulment of the bankruptcy.⁽²⁾ On forfeiture of the term the landlord would be entitled to emblements,⁽³⁾ and removable fixtures which the outgoing tenant is only entitled to remove during the term, or when his possession has ceased on expiration of the term.⁽⁴⁾

419. A lessee cannot avail himself of his own act or default to vacate a lease, since law permits no man to take advantage of his own wrong.⁽⁵⁾ The person legally entitled to re-enter is the lessor, or his assigns, but a lessor who has parted with his reversion either absolutely or by way of mortgage with possession,⁽⁶⁾ or whose interest has become merged or extinguished cannot maintain ejectment for a forfeiture.⁽⁷⁾

420. Section confined to Voluntary Alienation.—It has been held that, like section 10, this section relates only to Transfer of Property by act of parties.⁽⁸⁾ "That group of sections is headed by a portion of the Act which indicates that the sections relate to transfers by act of parties."⁽⁹⁾ Of course, it being so, if the property is alienated *per invitum*, e.g., in execution of a decree, the restrictive provision of this section would not apply. But, of course, it is always competent for the lessor to stipulate for a forfeiture even in such a case, and where it is so, the right of re-entry would, strictly speaking, only accrue after the attachment and sale had been suffered by the tenant. But the lessor may intervene at an earlier stage to prevent attachment, and as the attachment by itself can be of no use to the creditor, the debtor being already by his lease prevented from alienating, and as it would be necessary, even if the attachment were allowed to forbid the sale by a concurrent order, the attachment, which under these circumstances would be futile, would not be permitted.⁽¹⁰⁾ The stipulation for re-entry being in derogation of the tenant's rights must be explicit and must provide for re-entry for a breach of the covenant⁽¹¹⁾, for it cannot be inferred from a prohibition against alienation.⁽¹²⁾ A prohibition generally worded against mortgage, gift, sale or otherwise, would not by itself include an alien-

(1) *Vyankatraya v. Shivrambhat*, I.L.R., 7 Bom., 256 (261, 262).

(2) *Smith v. Gronow*, [1892] Q. B. D., 394 (398).

(3) *Davis v. Eytton*, 7 Bing., 154; *Silock v. Farmer*, 46 L. T., 404.

(4) *Pugh v. Arton*, L. R., 8 Eq., 625.

(5) *Reda v. Farr*, 6 M. & S., 121.

(6) *Fend Matthew v. Smart*, 12 East., 443.

(7) *Webb v. Russell*, 3 T. R., 393, see S. 111 and Comm. thereon.

(8) In the matter of the *West Hopetown Tea Co., Ltd.*, I. L. R., 12 All., 192 (197).

(9) *Ib.*, per Edge, C. J., at p. 197. See also *Vyankatraya v. Shivrambhat*, I.L.R., 7 Bom., 256; *Tamaya v. Timapa*, I. L. R., 7 Bom., 262; *Subbaraya v. Krishna*, I. L. R., 6 Mad., 159; *Nilmadhab v. Narattam*, I.L.R., 17 Cal., 826.

(10) *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256, followed in *Tamaya v. Timapa*, *ib.*, p. 262.

(11) *Doe d. Wilson v. Phillips*, 2 Ring., 13; *Doe d. Darke v. Bouditch*, 8 Q. B. D., 973.

(12) *Tamaya v. Timapa*, I. L. R., 7 Bom., 262.

ation by act of law, since the words "or otherwise," could not go beyond being confined to some act of the lessee *ejusdem generis* with those expressly mentioned.⁽¹⁾ In the absence of such a proviso, the lessor would appear to have no remedy but to restrain the alienation by injunction, and when this is impossible, as where the alienation has been completed, he has then no remedy but in damages. Even where there is a stipulation against such an alienation, the lessor can only obtain damages for breach of the covenant.⁽²⁾

421. Hindu Law otherwise.—The general principle of this section does not apply to Hindus, for Hindu law regards a devise to a person unborn as invalid. There is, however, no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. But the rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such as is known to the Hindu law, which an English estate tail is not. And the rule relating to the defeasance of a prior absolute interest by a subsequent event, is subject to two important conditions, *first*, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift; ⁽³⁾ and, *secondly*, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift.⁽⁴⁾ In this view of the law, Hindu law does not favour a contingent remainder.⁽⁵⁾ Now, since a disposition in favour of an unborn person cannot be created under Hindu law, the same result cannot be attained by means of trustees. For although trusts are permissible, still a man cannot be allowed to do by indirect means what is forbidden to be done directly, and hence, if beneficiary estates are created under the guise of an unnecessary trust of inheritance, the trust can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests, which the law recognizes, and therefore, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who but for the will, would lawfully have been entitled thereto.⁽⁶⁾ The rule of Hindu law against the making of a gift either by act *inter vivos* or by will, in favour of a person not in existence at the time when the gift is made, or at the death of the testator, as the case may be, extends equally to transfers for consideration. So a covenant which would not necessarily vest the future interest contemplated to result from the covenant, in a person in existence at the time of the covenant would be void for remoteness.

(1) *Tamaya v. Timapa*, I. L. R., 7 Bom., 264; *Subbaraya v. Krishna*, I. L. R., 6 Mad., 159 (164); citing *Davis v. Fyton*, 7 Bing., 154; *Weatherall v. Gering*, 12 Ves., 504; *Doe v. Carter*, 8 T. R., 57.

(2) *Tamaya v. Timapa*, I. L. R., 7 Bom., 262.

(3) *Seorjemanoy v. Denobundhoo Mullick*, 9 M. I. A., 123; affirmed in *Kristoromoni v. Norendro*, I. L. R., 16 Cal., 383 (392). P. C.; *Ramaswamy v. Chinnan*, I. L. R., 24 Mad., 477 (469).

(4) *Tagore v. Tagore*, 9 B. L. R. 377, P. C., affirmed in *Kristoromoni v. Norendro*, I. L. R., 16 Cal., 383 (392), P. C. To the same effect *Bhoobun v. Hurrish Olunder*, I. L. R., 4 Cal., 23, P. C.

(5) *Tagore v. Tagore*, 9 B. L. R., 377 (401), P. C.

(6) *Tagore v. Tagore*, 9 B. L. R., 377 (402),

P. C. But trusts are not reprobated in Hindu law (*ib.* p. 401). A familiar example of an implied trust is a *benami*-purchase or a provision for charity or for other beneficent objects *Gopekrish v. Gungapersad*, 6 M. I. A., 53. Similarly Hindu law recognizes the exercise of "powers" over definite objects as distinct from the ownership in them *e.g.*, power of management or to adopt in the case of a Hindu widow, which, as regards the property of her husband, is simply the power to appoint the person to succeed him in the event of his not having a son. *Javerbai v. Kablibai*, I. L. R., 15 Bom., 326; O.A., I. L. R., 16 Bom., 492 (498). But such powers do not possess all the characteristics of the term as used in English law, and in that sense the term as applied to Hindu wills is a misnomer. *Bai Motwahu v. Bai Mamubai*, I. L. R., 21 Bom., 709, P. C.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferrer in the property.

Transfer for benefit of unborn person.

Illustration.

A transfers property of which he is the owner to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

422. Analogous Law.—The principle of this section is the same as of section 100 of the Indian Succession Act, which applies equally to Hindus. It runs thus:—

"110. Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed."

Bequest to person not in existence at testator's death, subject to prior bequest.

Illustrations.

(a) Property is bequeathed to A for his life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is bequest to a person not in existence at the testator's death. It is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(b) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters, some of whom were not in existence at the testator's death. The bequest to A's daughters, comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(c) A fund is bequeathed to A for his life, and after his death to his daughters, with a direction that, if any of them marries, under the age of eighteen, her portion shall be settled, so that it may belong to herself for life, and may be divisible among her children after her death. A has no daughters living at the time of the testator's death, but has daughters born afterwards who survive him. Here the direction for a settlement has the effect, in the case of each daughter who marries under eighteen, of substituting, for the absolute bequest to her, a bequest to her merely for her life; that is to say, a bequest to a person not in existence at the time of the testator's death of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund is void.

(d) A bequeaths a sum of money to B for life, and directs that, upon the death of B, the fund shall be settled upon his daughters, so that the portion of each daughter may belong to herself for life and may be divided among her children after her death. B has no daughter living at the time of the testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest, to persons not yet born, of a life-interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void."

The rule laid down in this and the next section applies to moveable as well as immoveable property.⁽¹⁾ The principle here enunciated is in entire harmony with the English law, which recognizes the same rule.⁽²⁾ (§ 330).

(1) *Cowasji v. Rustomji*, 1 L.R., 20 Bom., 511.

(2) *Hay v. Earl of Coventry*, 3 T. R., 86 ;

Brundnell v. Elwes, 1 East., 452 ; *Whitby v. Mitchell*, 44 Ch. D., 85.

423. Principle.—The principle underlying this section is not to be confounded with that embodied in the following section.⁽¹⁾ The rule here laid down was expressed in the old legal language, that you could not limit a possibility upon a possibility. But what does that mean? It means that there might never be such a person as an unborn person who was to take for life. That was an obvious contingency. Besides there was another contingency. There might never be issue of that person. Therefore, there was a double contingency or a double possibility. Thus, in the illustration the transfer in favour of *A*'s eldest son is a contingency, for *A* might never have a son. And his bequest for his second son is equally a contingency, for his second son may not be born at all, and if born may predecease his first son. A transfer of such a character is opposed to public policy since it is made in favour of remote possibilities—it may be to the prejudice of near relations. The rule is a very old one, and has originated out of the feudal system.⁽²⁾ This rule against remoteness was at one time supposed to have been abrogated or superseded by the rule against perpetuities, but it is by no means so, for the old rule against a possibility on a possibility, applicable to legal limitations of real estate, namely, that, although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation—the two rules being independent and co-existing.⁽³⁾

This section read with sections 20 and 30 of the Act makes it clear that if a condition subsequent is inoperative, the prior disposition is not affected thereby.⁽⁴⁾ Again, vested interest does not imply immediate enjoyment.⁽⁵⁾ This section does not apply to cases where a grant is made to *living* persons successively and subject to other restrictions.

424. Future Estates: Vested and Contingent Remainders.—The evolution of the rule here laid down, out of the bewildering maze of real property law is the result of a series of logical deductions, a knowledge of which is as necessary to those who would appreciate the working of the rule, as to those we may not be satisfied with the dry dogmas of the Indian Jurisprudence. For the intelligible appreciation of the full breadth of the principle, it is, however, now necessary to introduce into the discussion certain terms. Hitherto the discussion has been confined to grants with present possession, or to grants to commence in possession at a future time. The present section assumes a grant to commence in interest at a future time, or in other words, it relates to future estates of which there are two kinds: (i) a contingent remainder, and (ii) an executory interest. The former may be created by any mode of conveyance, but the latter can arise only by the instrumentality of a will, or under the Statute of Uses, and which therefore need not be here considered. The subject of contingent remainders, has been dealt with in the Act, and should now be defined. If a grant is made to *A* for his life, and after his death to *B* for his life, and after his death to *C* for his life, and so on, the estates of *B* and *C* are intended to be as immediately and effectually vested as

(1) *In re Frost*; *Frost v. Frost*, 53 Ch. D., 245 (251, 252).

(2) *Per Lopes, L. J.*, in *Whitby v. Mitchell*, 44 Ch. D., 65 (93).

(3) *Whitby v. Mitchell*, 44 Ch. D., 85 (90).

(4) *See S. 30, post.*

(5) *S. 20.*

the estate of *A*, so that *B* would take on determination of the estate of *A*, and *C* would take on determination of the two prior estates. The future estates created in favour of *B* and *C* are then spoken of as *vested* remainders, and their characteristic is that they are always ready to come into possession the moment the prior estate is determined. The gift is immediate, but its enjoyment may be postponed till determination of the prior estate. As contra-distinguished from such an estate the contingent remainder is not ready from its commencement to its end, to come into possession at any moment when the prior estate may happen to determine.⁽¹⁾ As an example, suppose that a gift is made to *A*, a bachelor, for his life, and after the determination of that estate by forfeiture or otherwise in his lifetime, to *B* and his heirs during the lifetime of *A*, and after the decease of *A* to the eldest son of *A* and the heirs of his body. Here *B*'s estate is again a vested remainder, but the estate to *A*'s eldest son is a contingent remainder, for while *B*'s estate is ready to come into possession whenever *A*'s estate may happen to determine, the estate tail to the eldest son of *A* is contingent, since *A* being a bachelor may never marry, or may never have a son to take possession on determination of the estates of *A* and *B*. But should *A* marry and have a son, the contingent estate would then immediately become *vested*, for then the estate is ready to come into possession on determination of the prior estate.

425. The principal rule for the creation of a contingent remainder is that feudal possession must never be without an owner. Ancient law regarded livery of seisin or the change of possession as the only mode of transfer,⁽²⁾ but for which there could be no valid transfer. Hence if the transfer was unaccompanied by possession, it remained for ever with the grantor. As a logical consequence of this view a feoffment to *A* to hold from to-morrow would be absolutely void. "For it is an ancient rule of the Common Law that no estate of freehold can be created to commence *in future*, but it ought to take effect presently either in possession or remainder: because at Common Law no freehold in lands could pass without livery of seisin; which must operate either immediately, or not at all."⁽³⁾ Accordingly, in a feoffment to *A* for life, and after his decease and one day to *B*, the grant to *B* is void, for if otherwise, the feudal possession would have been for a day without any owner. This is expressed in the language of law that every remainder of freehold must have a particular estate of freehold to support it. And as a corollary to the rule Lord Coke laid down that the event on which a remainder is to depend must be a common possibility, and not a double possibility or a possibility on a possibility which the law will not tolerate.⁽⁴⁾ Accordingly, it was laid down that an estate given to an unborn person for life cannot be followed by an estate to any child of such unborn person, and that if such a limitation be made the estate given to the child of the unborn person is void.⁽⁵⁾ This rule was sometimes

(1) S. 20.

(2) To preserve contingent remainders, it is necessary to have trustees appointed, in whom there is vested an estate in remainder for the life of the tenant for life, to commence when the particular estate determines; 2 Black. Comm., 171.

(3) 2 Black. Comm., 166.

(4) 5 Rep., 94; 2 Black. Comm., 165.

(5) 2 Rep., 519; 10 Rep., 596. The doctrine was said to be the outcome of the scholastic logic and was said to be based on the au-

thority of logic—*Potentia est duplex, remota et proxima; et potentia remotissima et vana est quæ nunquam venit in actum*—"Possibility is of two kinds, remote and near; and that possibility is most remote and vain which never comes into action." The rule was continually declined in force, and Lord St. Leonards said that it had been exploded—*Cole v. Sewell*, 6 Ir Eq., R., 66; affirmed in *Cole v. Sewell*, 2 H. L. C., 196 (226), considered on point as to remoteness in *Abbiss v. Burney*, 17 Oh. D., 217. *In re Frost*, 43 Oh. D., 246; *Whitley v.*

attributed to the general policy of the law against double possibilities, and sometimes to the rule against perpetuities to be presently discussed (§ 430).

426. Apart from its historical association, the present section is a clear

Exception.

exposition of the rule which, though of ancient origin, has had to fight its way on the one hand through the logomachies of scholastic logic, and on the other, through a long succession of legal controversies. In England, the rule is, however, subject to a qualification in favour of a gift by will which has been extended by the Act even to dispositions *inter vivos*. In the case of a gift *by will* to the unborn person of some living person for his life, and after the decease of such unborn person, to *his* sons in tail, the courts of law have tried to meet the wishes of the testator as far as possible. And accordingly without making the whole disposition void, they disregard the invalid clause, justifying their interference on the ground that the testator would have done the same if he had known the law.⁽¹⁾ This view of the law having been, as remarked before, extended by the Act even to dispositions *inter vivos*, it follows that the prior disposition is not affected by the failure of the ulterior disposition.⁽²⁾ Another exception of which the section takes no note, is founded in English law on the view it takes of leasehold property, which being classed as chattel, is out of reach of the rule, and future interest therein created, were therefore considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree.⁽³⁾ As no such distinction is recognized by the Act, it would appear to follow that the rule would equally hold good here in the case of all property, whether free-hold or leasehold.

The section again would not apply to successive interests limited by time or otherwise and created in favour of several persons living at the time of the grant.⁽⁴⁾

14. No transfer of property can operate to create an

**Rule against
perpetuity.**

interest which is to take effect after the lifetime of one or more persons living at the date of such transfer and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

427. Analogous Law.—It would have been well if this section had been illustrated as the corresponding section 101 of the Indian Succession Act, ⁽⁵⁾ which is as follows :—

Mitchell, 44 Ch. D., 85, as to "survivor or survivors" in *In re Palmer's Settlement Trusts*, L. R., 19 Eq., 325. But while the reason has been abandoned the same rules have remained in force. It may be noted that contingent remainders were abolished by Stat. 7 & 8 Vict., c. 76, S. 8, but were revived in the following year by 8 & 9 Vict., c. 106, S. 1.

(1) *Hay v. Earl of Coventry*, 3 T. R., 86; *Brudenell v. Elwes*, 1 East., 452. In *Whitley v. Mitchell*, Cotton, L. J., clearly intimated as his opinion that the rule as to possibility

on a possibility has in no way been superseded by the more modern rule against perpetuities. 44 Ch. D., 85 (90). Even Lord St. Leonards said in *Monypenny v. Daring*, 2 DeM. & G., 145 (170), that the rule was too well settled to be broken in upon.

(2) 1 Jarm., Wills (5th Ed.), 267; *Hampton v. Holman*, 5 Ch. D., 183; cf. S. 30, *post*.

(3) S. 30, *post*.

(4) Raym., 151; 2 Black. Comm. 165; Wills, P. P. (15th Ed.), 349, 350.

(5) Act X of 1865.

“ 101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons, living at the testator's decease, and the minority of some persons, who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Rule against perpetuity.

Illustrations.

(a) A fund is bequeathed to *A* for his life; and after his death to *B* for his life; and after *B*'s death to such of the sons of *B* as shall first attain the age of 25. *A* and *B* survive the testator. Here the son of *B* who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B*; and the vesting of the fund may thus be delayed beyond the lifetime of *A* and *B*, and the minority of the sons of *B*. The bequest after *B*'s death is void.

(b) A fund is bequeathed to *A* for his life and after his death to *B* for his life, and after *B*'s death to such of *B*'s sons as shall first attain the age of 25. *B* dies in the lifetime of the testator, leaving one or more sons. In this case the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(c) A fund is bequeathed to *A* for his life, and after his death to *B* for his life, with a direction that after *B*'s death it shall be divided amongst such of *B*'s children as shall attain the age of 18; but that, if no child of *B* shall attain that age, the fund shall go to *C*. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of *B*, a person living at the testator's decease. All the bequests are valid.

(d) A fund is bequeathed to trustees for the benefit of the testator's daughters with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.”

428.. The rule here set out is borrowed from the English law, where it has

Genesis of the Rule.

been recognized from very early times.⁽¹⁾ After property in future estates had begun to be recognized, and the limitation of estates in remainder to unborn children, as well as the creation of future estates by way of shifting use and executory devise began to be permitted, it was felt that unless some rules restraining the creation of such estates were devised, property may by a single transfer be tied up in perpetuity. “In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions. Such estates were allowed to take effect at first, within the compass of an existing life,⁽²⁾ then within a *reasonable* time after.⁽³⁾ This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument, by which the executory estate was conferred.⁽⁴⁾ It was then held that any number of existing lives might be taken.⁽⁵⁾ Finally it was settled that the time allowed after the duration of existing lives should be a term of twenty-one years, independently of the minority of any person, whether entitled or not, with the possible addition of the period of gestation, but only where the gestation actually existed.⁽⁶⁾

In England, a grant infected with the vice of its possibly exceeding the prescribed limit, is absolutely void, even though the actual event happen within

(1) 1 Rep., 84a, 88a, 131b.

(2) *Howard v. Duke of Norfolk*, 2 Swanst., 454.

(3) *Marks v. Marks*, 10 Madd., 419.

(4) *Stephens v. Stephens*, 1 De G. & J., 62.

(5) *Thelluson v. Woodford*, 4 Ves., 227; 11 Ves., 112. •

(6) Will's R. P. (18th Ed.), 379., 380; citing *Cadell v. Palmer*, 7 Bingh. (N. S.), 202.

the prescribed period. But an exception is made if it was immediately preceded by, or be in defeasance of an estate tail, in which case since the tenant in tail may bar the entail, the remoteness of the event does not affect its validity.⁽¹⁾

And even where the disposition is invalid as offending against the rule, it cannot be ignored for the purpose of construction. Of course, the disposition itself would fail if it errs against the rule, but being a part of the grant it must be read as a part of the context for all purposes of construction, and as if no such rule had been established.⁽²⁾ In India a disposition offending against the rule is alone cut out, the rest of the disposition being still held valid.⁽³⁾ Hence, if a testator directs accumulation of his estate for two separate periods, one of which is good, and the other offends against the rule, the direction is good so far as the first period is concerned. Specific trusts of estates good in themselves are not invalidated by a subsequent disposal of the residue.⁽⁴⁾

The last section deals with the rule as to "a possibility upon a possibility"—a more ancient rule than the one against perpetuities to be presently discussed. The two rules are cognate, but otherwise quite distinct, neither having superseded nor abrogated the other.⁽⁵⁾ Being independent and co-existing rules they have been rightly so treated in the Act.

The rule applies equally to legal contingent remainders as well as to equitable limitations.⁽⁶⁾

429. In England the rule extends to personal property as well, for if it were otherwise trusts of indefinite duration might have engendered the same mischief which the rule is designed to guard against.⁽⁷⁾ The rule has been also extended here equally to moveable property.⁽⁸⁾ But, of course, it can have no application to personal contracts.⁽⁹⁾ A covenant therefore to do any act, as for example, to pay money, cannot be avoided by reason that the time of performance may not arise within the period allowed by the rule.⁽¹⁰⁾ It would, however, be otherwise, if the contract created an equitable interest in property.⁽¹¹⁾ As a contract for the sale of lands or for pre-emption does not create such an interest, it would not be void as opposed to the rule, although there may be cases in which it may be void for remoteness.⁽¹²⁾

430. The rule does not, however, extend as such to Hindus (§ 436-440) and Mahomedans (§ 441), but it extends to the Armenians⁽¹³⁾ and Parsis who are governed by the general principles of English law,⁽¹⁴⁾ though in applying the English law regard

(1) *Lewis on Perpetuity*, 669; *Morse v. Lorde Ormonde*, 1 Russ., 382; *Egerton v. Lord Brownlow*, 4 H. L. C., 1; *Cole v. Sewell*, 2 H. L. C., 18; *Heasman v. Pearse*, L. R., 7 Ch., 275, overruling *Heasman v. Pearse*, L. R., 11 Eq., 522.

(2) *James L. J.*, in *Heasman v. Pearse*, L. R., 7 Ch., 275 (283). The Law of Perpetuities has been historically treated in notes to *Cadell v. Palmer*, W. & T. L. C. (3rd Ed.), 470 *et seq.*; 1 *Jarm. Wills* (4th Ed.), 258; App. A, 3 *Davidson*; Pre. Con. (3rd Ed.), pp. 336, 338; 6 L. Q. R., 410, *Grav. Rule against Perpetuities* (Boston, 1886), 135; *Lewis on Perpetuities*, 408.

(3) S. 30, *post*.

(4) *Ketter Mohan v. Gunga*, 4 C. W. N., 571, *note*.

(5) *Butler's note to Fearn* (10th Ed.).

565n.

(6) *In re Ashford* [1905], 1 Ch., 535.

(7) *Cf. Will.*, R. P. (18th Ed.), 379, 380; *Will.*, P. P. (15th Ed.), 350; *Accumulations Act*, 1892 (55 & 56 Vict., c. 58).

(8) *Covvasji v. Rustonji*, I. L. R., 20 Bom., 511.

(9) *Borlands v. Steel Bro. & Co.*, [1901], 1 Ch., 279.

(10) *Walsh v. Secretary of State for India*, 10 H. L. C., 367.

(11) *London and South Western Railway v. Gomm*, 20 Ch. D., 562.

(12) *Ramaswamy v. Chinnan*, I. L. R., 24 Mad., 449 (457, 469).

(13) *Colgan v. Administrator-General*, I. L. R., 15 Mad., 424.

(14) *Limji v. Bapaji*, I. L. R., 11 Bom., 441 (447); following *Yapchoah v. Ong Cheng*,

must be had to what are its general equitable provisions and what are rules which owe their origin to the peculiarity of the feudal tenure.⁽¹⁾

Another exception is made in favour of a gift to charitable uses, a subject which will have to be separately dealt with elsewhere.⁽²⁾

A gift of a residue to a class, with the period of distribution postponed, is valid.⁽³⁾

431. Principle.—The rule against perpetuities is a comparatively modern development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances. The rule is one of public policy.⁽⁴⁾ "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in, or dominion over property, will be obvious if we consider, for a moment, what would be the state of a community in which a considerable proportion of the land and capital was locked up. The free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult; the capital of country withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all."⁽⁵⁾ The rules against perpetuities, while they are efficient for the purpose of preserving and guaranteeing the free circulation of property to the utmost reasonable extent, yet afford ample scope for that attention to personal and family exigencies, which it is neither the policy of the laws, nor the interest of society, entirely to overlook."⁽⁶⁾ "A perpetuity is a limitation, tending to take the subject out of commerce, for a longer period than a life or lives in being, and twenty-one (in India eighteen)⁽⁷⁾ years beyond, and in the case of a posthumous child, a few months more allowing for the term of gestation."⁽⁸⁾ "A perpetuity," said Lord Guildford, is a thing odious in law, and destructive to the common wealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity."

432. The rule of law as to remoteness—which allows absolute ownership to be suspended for a life or lives in being and twenty-one years afterwards, and treats a child *en ventre sa mere* as a life in being—is not infringed by the fact that when the instrument limiting the estates comes into operation (in the case of a will the devisors' death) the first life-tenant is *en ventre sa mere*; but on his subsequent birth alive the law applies to the doctrine of relation back and treats the child as having been born alive at the time when the instrument

L. R., 6 P. C., 381; *Hatma v. The Advocate-General*, 1 L. R., 6 Bom., 42; *Fardunji v. Mithubai*, 1 L. R., 22 Bom., 355 (368).

(1) *Mithubai v. Limji*, 1 L. R., 5 Bom., 506; C. A., 1 L. R., 6 Bom., 151; *Fardunji v. Mithubai*, 1 L. R., 22 Bom., 355. [The rule in *Shelley's* case is, for example, inapplicable to Parsis. *Concasji v. Rustomji*, 1 L. R., 5 Bom., 506.]

(2) S. 17, *post*.

(3) *Maseyk v. Fergusson*, 1 L. R., 4 Cal., 304, O. A., *ib.*, 670.

(4) *In re Oliver's Settlement* [1905], 1 Ch., 191 (196).

(5) Jarman on Wills (4th Ed.), pp. 250, 251.

(6) Lewis on Perpetuity, Introdn.; *Spencer v. Duke of Marlborough*, 1 Eden, 404; *In re Oliver's Settlement* [1905], 1 Ch., 191 (196).

(7) S. 3, Indian Majority Act (IX of 1875). The period of gestation is also included if gestation exist; *Cadell v. Palmer*, 7 Bingh. (N. S.), 202.

(8) Lewis on Perpetuity, Chap. 12.

came into operation, whether the application of the doctrine is for the benefit of the child, or immaterial to him, or to his actual disadvantage.⁽¹⁾

433. Distinction between ss. 13 and 14.—The principle underlying these sections is not to fetter the creation of absolute estates by provisos and restrictions. By the last section, the transferrer is not permitted to transfer any but an absolute estate, *i.e.*, his whole and entire interest in the property in favour of an unborn person, when the transfer in favour of him is to take effect after the determination of the prior interest created by the same transfer. Under this section the *transfer* itself whether of whole or of limited interest cannot be created so as to last for one or more *existing* lives *plus* 18 years (and the period of gestation in case of a possible issue). Section 13 enacts in favour of an *absolute* transfer after a period, and section 14 enacts *against* transfers in perpetuity. Such transfers cannot be made without the intervention of trusts.⁽²⁾

434. The rule enunciated in this section may be illustrated by one or two examples. *A* makes the gift of certain property to

Illustration.

B, a person living, with remainder to *C* on his attaining his 18th year. The gift is valid. But it would be invalid if the remainder was given to *C* on his attaining his 19th year. So where a Hindu testator bequeathed his property in trust for his great grandsons on attaining their majority, and in the event of his having no great grandsons to his daughter's sons when they come of age, the bequest was held to be void.⁽³⁾ So also a *wakf* whereby the testatrix dedicated her property for the perpetual lighting and maintenance of her husband's tomb was declared to be void as offending against the rule as to perpetuities.⁽⁴⁾ A gift to the first son of *A*, a bachelor, who shall attain the age of 19 years is void for remoteness.⁽⁵⁾ "In the case of an executory gift by will, however, the time within which the estate given must arise, is computed from the death of the testator, to whom knowledge of the circumstances then existing is imputed. So that a gift, which would have been void, if the testator had died immediately after making his will, may be valid at his death." Thus, in the above example, if the gift were made by will, and *A* were to die before the testator, leaving a son, it would be valid; for the person to take would have been ascertained at the testator's death, and the estate given to him must in such case necessarily arise within a life in being, namely, his own. And the gift would also be valid, if a son of *A* had attained 19 years before the testator's death, though *A* survived the testator.⁽⁶⁾

435. A testatrix devised real estate to trustees upon trust to pay the income to *M* during her life, and after her death to stand possessed of the real estate upon trust for the second and every younger son of *M* born or to be born, successively, with remainder, after the death of each such son, upon trust for his first and other sons successively in tail-male. The testatrix died in October, 1880, at which date she had (a) a son, who died in 1877, (b) a son who was disqualified by the will from taking under the limitations, and she was

(1) *Moore v. Wingfield* [1903], 1 K. B., 874, O. A., [1903], 2 Ch., 211.

(2) *Per Peacock, C. J.*, in *Kumara Asima v. Kumara*, 2 B. L. R., (O' C.), at p. 36.

(3) *Brajanath v. Anandamayi*, 8 B. L. R., 208.

(4) *Kaleloola v. Naseerudeen*, I. L. R., 18

Mad., 201.

(5) *Newman v. Newman*, 10 Sim., 51; *Griffith v. Blunt*, 4 Beav., 248.

(6) *Wills*, R. P. (18th Ed.), 380, 381 note; 1 *Jarm. Wills* (5th Ed.), 216; *Picken v. Matthews*, 10 Ch. D., 264.

pregnant of (c) a third son, S, who was born in February, 1881, it was held that the limitations did not transgress the rule against remoteness, that the sons of S took valid estates in tail-male in remainder, and that it was immaterial that it was disadvantageous to S to apply the doctrine of relation back of his birth to the date of the death of the testatrix, and thus prevent him from taking a larger estate than an estate for life.⁽¹⁾ Although the expression "born in a donor's lifetime" is usually held to include a child *en ventre sa mere* at the date of his death, particularly in cases which raise the question whether limitations are void for perpetuity,⁽²⁾ still where the donor refers to a person "born in my lifetime" the same latitude of construction cannot be permitted. A testator devised freehold estate to uses in strict settlement, but he directed by a codicil that no devisee should have a vested interest therein or be entitled to possession thereof until the attainment of twenty-four years. It was held that the effect of the codicil was to make the limitations of the will executory devises, and consequently that they were void for remoteness, and there was an intestacy.⁽³⁾

436. Hindu Law and Perpetuities.—This rule does not apply to Hindus but Hindu law is circumscribed by greater restrictions.⁽⁴⁾ A Hindu cannot by a will or gift divert succession permanently.⁽⁵⁾ As their Lordships of the Privy Council observed⁽⁶⁾: "The power of parting with property once acquired so as to confer the same property upon another, must take place either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner, transfer does. Inheritance is a rule laid down (or, in the case of custom, recognized) by the estate, not merely for the benefit of individuals, but for reasons of public policy.⁽⁷⁾ It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance takes place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossee v. Denobundo Mullick*:⁽⁸⁾ 'A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or policy.' . . . It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in the terms, which in English law would designate estates tail." Under Hindu law, any provision for perpetual descent and for restraining alienation, whether for spiritual or secular purpose is void,⁽⁹⁾ but not so as to invalidate subsequent trusts of the will, if these are valid according to law.⁽¹⁰⁾ A Hindu cannot by a will institute a course of succession unknown to the Hindu law; and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to Hindu law

(1) *Moore v. Wingfield* [1903], 1 K.B., 874 O. A. [1903], 2 Ch., 411.

(2) *Lona v. Blackall*, 7 T.R., 100; *In re Wilmer's Trusts* [1903], 2 Ch., 411; *Villar v. Gilbey* [1905], 2 Ch., 301 (305).

(3) *In re Wrightson* [1904], 2 Ch., 95; *In re Lechmere and Lloyds*, 18 Ch. D., 524; *Miles v. Jarvis*, 24 Ch. D., 633; *Dean v Dean* [1891], 3 Ch., 150.

(4) *Tagore v. Tagore*, 4 B.L.R., (O. C.) 167; *Goburdhan v. Sham Chand. Bourke* 282; *Kamara Asima v. Kumara*, 2 B.L.R. (O. C.), pp. 11 and 32.

(5) *Mayne's Hindu Law*, § 285.

(6) *Tagore v. Tagore*, 9 B.L.R., 377 (394), P.C.

(7) *Domat*, 2413.

(8) 6 M. I. A., 555; 4 W. R., 114, P.C. (These words are not to be found in this judgment.)

(9) *Mayne's Hindu Law* (5th Ed.), § 395; *Anantha v. Nagamuthu*, I.L.R., 4 Mad., 200.

(10) *Kally Prosonna v. Gopee*, 7 C.L.R., 241; *Krisnamani v. Ananda*, 4 B.L.R., (O.O.), 231; *Colgan v. Administrator-General*, I.L.R., 15 Mad., 424.

which, for example, an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: *firstly*, the event must be one that will happen, if at all, at latest upon the close of a life in being at the time of the gift;⁽¹⁾ *secondly*, that a defeasance by way of gift over must be in favour of some person in existence at the time of the gift;⁽²⁾ the latter case not only deciding that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is also invalid.⁽³⁾ The principle of this case is reiterated by the same tribunal which has laid down that since an heir of the grantee not in existence at the time of such grant is incapable of taking thereunder the fact that for some time after the death of the grantee, the grantor treated his heir, who was not in existence at the time of the grant, as entitled thereunder, does not create an equity in favour of such heir, and the latter is not entitled to specific performance of the agreement under which the grant was made.⁽⁴⁾

437. Whether the gift be *in presenti* or *in futuro*, the donee must be a person in existence, and capable of accepting the gift at the time it takes effect.⁽⁵⁾ At least the donee must be capable of being ascertained at the death of the testator.⁽⁶⁾ The rule is, however, subject to two qualifications in favour of an adopted child, and a child *en ventre sa mere*. A child adopted after a man's death in pursuance of a power given by him is in contemplation of law begotten by that man.⁽⁷⁾ And the same rule applies to a transfer for consideration.⁽⁸⁾ But the donee may be either an actual or a juridical person, and so if the gift or dedication be in favour of an idol it must be in existence at the time of the testator's death.⁽⁹⁾ As the Privy Council held that a Hindu owner cannot make a conditional grant of a future interest in property in favour of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law upon his own power of alienating his estate discharged of such future interest is a reason for the invalidity of such a grant. So the transfer of property in trust postponing its vesting till the testator's youngest son shall have attained 21 years, or the survivor of the widows shall have died, is not permitted by Hindu law.⁽¹⁰⁾ But if in the above case the vesting had been postponed for 18 instead of 21 years, which is the period of majority in this country,⁽¹¹⁾ the transfer would have been good, as in accordance with the rule.⁽¹²⁾

(1) *Soorjeemony v. Denobundo*, 9 M.I.A., 123; 4 W. R., 114, P. C.; *Javerbai v. Kablibai*, I. L. R. 16 Bom., 492; *Bai Matirahu v. Bai Mamubai*, I.L.R., 21 Bom., 709, P.C.; *Kashinath v. Chinnaji*, I.L.R., 30 Bom. 477 (490).

(2) *Tagore v. Tagore*, 9 B.L.R., 377.

(3) *Kristomoni v. Norendro*, I.L.R., 16 Cal., 383, P.C.

(4) *Raja Padmanund v. Hayes*, I.L.R., 28 Cal., 720, P.C., distinguishing *Bhoobun Mohini v. Hurriish Chunder*, I.L.R., 4 Cal., 23, P. C.

(5) *Tagore v. Tagore*, 9 B. L. R., 377 (P.C.), Peacock, C.J., in *Krishnaramani v. Ananda*, 4 B. L. R. (O. C.), 231; *Bramamayji v. Chandra*, 8 B. L. R., 400.

(6) *Tagore v. Tagore*, 1 B. L. R. (O.C.),

103.

(7) *Tagore v. Tagore*, 9 B. L. R., 377, P.C.

(8) *Ramasany v. Chinnan*, I. L. R., 24 Mad., 449 (469); *Chundi Churn v. Sidheswari* I. L. R., 16 Cal., 71 P. C.

(9) *Rajamoyee v. Troyluckho*, 6 C. W. N., 267, *Upendra v. Hemchandra*, I. L. R., 25 Cal., 405, P. C.; *Bai Motivahoo v. Bai Mamubai*, I. L. R., 21 Bom., 709, P. C.

(10) *Srimati v. Jugeschandra*, 8 B. L. R., 400 (407); *Nilcomul v. Jotendro*, I. L. R., 7 Cal., 178; *Rai Kishori Dasi v. Debendranath*, I. L. R., 15 Cal., 409; *Gordhandas v. Ramcoover*, 3 Bom. L. R., 857 (865).

(11) Indian Majority Act (IX of 1875).

(12) *Gordhandas v. Ramcoover*, 3 Bom. L. R., 857 (868), observing on *Amrito Lal v. Surnomoya*, I. L. R., 25 Cal., 662.

438. Now since the rules of Hindu law are stricter and narrower than the rule, it follows that subject to its peculiar limitations, a disposition of property which offends against the rule as to perpetuities would be equally void under Hindu law, which similarly also relaxes its provisions in the case of religious and charitable endowments. It has been accordingly held that the creation of a trust by a Hindu for the accumulation for 99 years of the surplus income (after certain yearly payments) of his estate in the purchase of zemindaries, etc., from time to time, and empowering his trustees to continue the trust after the expiration of the 99 years' term, was void in the absence of any disposition of the beneficial interest in the zemindaries so to be purchased.⁽¹⁾ In construing the wills of Hindu testators the courts are very reluctant to tie up property for an indefinite period. So where a bequest creating a series of life-interests directed that a certain sum was to be paid to the legatee "so long as he shall be alive ; (and) after his death continue to pay the same to his descendants from generation to generation." it was held that the words "from generation to generation" must be construed to import no more than what is implied by "absolutely" and "for ever" in an English conveyance, and that although there is no rule of Hindu law imposing any restriction in point of time on the operation of a bequest creating a series of successive life-interests, still the bequest must be held to have conveyed an absolute interest in the sum to the descendants in existence at the time of the tenant-for-life's death, who were entitled in equal shares to an amount sufficient to yield the monthly sum bequeathed by the testator.⁽²⁾ And since a trust cannot be restored to with the object of evading the rule, a direction in the will to convert the accumulations of money in the hands of the executors and trustees into Government or other security, the interest and produce of which to be accumulated and in like manner to be invested so, till the aggregate thereof shall amount to three lacs, when it should be divided amongst his surviving sons and the descendants of deceased sons *per stirpes*, was also void as the trusts were intended to create a perpetuity, and that since the direction was both repugnant as well as uncertain, it being impossible to ascertain at the testator's death, the objects of his bounty, no effect whatever could be given to it.⁽³⁾

439. In construing transfers by gift among Hindus, a benignant construction is to be placed, and the donor's intention carried out, if ascertainable to the extent and in the form which the law allows. Thus, if an estate be given by a Hindu to *A* without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable, as the law directs ; if to it be added an imperfect description of it as a gift of inheritance not excluding the inheritance imposed by law, an estate of inheritance would pass ; if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected ; if a gift be to *A* and his heirs to be elected from a line other than that specified by law and expressly excluding the legal course of inheritance, the gift is only good so far as it is consistent with the law. *A* would take a life-estate, and the other limitations would fail. All estates of inheritance created by a gift or will, so far as they are inconsistent with the general law of inheritance, are

(1) *Asima v. Kumara Krishna*, 2 B.L.R., 400.
(O. C.), 11.

(3) *Krishnamani v. Ananda*, 4 B.L.R.,
(O. C.), 231.

(2) *Arunnagam v. Anni*, 1 M. H. C. R.,

void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates-tail. A Hindu may by will create an estate for life. So where the testator left his property to A for life with remainders, showing that A should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, it was held that A took no more than a life-estate.⁽¹⁾ Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid; and that, if they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property. Hence, the creation of a trust which had the effect of creating a perpetuity, would be void as illegal.⁽²⁾ A testator cannot get round the rule by providing that the donees shall be entitled only to the profits of his estate which should continue intact, or that the profits thereof shall in part be applied to religious benefits,⁽³⁾ and the rule does not except even a family dwelling-house.⁽⁴⁾ But the recital of an intention to create a perpetuity does not render the subsequent trusts invalid, so far as they are otherwise good according to law.⁽⁵⁾ But where the testator appointed his wife executrix, and vested her with entire authority and responsibility, and then proceeded to appoint certain managers to perform certain duties under the will which could not be performed by a *purda* woman, adding that, if it should appear to the executrix or the executors for the time being that they would not be able to protect the property, then they should form a family fund in the Government Trust Fund of all the property, and that the interest thereof should be employed in the performance of certain religious ceremonies and the family expenses, and then made a gift of all the property to his great grandsons to be born on their attaining majority. It was held that the bequest was void for remoteness.⁽⁶⁾ Similarly a provision in a will giving the testator's widow permission to adopt and making provision for the adopted son entering into possession after her death, providing further that, if the adopted son died unmarried, the estate should pass to the testator's nearest *sapinda gnyati*, was similarly held to be invalid, since the nearest *sapinda* was a person who might not be in existence at the death of the testator, being one who could not be ascertained at that time.⁽⁷⁾

440. Where the testator has conferred the power of appointment to his estate, the person appointed then takes the estate as from the testator.⁽⁸⁾ A Hindu testator devised his immoveable property upon trust for the income to be appropriated to the maintenance of his widow and of his daughter, and of the children that might be born of her, the property to be divided among the heirs

(1) *Tagore v. Tagore*, 4 B.L.R. (O.C.), 103; 9 B.L.R., 377, P. C., distinguishing *Soorjeemoney v. Deenobundoo*, 9 M. I. A., 123. It was held by Wilson, J., in a case that the rule of construction here laid down has been considerably modified since the passing of the Hindu Wills Act (XXI of 1870), in respect of cases governed by that Act, *Alangamonjori v. Sonamoni*, I.L.R., 8 Cal. 157; but this view was not accepted on appeal: *Alangamonjori v. Sonamoni*, I.L.R., 8 Cal., 637; cf. *Kally Nath v. Chunder Nath*, I.L.R., 8 Cal., 378.

(2) *Krishnamani v. Ananda*, 4 B.L.R.

(O.C.), 231.

(3) *Shookmoy v. Monohari*, I.L.R., 7 Cal., 269, O.A., I.L.R., 11 Cal., 684, P.C.

(4) *Ib.*

(5) *Kally Prosono v. Gopee Nath*, 7 C.L.R., 241.

(6) *Brajanath v. Anandamayi*, 8 B.L.R., 280; *Bramamayi v. Jogesh Chunder*, 8 B.L.R., 400. (Gift to unborn male issue of the sons and grandsons held to be invalid.)

(7) *Ramkuttie v. Kristo*, 20 W.R., 472.

(8) *Bai Motivaku v. Bai Manubai*, I.L.R., 21 Bom., 709, P. C., O. A., from I. L. R., 19 Bom., 647.

of such children. If there should not be any children born of his daughter, the property under the will should then devolve upon those "to whom she might direct it to be delivered by making her will." It was held that by substituting his daughter for himself as the person empowered to designate, the limitation that the donee must be in existence at the death of the testator still held good, and that the daughter could not exercise her power in favour of a person then unborn.⁽¹⁾

441. Mahomedan Law.—With the exception of a *wagf* or a charitable devise, Mahomedan law does not favour a perpetuity. But the creation of a *wagf* is often resorted to for the purpose of creating a perpetuity. In such cases the so-called *wagf* is only so in name, the ulterior object of the donor being unmistakably to create a perpetuity for the benefit of the donee or his descendants.⁽²⁾ The subject will be found fully discussed under section 17.

442. The principle of the rule was applied in a Mahomedan case in which the facts were as follows:—By a residuary legacy certain property was left to one Husenbhoy Ahmedbhoy to be paid to him upon his attaining the age of 25 years, it being provided that "till then my executant, Ahmedbhoy Habibhoy, shall keep with him the whole of that property." On attaining the age of 23 years, that is, two years before the legacy fell due, the legatee sued his executor for payment, contending that the clause in the will postponing his enjoyment after attaining his majority was inoperative, and that he became entitled to have the residue handed over to him on his attaining majority. On the other side the clear directions of the will were relied upon, but the Court held that the clause postponing enjoyment after majority was inoperative.⁽³⁾

443. Covenants within the Rule.—Besides transfers to person unborn, the Privy Council has declared that a covenant of that nature in favour of non-existing covenantees is open to the same objection. It is a rule of construction, that where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor, but is to be construed in favour of the grantee. If it is bad for uncertainty, and the grant clear, the latter is operative and the exception fails. If the certainty of an exception is made to depend upon an election by a certain person, and the election need not be made under the terms of the grant within the time prescribed by the rule of perpetuities, the exception will be invalid as offending against it.⁽⁴⁾ Another phase of the same question is presented where in a lease for 99 years the lessor covenanted in favour of giving the lessee at any time during the term the option to purchase the reversion at a fixed price. Here inasmuch as the covenant may conceivably infringe the rule against perpetuities, it was held to be void for remoteness. "If the grant," observed Warrington, J., "creates any interest in land, then it seems to me that the effect of it is to render it something more than a mere covenant, and to create an interest in land which does not vest at the moment at which it is granted,

(1) *Bai Motivahu v. Bai Mamubai*, I.L.R., 19 Bom., 647, O.A.; I.L.R., 21 Bom., 709, P.C.

(2) See for example, *Mahomed v. Lotful Huq*, I.L.R., 6 Cal., 744, approved in *Hamid Ali v. Mujawar Husain*, I.L.R., 24 All., 267 (270).

(3) *Husenbhoy v. Ahmedbhoy*, I.L.R., 26

Bom., 319 (323), following *Gosavi v. Rivett-Carnac*, I.L.R., 13 Bom., 463; *Gosling v. Gosling*, Johns., 265, distinguishing *Gibbs v. Ramsey*, 2 V. & B., 294; *Fowler v. Garlike*, 1 R. & M., 232; *Yeacheah v. Ong Chenu*, L.R., 6 P.C., 381.

(4) *Savill Brothers v. Bethell* [1902], Ch., 523.

but requires for its vesting the happening of another event, namely, the exercise of the option and the payment of the purchase-money, which event may happen beyond the limit."⁽¹⁾ Such a covenant would undoubtedly create an interest in land, ⁽²⁾ and as such it would create a rule obnoxious to the rule against perpetuities. Such a covenant must, however, be distinguished from the covenant to renew which runs with the land and, as such, is unfettered by the rule. There is, however, no reason why a covenant to renew should be held to run with the land, and the only reason for its justification is its antiquity.⁽³⁾

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

Transfer to class
some of whom come
under sections 13
and 14.

444. Analogous Law. This section corresponds with section 102 of the Indian Succession Act, which enacts as follows :—

"If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections, or either of them, such bequest shall be wholly void."

Illustrations.

(a) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A's living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is inoperative as to any child born after the testator's death; and as it is given to all his children as a class, it is not good as to any division of that class, but is wholly void.

(b) A fund is bequeathed to A for his life, and after his death to B, C, D, and all the other children of A, who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in Illustration (a). The mention of B, C, D by name does not prevent the bequest from being regarded as a bequest to a class, and the bequest is wholly void.

The marginal note appended to the Bill, 1879, shows that the section was drafted in view of the English precedent therein cited,⁽⁴⁾ the principle of which will be found discussed in the ensuing commentary (§ 379 or 427).

445. Principle—The rule laid down here is the same as in England,⁽⁵⁾ where the law is that when there is a time fixed at which a fund is to be divided into separate shares, each share stands separate, and the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, and it will not be made void by the invalid gift of a portion of another share to the donee of the first mentioned share. But

(1) *Woodall v. Clifton* [1905], 2 Ch., 257 (259, 260, 276).

(2) *London and South Western Ry. Co., v. Gomm*, 20 Ch. D., 562 (575, 576); followed in *Woodall v. Clifton* [1905], 2 Ch., 257 (260 279).

(3) *Woodall v. Clifton* [1905], 2 Ch., 257

(268, 279).

(4) *Bentinck v. Duke of Portland*, L. R., 7 Ch. D., 693; the same rule was laid down in *Leake v. Robinson*, 2 Mer., 363; cf. *Ramtal v. Kanai Lal*, I. L. R., 12 Cal., 663 (681).

(5) *Soudamoney v. Jogesh Chunder*, I. L. R., 2 Cal., 262.

where there is a gift to a class and the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is then void. Thus, where a testatrix made a bequest in trust for such of her four nephews and nieces as should be living at the expiration of twelve months after the death of their mother, and the issue then living who should attain the age of 21 years, of any of the nephews and nieces who should have died before the expiration of the twelve months, it was held on the construction of the will, that there was no period of distribution fixed except by the gift to the class; and that as the members of the class might not be ascertained until the expiration of more than 21 years from the death of the mother, the whole bequest failed.⁽¹⁾ The rule here enunciated applies even though all the members of the class are born before the gift takes effect, if it was antecedently possible that they might have not been so born, and the fact that the gift might have included objects too remote is fatal to its validity, irrespective of the event.⁽²⁾ The principle upon which it is founded is that, if the repugnant restriction is removed, how is the division to take place, consistently with the expressed intention of the transferor, for it is impossible to know what shape his wishes would have taken, if he had been informed that they could not be carried out as he intended.⁽³⁾ The wishes of the testator cannot, of course, be ignored.⁽⁴⁾ As was observed by Sir W. Grant, M.R., in a case:⁽⁵⁾ "The bequests in question are not made to individuals but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest to a class and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequest what he never intended them to be, namely, a series of particular legacies to particular individuals or (what he had as little in contemplation) distinct bequests in each instance to two different classes, namely, to grandchildren living at his death and to grandchildren born after his death." This case has been followed in numerous subsequent cases in England⁽⁶⁾ and in several cases in this country,⁽⁷⁾ but they would require to be somewhat modified before they can be made applicable to the different family life of the Hindus.

446. As Wilson, J., in a case⁽⁸⁾ justly observed: "These words were used in England, a country in which the nearest relatives are

Hindu law.

separate in property, in residence, and in all the details of life; one brother is, no more affected by a gift to another brother than by a gift to a stranger, and there is all the difference in the world between a gift to all the members of a class and a gift to some of them. But with Hindus the joint

(1) *Per* Fry, J., in *Bentinck v. Duke of Portland*, L. R., 7 Ch. D., 693; distinguishing *Gryffith v. Pownall*, 13 Sim., 393; *Catlin v. Brown*, 11 Hare, 372; *Knapping v. Tomlinson*, 34 L. J. Ch., 3, in all of which the shares taken by the persons ascertained within the period were incapable of increment by anything that might happen to the other shares.

(2) *Rajomoyee v. Troyluckho*, 6 C. W. N., 167 (278).

(3) *Mayne's Hindu Law*, § 354.

(4) *Pearks v. Moseley*, 11 Ch. D., 555; 5 App. Cas., 714.

(5) *Leake v. Robinson*, 2 Merivale, 363; so also *Rolfe, B., in Dunganon v. Smith*, 12 Cl. & F., p. 575; see also *Bramanayji v. Jogesh*

Chunder, 6 B.L.R., 400; *Soudamoney v. Jogesh Chunder*, I. L. R., 2 Cal., 212; *Kherodamoney v. Doorgamoney*, I. L. R., 4 Cal., 455; *Advocate-General v. Karmali*, I. L. R., 29 Bom., 183 (150, 151).

(6) *Pearks v. Moseley*, L.R., 5 App. Cas., 714.

(7) *Kashmath v. Atmaram*, I.L.R., 15 Bom., 543; *Ramlal v. Kaur Lal*, I.L.R., 12 Cal., 663; *Rajomoyee v. Troyluckhuo*, I.L.R., 29 Cal., 260; *Administrator-General of Madras v. Money*, I.L.R., 15 Mad., 466; *Rai Bishenchand v. Mt. Asmaida*, I.L.R., 6 Alt., 560, P.C.

(8) *Ramlal v. Kanai Lal*, I.L.R., 12 Cal., 663 (682).

family state is the normal state; separate property is the exception. Even where individual members of a family have separate property, they may and generally do continue to live together joint in food and worship, and joint as to their inherited property. Moreover, there are also ordinarily in, or attached to the family, a number of dependent members, and even dependents not strictly members of the family. This is the state of things which every Hindu settler and testator contemplates as existing and desires to perpetuate. To such a people the view taken by Jessel, M. R., aptly applies, for he says: 'The testator may be considered to have a primary and a secondary intention. His primary intention is that all members of the class shall take, and his secondary intention is, that if all cannot take, those who can, shall do so.' '(1) Therefore in cases not governed by the section the general rule is that, where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking. But a different view has been taken in a Calcutta case, in which, following the leading English precedents, a Divisional Bench has laid down that the rule enunciated in the section applies equally to Hindus.(2) But in view of the state of the authorities, this view is obviously untenable. It might be urged that the English rules of construction are no less planned to ascertain the real intention of the testator or donor and that the work of construction without the aid of rules is apt to be as vague and indefinite as the judging of a distance without measurement. But as against this view, it may be said that while it is true that the rules of construction are rules designed to assist in ascertaining intention, still their applicability must for that very reason depend upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact, that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. Such rules are obviously of very little use in interpreting the instruments of the natives of this country, who view most transactions from a different point of view, think differently, and speak differently from Englishmen, and who have never heard of the rules in question. Even in England no one thinks of construing a mercantile contract by the same canons as a marriage settlement. There are in some points different rules for interpreting deeds and wills—wills of realty and wills of personalty, conveyances on sales, and family arrangements.(3) But at the same time there are certain rules of construction which are so reasonable as to be universally applicable (§§ 336—338).

447. Hindu Rules stated.—Reasons have been given before to shew why the rules of Hindu law necessarily differ from the doctrine enunciated in

(1) *In re Coleman*, 4 Ch. D., 167. This view coincides with that taken by the P.C., in *Rai Bishenchand v. Mt. Asmaula*, I.L.R., 6 All., 560, P.C., per Wilson, J., in *Ramlal v. Kanai Lal*, I.L.R., 12 Cal., 673 (683); *Bhagabati v. Kali Charan*, I.L.R., 32 Cal., 992, F.B.; *Rangananda v. Baghiratti*, I.L.R., 29 Mad., 412 (418).

(2) *Rajomoyee v. Troyluckho*, 6 C.W.N.,

267 (278); following *Leake v. Robinson*, 2 Mer., 363; *Pearks v. Moseley*, 5 App. Cas., 714.

(3) Per Wilson, J., in *Ramlal v. Kanai Lal*, I.L.R., 12 Cal., 663 (678), followed in *Bhoba Tarini v. Peary Lal*, I.L.R., 24 Cal., 646; *Ramlal Sett v. Kanai Lal Sett*, I.L.R., 29 Cal., 260.

the section. "The notions present to the mind of the head of a joint Hindu family, who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."⁽¹⁾ It then follows that the two cases cannot be placed on the same footing. And it has been accordingly laid down that where the intention of a donor is to give a gift to two named persons capable of taking the gift, it being also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, although the whole of the testator's intention cannot be carried out, still the part of the gift which is capable of taking effect should be given effect to. And so as a general rule, where there is a gift to a class, some of whom are or may be, incapacitated from taking because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.⁽²⁾ But there is a difference between a present gift to persons capable of taking, which is intended afterwards to open out and let in others not capable of taking, and a future gift to a class, which may or must include both classes, all of whom are intended to take at the same time. In the former case the gift is not altogether void, but in the latter case, the question depends upon the question as to whether the beneficiaries were alive at the time of the gift or at least at the time of the death of the testator.⁽³⁾ Thus where the testator bequeathed a certain sum "subject to the condition that she shall invest the same in lands and enjoy the produce and shall transmit the corpus intact to her male descendants," and within a month after the testator's death, a son was born to the donee, who, however, died in a few months. The donee died subsequently, and her husband thereupon sued as heir of his son to recover the amount of the above bequest, but it was held that, as the daughter's son never acquired a vested interest in the bequest, the plaintiff could not recover as his heir.⁽⁴⁾

448. But in Hindu law the presumption is always made that the testator had intended that his wishes should take effect rather than that they should be defeated altogether.⁽⁵⁾ So where the testator created a trust for the benefit of his daughter-in-law, wife of his son *A*, and directed that on her death the income was to be paid to *A* after whose death "the amount of the interest is to be paid from time to time to his sons or daughters who may be alive according to what may be considered proper." At the time of the testator's death, *A*, his wife, and one daughter *C*, were alive, as also another son *B*, who on the death of *A* and his wife sued for exclusive possession of the property as against *C*, contending that *C* could only claim as one of the class of "sons or daughters" of *A* mentioned in the will, which being a gift to a class was void, as it included or might include persons who were not in existence at the time of the testator's death. But Farran, J., overruled the contention and held that the primary intention of the testator was that all the members of the class specified should take, and his secondary intention was that if all could not take, those who could, should do so, and that since *C* was a member of the class who could take the property, it must

(1) *Rai Bishenchand v. Mt. Asmaida*, I. L. R., 6 All., 560 (575), P. C., following *Hardi Narain v. Ruder Perakash*, I. L. R., 10 Cal., 626, P. C.

(2) *Ramlal v. Kanai Lal*, I. L. R., 12 Cal., 663, doubting *Soudamoney v. Jogesh Chunder*, I. L. R., 2 Cal., 262; *Kherodamoney v. Doorgamoney*, I. L. R., 4 Cal., 455. To the same effect *Tribhuvandas v. Ruttonji*, I. L.

R., 18 Bom., 7; *The Advocate-General v. Karnali*, I. L. R., 29 Bom., 150; *Bhagabati v. Kalicharan*, I. L. R., 32 Cal., 992, F. B.

(3) *Bramamoyi v. Jogesh Chunder*, 8 B. L. R., 400.

(4) *Srinivasa v. Dandayudapani*, I. L. R., 12 Mad., 411.

(5) *Mangaldas v. Tribhuvandas*, I. L. R., 15 Bom., 652.

be inferred that the testator meant that she should take it, rather than that his intention should be defeated altogether.⁽¹⁾ There is no gift to a class as is understood by the term in a will drawn up in the English form, where the testator directed that "my son-in-law, Narayan Ganoba, with his wife Sokabai and children to live in the house for ever." So where in accordance with the direction, both Narayan and Sokabai lived and died in the house, and when the right of their children to live in the house was contested by the testator's other grandchildren being sons of his son Venkoba, who contended (i) that there was no gift to the children independently of Narayan, and (ii) that if there was a gift to the children, it was void, as being a gift to a class, some members of which might have come into existence after the testator's death; it was held that the gift was made to the children independently of Narayan, and that, as regards the second contention, the gift could not be regarded as a devise to a class in the sense of a gift to a body of persons, uncertain in number at the time of the gift to be ascertained at a future time, the share of each being dependent for its amount upon the ultimate number of persons, but that the benefit which each member of the class was to take, was in no way dependent on the number of the children, each had a distinct and independent right to reside in the house, and the number of persons who might ultimately belong to the class was in no sense regarded as a criterion of the interest which each was to take.⁽²⁾

449. A bequest to such person or persons as *A* should by deed in writing appoint is valid and would be given effect to, subject however to the restrictions which the Hindu testamentary law imposes on the testator himself, *viz.*, that the appointment should be made, so that (i) the appointee might be ascertained when the event arose on which he was to take, and (ii) the appointee be a person who was alive at the death of the testator.⁽³⁾ Considerations which only show that a testator has made a disposition in his will which the Court is surprised to find there, though they might determine the sense in which the testator had used an ambiguous expression, cannot of themselves lead it to refuse to give effect to the plain language he has employed, *e.g.*, to read a bequest to "children" as a bequest to "sons" only. A bequest to "the children of *A* living at his decease," where some such children are in existence at the date of the will, need not be construed as a gift to a class of which some members might come into existence after the testator's death, when such a construction would manifestly defeat the primary object of the testator.⁽⁴⁾ A provision by a testator that after the death of the last survivor of his five sons the property should be divided as directed among the sons and daughters of his sons, provision being also made in certain events for the widows of his deceased sons would be valid or void according as the testator intended to benefit the donees as a whole, or only members individually. If the former, the fact that two more grand-daughters were born after the testator's death would render invalid the entire bequest. But if the latter, the bequest would follow the principle before discussed. The principle deducible from the authorities is that it is the primary duty of the Court so to construe a will as

(1) *Mangaldas v. Tribhuvandas*, 1 L. R., 15 Bom., 652; following *Ramlal v. Kanai Lal*, 1 L. R., 12 Cal., 663; *Maryanama v. Padma Nobhayya*, 1 L. R., 12 Mad., 393, and the dictum of Jessel, M. R., in *In re Coleman*, 4 Ch. D., 167 (169).

(2) *Krishnanath v. Atmaram*, 1 L. R., 15

Bom., 543, following as to the meaning of the term "class;" *Leake v. Robinson*, 2 Mer., 363.

(3) *Javerbaj v. Kablibai*, 1 L. R., 16 Bom., 492; O. A., from 1 L. R., 15 Bom., 326.

(4) *Krishnunarao v. Benabai*, 1 L. R., 20 Bom., 571.

to carry out, as far as possible, the intentions of the testator, and that if it comes to the conclusion that the testator had the primary intention of benefiting all the members of a class, and if such intention fails by reason of its being void, yet if it can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testator's death, then effect should be given to such secondary intention. For the purpose of ascertaining these primary and secondary intentions, it is, of course, necessary to take all the material facts as to the testator's family into consideration, and to read the various provisions of his will as a whole.⁽¹⁾ It must, however, be confessed that, although the rule so settled may be now taken to have received consensus of the Indian Courts, still it is not altogether free from difficulty, for what is the meaning of the phrase "primary and secondary intention." Does it imply an intention to benefit persons in the alternative, and, if so, the rule is as unnecessary as it is misleading. But if by the term "secondary intention" is intended an intention implied though not expressed, the rule recedes into a subordinate place amongst the rules of construction, and scarcely deserved the notice that has been bestowed on it.

450. If a testator appoints persons to be his executors and trustees, and direct them to do certain acts which can only be done by the *owners* of his residuary estate, the trustees will take that estate, though there be no express devise to them ⁽²⁾ So again where the intention can be safely inferred, the words used are immaterial. Thus a direction under the testator's will to the principal legatee to pay a certain sum every month "to my dependants and personal servants" adding "be it known that the expenses of the *emambara*, etc., will be continued for ever, and also the pay of G. K. and M. A. will be defrayed for ever, i.e., generation after generation. The rest of the servants will be paid for life only." It was held that these words were not only expressions of a wish, but constituted a bequest to the persons designated.⁽³⁾

A gift in a will to widows of sons, is, in the case of Hindus or Mahomedans, a gift to a "class," as Hindus and Mahomedans are by their law permitted to have more than one wife at the same time.⁽⁴⁾

451. What is a "class."—This being the principle, it is clear that this section would apply only when the interest created is for the benefit of a class and not to *personae designatæ*. For in the latter case the testator's wishes being ascertainable and definite, the intention of the testator cannot be defeated, and consequently a transfer in favour of such persons would not be for that reason void.⁽⁵⁾ But what is intended by the term "class" is often a matter of some difficulty. "A number of persons are popularly said to form a class when they can be designated by some general name, as 'children,' 'grandchildren,' 'nephews;' but in legal language the question whether the gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to

(1) *Ramlal v. Kanailal*, I. L. R., 12 Cal., 663; *Krishnanath v. Atmaram*, I. L. R., 15 Bom., 543; *Mangaldas v. Tribhuvandas*, ib., 652; *Tribhuvandas v. Gangadas*, I. L. R., 18 Bom., 7; *Krishnarao v. Benabai*, I. L. R., 20 Bom., 571; *Khimji v. Morarji*, I. L. R., 22 Bom., 533 (539).

(2) *Tripoorasoodery v. Debendronath*, I. L. R., 2 Cal., 45.

(3) *Suleman v. Dorab*, I. L. R., 8 Cal., 1 P. C.

(4) *Khimji v. Morarji*, I. L. R., 22 Bom., 533.

(5) *Administrator-General of Madras v. Money*, I. L. R., 15 Mad., 448 (466); per Lord Hobhouse in *Rai Bishenchand v. Mt. Asmaida*, I. L. R., 6 All., 560 (574), P. C.

take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons.”⁽¹⁾ But the strict rule herein laid down has not been followed by the Privy Council in determining Indian cases. Thus in a case⁽²⁾ where the transfer was made to one Satrujit and his brothers, the Privy Council observed:—“Is then the gift indisputably designated for him wholly to fail because the parties supposed that they could join with him, possible after-born sons, who, if they had happened to be born, could not legally claim under a gift? . . . No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail. . . . Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan which is consistent with one construction of the deed and is clearly proved from the transfer of the property in fact. But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to English deeds of gift. . . . They are only showing that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement are something very different from the notions present to the mind of an English testator when he makes a gift to a class.”

452. Thus then in this case their Lordships have expressly laid down that, although the testator's entire wishes cannot be given effect to, yet effect may be given to such wishes as are not invalid. This case was followed by the Calcutta High Court in a case⁽³⁾ in which, dissenting from the cases⁽⁴⁾ quoted before, it held that “where there is a gift to a class some of whom are, or may be, incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should inure for the benefit of those members of the class who are capable of taking.”⁽⁵⁾ The same view has been taken by two other High Courts.⁽⁶⁾

453. It will, however, be seen that this view is not in accord with that **S. 102. III. (b),** conveyed by illustration (b) to section 102 of the Indian Succession Act, where it said that the mention of *B, C* and commented on. *D* by name does not prevent the bequest from being regarded as bequest to a class. This the Privy Council have not failed to notice in the judgment above quoted, for they say:—“Section 102 lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in sections 101 and 102.”⁽⁷⁾ And the gift under consideration does not fall within either of these two sections. It may be that illustration (b) to section 102 imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended not to define the word

(1) Jarman on Wills, pp. 268 & 269, quoted with approval in *Krishna Nath v. Atmaram*, I. L. R., 15 Bom., 543 (548).

(2) *Rai Bishenchand v. Mt. Asmaida*, I. L. R., 6 All., 560 (574), P. C.

(3) *Ramlal v. Kanailal*, I. L. R., 12 Cal., 663.

(4) *Soudamoney v. Jogesh Chunder*, I. L. R., 2 Cal., 262; *Kherodamoney v. Doorga-*

money, I. L. R., 4 Cal., 455.

(5) *Per Wilson, J.*, in *Ramlal v. Kanailal*, I. L. R., 12 Cal., 663.

(6) *Krishna v. Atmaram*, I. L. R., 15 Bom., 543; *Mangaldas v. Tribhuvandas*, I. L. R., 15 Bom., 652; *Manjamma v. Padmanabhayya*, I. L. R., 12 Mad., 393.

(7) This is incorrect, and should be *Ss. 100 and 101*; see *S. 102*.

'class,' but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by sections 100 and 101." This case has materially altered the law as laid down in the earlier cases,⁽¹⁾ some of which⁽²⁾ having propounded the contrary view, have been overruled by the Privy Council.

454. Indian Rule of Construction.—As much depends upon the proper construction of the instruments of transfer, the correct rule for the construction of such documents, may here be laid down. The Privy Council has remarked in a leading case:⁽³⁾ "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses." The object should be to ascertain the intention of the testator having regard to the habits of thought and modes of expression prevalent amongst those to whose language the rules of construction are applied. "It is a very serious thing to use such (*i.e.*, English) rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question. Even in England no one thinks of construing a mercantile contract by the same canon as a marriage settlement."⁽⁴⁾ So in other cases the same Board has laid down that, in construing family settlements, the courts are to ascertain the real meaning of the parties to the transaction: that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a gift to persons capable of taking, that gift is effectual, although it was also intended that other persons, incapable of taking, should afterwards come in and share in the gift. The technical rules of construction which have become stereotyped, as a part of English conveyancing, are then to be deprecated in construing an Indian deed, and this is the view which that High tribunal has reiterated in several cases that went up before it for adjudication⁽⁵⁾ (§§ 336-338).

455. English Rules of Construction.—The trend of English cases seems to be that in dealing with a gift to a class you enquire first at what period the class is to be ascertained—it may, in the case of a will, be on the death of the testator, or at a later period. If the class is to be ascertained on the death of the testator, no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date, those who become members of the class within the extended period are admitted; and subject to any period of remoteness those who are thus capable of taking, take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so, even if the gift be to persons born and to be born.⁽⁶⁾ If any die

(1) *Per* Wilson, J., in *Ramlal v. Kanailal*, 1. L. R., 12 Cal., 663 (672).

(2) *Soudamoney v. Jogesh Chundra*, 1. L. R., 2 Cal., 262; *Kherodemoney v. Doorgamoney*, 1. L. R., 4 Cal., 455; cf. *Krishnanath v. Atmaram*, 1. L. R., 15 Bom., 543.

(3) *Hunooman Prasad v. Mt. Baboola*, 6 M. I. A., 411.

(4) *Per* Wilson, J., in *Ramlal v. Kanailal*, 1. L. R., 12 Cal., 663 (678). See also *Sreemutty v. Sibchunder*, 6 M. I. A., 1; *Gokul*

Das v. Rambux, L. R., 11 I. A., 126.

(5) *Hunooman Prasad v. Mt. Baboola*, 6 M. I. A., 411; *Sreemutty v. Sibchunder*, *ib.*, 1; *Gokul Das v. Rambux*, L. R., 11 I. A., 126; *Tagore v. Tagore*, 9 B. L. R., 377, P. C.; *Rai Bishen v. Mt. Asmaida*, 1. L. R., 6 All., 560, P. C.

(6) *Sprackling v. Ranier*, 1 Dick., 344; *Ayton v. Ayton*, 1 Cox., 327; *Whitbread v. Lord St. John*, 10 Ves., 152; *Mann v. Thompson*, Kay, 638.

in the testator's lifetime, they are simply excluded, and the rest take the whole.⁽¹⁾ If one is incapacitated from taking because he has attested the will, he is simply excluded, and the rest take the whole.⁽²⁾ There are, of course, cases in England relating to *real* property in which different rules have been applied. But, as observed by Wilson, J.: "Rules connected with the English law of real property could hardly with reason be applied to the wills and deeds of Hindus, and in *Kherodemoney's case* the Court refused to apply them, and I think rightly."⁽³⁾

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer to take effect on failure of prior transfer.

456. Analogous Law.—This section corresponds with section 103 of the Indian Succession Act which runs thus:

"103. Where a bequest is void by reason of any of the rules contained in the same will, and intended to take effect after or upon failure of such prior bequest, is also void.

Illustrations.

(a) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, for his life, and after the decease of such son, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect after the bequest to such of the sons of *A* as shall first attain the age of 25, which bequest is void under sec. 101. The bequest to *B* is void.

(b) A fund is bequeathed to *A* for his life, and after his death to such of his sons as shall first attain the age of 25, and if no son of *A* shall attain that age, to *B*. *A* and *B* survive the testator. The bequest to *B* is intended to take effect upon failure of the bequest to such of *A*'s sons as shall first attain the age of 25, which bequest is void under sec. 101. The bequest to *B* is void."

457. Principle.—The rule laid down in this section is in accordance with the English law by which limitations upon void limitations are themselves void. The transaction being indivisible, once a person transfers property and his whole interest being transferred, the failure of the prior interest leads to the failure of the whole transaction. As observed by Lord St. Leonards of the gift over which was void: "It was void, not because it was not within the line of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event where the person to take was in actual existence, but could not take."⁽⁴⁾ This section only applies when the two events

(1) *Stewart v. Sheffield*, 13 East., 526; *Re Coleman*, 4 Ch. D., 167.

(2) *Young v. Davies*, 2 Dr. & S., 167; *Fell v. Biddulph*, L.R., 10 C.P., 701.

(3) *Per Wilson, J., in Ram Lal v. Kanailal*, I.L.R., 12 Cal., 663 (680). The real property cases are too numerous to be cited here. The latest of these cases are *All v. Lord Stratheden & Campbell* [1894], 3 Ch., 265;

In re Springfield, Chamberlain v. Springfield [1894], 3 Ch., 603; *In re Abbott* [1893], 1 Ch., 54. *In re Wood Tullett v. Colville* [1894], 2 Ch., 310; *In re Lord Sudeley* [1894], 1 Ch., 334; in which, however, a different view consonant with the Indian rule was followed by Chitty, J.

(4) *Moneypenney v. Derring*, 2 DeG. M. & G., 182.

cannot be separated; if they can be separated, then only the invalid limitation is disregarded, but the transfer itself is not void.⁽¹⁾

458. Gift over when invalid.—The first requisite of the failure of the gift over made in default of the antecedent disposition failing to take effect, is that it must have been created *in the same transaction*. The gift over being upon a contingency which is bad, becomes itself invalid, the reason being that the persons entitled under the subsequent limitation were not intended to take unless and until the prior limitation is exhausted: and as the prior limitation being void, for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settler in favour of the beneficiaries under the subsequent limitation.⁽²⁾ But this limitation does not necessarily apply to limitations in default of appointment, in which usually the intention is that they should take effect unless displaced by a valid exercise of the preceding power of appointment. Thus where the donees of a limited power of appointment purported to exercise it by appointing trustees upon such trusts as *A*, one of the objects of the power should, with certain consent, appoint; and in default of, and subject to, any such appointment, upon certain trusts which were within the power. It was held that, although the power of appointment purported to be conferred on *A* was void, the trusts in default of appointment were valid.⁽³⁾ Hence limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuity.⁽⁴⁾ Again, if the gift over is dependent upon the happening of either of two events, one of which is legal, and the other illegal, the succeeding interest will take effect only if the former event in fact happens, although the second event may offend against the rule. In such cases, the whole question depends upon whether the clause for carrying the estate over is divisible or not. If it is, the valid disposition would take effect without reference to the invalid contingency. Thus, suppose a gift over is made of property in the event of there never being any child of *A* or in the event of no child attaining, etc., twenty-one. Now here the first contingency is valid, but the second is too remote, but the gift over would none the less take effect on the happening of the former event.⁽⁵⁾ The question in such cases is, whether the gift can be split into two alternatives, in which case, if the alternative, which is within the legal limits, happens, the gift over would take effect.⁽⁶⁾

459. The same rule would appear to apply to Hindus, at any rate to those to whom the Hindu Wills Act (7) is applicable. Thus, a bequest of a trust-fund which "my great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu Law. God forbid it, but should I have no great-grandsons in the male line then my daughters' sons, when they are of age, shall take the said property from the trust-fund and divide it according to the Hindu

(1) *Evers v. Challis*, 7 H. L. C., 531, 534; *Watson v. Young*, 28 Ch. D., 436 (443); *Jones v. Westcomb*, 1 Eq., Ca. Ab., 245; *In re Bence Smith v. Bence* [1891], 3 Ch., 242.

(2) *Robinson v. Hardcastle*, 2 R. R., 241 (251); *Routledge v. Dorrie*, 2 Ves., 357; *Beard v. Westcott*, 5 B. & Al., 801; *Money-penny v. Derrington*, 2 DeG. M. & G., 145 (181, 182); *In re Abbott; Peacock v. Frigout* [1893], 1 Ch., 54 (57).

(3) *Webb v. Sadler*, L. R., 8 Ch., 419.

(4) *In re Abbott; Peacock v. Frigout* [1893], 1 Ch., 54 (59); explaining *Wollaston v. King*, L. R., 8 Eq., 165; *Morgan v. Gronow*, L. R., 16 Eq., 1.

(5) *Watson v. Young*, 28 Ch. D., 436 (443); *Evers v. Challis*, 7 H. L. C., 531.

(6) *Evers v. Challis*, 7 H. L. C., 531 (547).

(7) Act XXI of 1870.

Shastras in vogue." Here the bequest to the daughter's son was dependent on, and not alternative to, the gift to the great-grandsons, and therefore a bequest which is void within the rule.⁽¹⁾ And it would be so if the words make the gift to the daughters' sons contingent on the double event, *first*, of the gift to the great-grandsons ultimately failing to take effect according to its terms, and of *secondly*, the daughters' son coming of age. But if, on the other hand, the bequest mean: "if at the time when my daughters' sons come of age, the gift to my great-grandsons for any reason has not taken effect, then my daughters' sons shall take the property," then the gift being in the alternative shall not infringe the rule and would take effect.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

460. Analogous law.—Similar exceptions are made in the Indian Trusts Act, section 1. But the corresponding provisions of section 105 of the Indian Succession Act⁽²⁾ are restrictive on the lines of the English Mortmain Acts.

In England before the passing of the Statute of Mortmain the policy of early times was to favour gifts to charitable and religious uses,⁽³⁾ so much so that property once devoted to charity was never allowed to be diverted to any other channel, by the failure or uncertainty of the particular objects. But the proneness of people to make ill-considered dying bequests under religious influence to the church threatened to develop into a public danger, and a statute had accordingly to be passed to prevent persons from making death-bed bequests.⁽⁴⁾ It was enacted that no hereditaments or personal estate to be laid out in the purchase of hereditaments, was to be disposed of or charged for any charitable use, otherwise than by indenture sealed and delivered in the presence of two credible witnesses, twelve calendar months before the death of the donor, and enrolled in Chancery within six calendar months after the execution. The assurance must further be made to take effect in possession immediately for the charitable use intended, and must, as a rule, be without any provision for the benefit of the assurer or his successors.

461. The time-limit is not imposed on sales of land to a charity for full value. The provisions of this statute have in part been modified by more recent enactments.⁽⁵⁾ Thus, personal property may be devised by will to a charity.⁽⁶⁾ The investment on mortgage of land of money held by any corporation or trustees for any public or charitable purpose is also exempted from the statute.⁽⁷⁾ The two universities of Cambridge and Oxford, and the colleges thereof, and the scholars upon the foundation of the colleges of Eton, Winchester and Westminster,⁽⁸⁾ and the whole of Scotland⁽⁹⁾ are also exempted from its conditions.

(1) *Brajanath v. Anandamayi*, 8 B.L.R., 208.

(2) As to the meaning of which see *Administrator-General v. Simpson*, I.L.R., 26 Mad., 73.

(3) 43 Eliz., c. 4, enlarged the devising power of testators, *Attorney-General v. Rye*, 2 Vern., 453; *Attorney-General v. Burdett*, b., 755.

(4) 9 Geo. II, c. 36, brought into force from 24th June 1736.

(5) Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict., c. 42, repealing, 9 Geo. II, c. 36.

(6) S. 4, 51 & 52 Vict., c. 42; 54 & 55 Vict., c. 73.

(7) 33 & 34 Vict., c. 34.

(8) S. 4, 9 Geo. II, c. 63.

(9) *Ib.*, s. 6.

The Act extends to leaseholds and moneys secured on mortgage, and even to judgment-debts creating a charge on real property.⁽¹⁾

462. The present section then widely differs from the corresponding law in England, and if the latter affords any analogy at all, it must be found in the cases determined before the passing of the restrictive enactments. The English statute had never any application to India,⁽²⁾ and consequently, its provisions will not apply to bequests made by domiciled Englishmen in this country.⁽³⁾ Neither the statute nor the section applies to Hindus, Mahomedans or Buddhists,⁽⁴⁾ but the principle here enunciated has been recognized in their cases also.

463. Principle.—This exception to the general rule against perpetuity is made on the ground of public utility, for it is only fair that transfers made for charitable purposes and towards objects of public benevolence should be free from the trammels of law which, if enforced, might have the result of diverting funds from objects of unquestionable public advantage and philanthropy. In England, however, such bequests are not valid. No doubt the policy of early times strongly favoured gifts,⁽⁵⁾ even of land, to charitable purposes. At the commencement of the eighteenth century, however, the tide of public opinion appears to have flowed in an opposite direction, and legislative restrictions were placed upon what were termed "superstitious and charitable uses." Thus by the Statute of Mortmain⁽⁶⁾ commencing from the 24th June 1736, no transfer of *immoveable* property could be made except by a sealed indenture executed twelve months before the death of the donor, and which had to be enrolled in Chancery within six months before the death. This Statute was repealed and revised by the Mortmain and Charitable Uses Act, 1888,⁽⁷⁾ which is still in force in England, but not in Scotland.⁽⁸⁾ It is, however, subject to certain exceptions in favour of objects of public utility to convenience, *e.g.*, sites for schools,⁽⁹⁾ literary and scientific or similar institutions,⁽¹⁰⁾ recreation and play grounds,⁽¹¹⁾ or places of worship or burial,⁽¹²⁾ or for dwellings of the working classes.⁽¹³⁾

464. Benefit of the public.—The objects in favour of which, this exception is enacted are objects which would be designated "charitable" for "charity" has been defined to be a general public use.⁽¹⁴⁾ The Elizabethan Statute⁽¹⁵⁾ enumerates various (though not as commonly supposed all) kinds of charities, *viz.*, the relief of the aged, impotent and poor people,⁽¹⁶⁾ maintenance of sick and maimed soldiers and mariners, schools of learning,⁽¹⁷⁾ free schools

(1) *Jeffries v. Alexander*, 8 H. L. C., 594.

(2) *Mayor of Lyons v. East India Co.*, 1 M. L. A., 175; *Advocate-General v. Vishwanath*, 1 B. H. C. R., (A C) 9; *Das Mercus v. Cones*, 2 Hyde, 65; *Andrews v. Jakim*, 2 B. L. R. (O. C.), 148; *Judah v. Judah*, 5 B. L. R. (O. C.), 433; *Colgan v. The Administrator-General*, 1 L. R., 15 Mad., 424 (443).

(3) *Broughton v. Mercer*, 14 B. L. R., 448; *Colgan v. Administrator-General*, 1 L. R., 15 Mad., 424.

(4) S. 2 (d) and s. 10, *ante*.

(5) S. 43, Eliz., c. 4, authorizing testamentary appointments to corporations for charitable uses.

(6) 9 Geo. II, c. 36.

(7) 51 & 52 Vict., c. 42, amended in 1891, 54 & 55 Vict., c. 73, s. 5. As to cases on these

Statutes, see *Churcher v. Martin*, 42 Ch. D., 312 (decided on the Act of Geo. II). In re *Bridger* [1894], 1 Ch., 297; In re *Hume* [1895], 1 Ch., 422.

(8) By s. 6.

(9) 4 & 5 Vict., c. 39, ss. 210, 16; 7 & 8 Vict., c. 37; 14 & 15 Vict., c. 24; 15 & 16 Vict., c. 49.

(10) 17 & 18 Vict., c. 112, ss. 1, 13 & 14.

(11) 22 Vict., c. 27.

(12) 45 & 46 Vict., c. 21.

(13) 53 & 54 Vict., c. 16.

(14) *Jones v. Williams*, Amb., 651.

(15) 43 Eliz., c. 4.

(16) *Nash v. Morley*, 5 Beav., 177.

(17) *Attorney-General v. Nash*, 3 B. C.C., 587.

and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; the relief, stock, or maintenance of houses of correction; marriages of poor maids, supportation and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; and aid in case of any poor inhabitants, concerning payment of fifteens, setting out of soldiers and other taxes. Besides these objects specified in the Statute, charity extends to gifts for other purposes also. Thus, gifts for the erection of water-works,⁽¹⁾ or to be applied for the good of a place,⁽²⁾ general improvement of a town,⁽³⁾ for endowing a church, or preaching a sermon,⁽⁴⁾ for endowing or erecting a hospital,⁽⁵⁾ or for the benefit of widows and orphans,⁽⁶⁾ for the maintenance of a lecturer or quadrupeds and birds useful to man, anti-vivisection societies,⁽⁷⁾ and finally gifts for any purpose which is either for the public or general benefit of a place,⁽⁸⁾ or tends towards public religious instruction or edification⁽⁹⁾ have been respectively held to be charitable.⁽¹⁰⁾

465. "Charity in its legal sense," said Lord Macnaghten,⁽¹¹⁾ "comprises four principal divisions—trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly. A religious purpose is a charitable purpose; a society for religious purposes would, therefore, ordinarily be a society for charitable purposes. Any mode of promoting the welfare of mankind would be a charitable object.⁽¹²⁾ Charitable purposes are not restricted to the giving of alms or other charitable reliefs.

466. Indian Cases on Charity.—Gifts and bequests for the following purposes are valid: For *sadavarat*⁽¹³⁾ (food given to all comers) and *avala*⁽¹⁴⁾ (i.e., a cistern of water for animals to drink out of) or a well;⁽¹⁵⁾ so also gifts to a temple or an idol,⁽¹⁶⁾ a *wakf*, or endowment to religious and charitable uses,⁽¹⁷⁾ maintenance of *choultries* for affording shelter to strangers.⁽¹⁸⁾ But a *wakf* must be certain as to the property appropriated, unconditional, and not subject to an option,⁽¹⁹⁾ and solely devoted to the worship of God or to religious or charitable purposes.⁽²⁰⁾ A devise for the support of a hospital is valid.⁽²¹⁾ A bequest by

(1) *Jones v. Williams*, Amb., 651.

(2) *Attorney-General v. Webster*, L R , 20 Eq., 483.

(3) *House v. Chapman*, 4 Ves., 542; *Attorney-General v. Heels*, 2 S. & St., 67.

(4) *Turner v. Ogden*, 1 Cox, 316.

(5) *Tetham v. Anderson*, 2 Ed., 296; *Attorney-General v. Kell*, 2 Brav., 575.

(6) *Attorney-General v. Comber*, 2 S. & St. 93.

(7) *In re Foreaux* [1895], 2 Ch., 501.

(8) *Attorney-General v. Aspinall*, 2 My. & Cr., 622 (623).

(9) *Wilkinson v. Lindgren*, L.R., 5 Ch., 570; *Cocks v. Manners*, L.R., 12 Eq., 585.

(10) 2 Jarm., pp. 209, 210, 211.

(11) *Commissioners v. Pemsel*, [1891], A.C., 589.

(12) *Anjuman-i-Islamia v. Nasiruddin*, 3

A. L. J. R., 124; following *White v. White*, [1893], 2 Ch. 41.

(13) *Jamnabai v. Khimji*, I. L. R., 14 Bom., 1.

(14) *Id*

(15) *Id*

(16) *Thackersey v. Hurbalum*, I. L. R., 8 Bom., 432; *Bhuggobutty v. Goroo Prosonno*, I. L. R., 25 Cal., 112 (127).

(17) *Jeevan v. Shah Kabeerudeen*, 2 M. I. A., 390.

(18) *Hossain v. Ali Ajain*, 4 M. H. C. R., 44.

(19) *Fatma v. The Advocate-General*, I. L. R., 6 Bom., 42.

(20) *Muhammed Hamidullah v. Latful Huq*, I. L. R., 6 Cal., 744; *Luchmiput Singh v. Amir Alum*, I. L. R., 9 Cal., 176; *Bikani v. Shuklal*, I. L. R., 20 Cal., 116, F.B.

(21) *Broughton v. Mercer*, 14 B. L. R., 442.

a Parsi for the performance of *Soo Baj rozaar*, *ghambur* and *dosla* ceremonies, the consecration of *niraugdin*, and the recitation of *Yezashin* was upheld,⁽¹⁾ but not so a bequest by an Armenian for masses.⁽²⁾ A gift by a Hindu to *Dharam* (religion) is too vague to be valid.⁽³⁾ But a fund for the purpose of a Jain temple and maintenance of priests or the poor is valid.⁽⁴⁾ Religious bequests are presumably charitable.⁽⁵⁾

467. What are not Charities.—The following have been held to be transfers not for charitable uses and therefore void : a gift to procure masses for the soul of the testator and others.⁽⁶⁾ So also a gift to a convent of nuns (whose sole object is the sanctifying of their own souls, and not performing any duty of a charitable nature),⁽⁷⁾ or a gift for the erection or repair of a monument,⁽⁸⁾ vault or tomb, not forming part of a church.⁽⁹⁾ So also a gift for the performance of ceremonies for the spiritual good of the donor or his family⁽¹⁰⁾ because they lead to no *public* advantage.⁽¹¹⁾ So also the gift of a cup to be given to the most successful yacht is not charitable, being a gift for the encouragement of sport.⁽¹²⁾ And similarly it has been held that a gift for the repair of a private tomb⁽¹³⁾ or a monument,⁽¹⁴⁾ or to establish a private museum is not charitable.

468. Hindu Endowments.—Hindus, Mahomedans and Buddhists are, as already stated, entirely exempted from the operation of this chapter. It, therefore, becomes necessary to see how far these rules sanction charitable bequests. It has been ruled by the Privy Council that an alienation by a Hindu or Mahomedan or a Buddhist in perpetuity for a private object is not void,⁽¹⁵⁾ but the gift must be in reality for the object, and not a cover for making bequests against the rule as to perpetuities in which case it would be void.⁽¹⁶⁾ Property dedicated to some permanently charitable object cannot, as a rule, be alienated unless the necessity for alienation is completely established.⁽¹⁷⁾

469. Religious Endowments: valid and invalid.—The Hindu law, unlike the English law with respect to charities, makes an exception in

(1) *Limji v. Bapuji*, I. L. R., 11 Bom., 441; dissented from in *Jamshedji Tarachand v. Soonabai*, I. L. R., 33 Bom., 122.

(2) *Colgan v. Administrator-General*, I. L. R., 15 Mad., 424.

(3) *Devshunker v. Motiram*, I. L. R., 18 Bom., 136; *Morarii v. Nenbai*, I. L. R., 17 Bom., 351; *Runchordas v. Parvati*, I. L. R., 23 Bom., 725, P. C.

(4) *Thackersey v. Hurbhum*, I. L. R., 8 Bom., 432.

(5) In re *White*; *White v. White* [1893], 2 Ch., 41.

(6) *West v. Shuttleworth*, 2 My. & K., 684; *Re Blundell's Trust*, 31 L. J. (Ch.), 52; *Yeap v. Ong*, L. R., 6 P. C., 396 (Chinese 'superstition' case); *Colgan v. Administrator-General*, I. L. R., 15 Mad., 424.

(7) *Cocks v. Manners*, L. R., 12 Eq., 574.

(8) *Thomson v. Shakespear*, 29 L. J. Ch. 140, 278.

(9) *Hoare v. Osborne*, L. R., 1 Eq., 585; *Re Rigley's Trust*, 86 L. J., (Ch.), 147; *Richard v. Robson*, 31 Beav., 224; 31 L. J. Ch., 397; *Fowler v. Fowler*, 33 Beav., 616.

(10) *Trimmer v. Danab*, 25 L. J. Ch., 424.

(11) *Yeapachea v. Ong Cheng*, L. R., 6 P. C., 381; *Fatma Bibi v. Administrator-General*, I. L. R., 6 Bom., 42; *Limji v. Bapuji*, I. L. R., 11 Bom., 441.

(12) In re *Nottage* [1895], 2 Ch., 649.

(13) *Richard v. Robson*, 31, L. J. Ch., 397.

(14) *Fowler v. Robson*, 33 Beav., 616.

(15) *Jewan Dass v. Shah Kabeer-oo-deen*, 2 M.I.A., 390; *Fatma Bibi v. Advocate-General*, I. L. R., 6 Bom., 42; *Sookhmoy Chunder v. Monohari*, I. L. R., 11 Cal., 684, P. C.; *Limji v. Bapuji*, I. L. R., 11 Bom., 411; *Bikani v. Shuklal*, I. L. R., 20 Cal., 116, F. B.

(16) *Mahomed Hamidullah v. Latful Huq*, I. L. R., 6 Cal., 744; *Promotho v. Radhika*, 14 B. L. R., 175; *Phore v. Damodar*, I. L. R., 3 Bom., 84; *Anantha v. Nagamuthu*, I. L. R., 4 Mad., 200.

(17) *Mayne's Hindu Law*, § 397; *Radhabulab v. Juggut Chunder*, 4 S. D. A., 152; *Shibesevree v. Mathranath*, 13 M. I. A., 270; 13 W. R., P. C., 28; *Jagessur v. Rodroo*, 12 W. R., 299; *Tahboonissa v. Koomar*, 15 W. R., 118; *Arruth v. Juggurnath*, 18 W. R., 429; *Mahant Burm v. Kashi*, 20 W. R., 471; *Bunwari v. Mudun*, 21 W. R., 41.

favour of religious endowments.⁽¹⁾ But the fact that the exception is allowed both by the Hindu and Mahomedan law is often taken advantage of, for the purpose of creating a perpetuity. In such cases, the so-called endowment is only so in name, the ulterior object of the donor being unmistakably to create a perpetuity for the benefit of the donee or his descendants. Now since both Hindu and Mahomedan law lean against a devise creating a perpetuity, it is necessary to ascertain the limits within which a religious endowment may be validly made. For on this question would hinge the determination of the other question as to when should the dedication be regarded as illusory and invalid. The Hindu law, unlike the English law with respect to charities, makes no distinction between a religious endowment, having for its object the worship of a household idol and one which is for the benefit of the general public.⁽²⁾ A Hindu idol being symbolical of religious purposes is capable of being endowed with property, and no express words of gift to such an idol in the shape of a trust or otherwise are required to create a valid dedication, provided that the object of the donor be clearly specified, and the property intended for the endowment be set apart or dedicated to those purposes.⁽³⁾ Of course, where the gift is to take effect *inter vivos*, a registered document is necessarily a prerequisite,⁽⁴⁾ but since a Hindu may make a nuncupative will,⁽⁵⁾ it follows that he may likewise make a nuncupative devise to secular or religious purposes. On the other hand, where deeds have been duly executed dedicating his property to trustees for the worship of the family idol, if the donor had intended that the deeds should not be acted upon and has not divested himself of his property, there is then no endowment.⁽⁶⁾ Similarly, where a man purchased property in the name of his own idol, which no one except himself had the power or right to worship it, it could not be regarded as the property of the idol, but is the property of the person who purchased it.⁽⁷⁾ Hindu law creates no legal obligation to endow a family idol to support it, although perhaps it may create a moral obligation under certain circumstances.⁽⁸⁾ And the mere fact that a portion of the profits of land in the possession of a party had been for some time used for the worship of an idol is no proof of an endowment.⁽⁹⁾ But, although the mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, still where there is apparently good evidence, going back for more than half a century, that the land was given for the support of an idol, proof that from that time the proceeds had been so expended would be a strong corroboration.⁽¹⁰⁾ In such cases, one test of an endowment as to whether it is *bona fide* or nominal is to see how the founder himself treated the property, and how the descendants have since treated it.⁽¹¹⁾ A trust is not required to support a Hindu foundation, as it is by English law.⁽¹²⁾ And it has been laid down that in India a trust for a Hindu

(1) *Bhuggobutty v. Gooroo Prosonno*, I.L.R., 25 Cal., 112.

(2) *Rupa v. Krishnaji*, I.L.R., 9 Bom., 169; *Khetter v. Hari*, I.L.R., 1 Cal., 557.

(3) *Manohur v. Lakhmiram*, I.L.R., 12 Bom., 263; followed in *Bhuggobutty v. Gooroo Prosonno*, I.L.R., 25 Cal., 112 (127).

(4) S. 123, *post*.

(5) *Bhagvan v. Kala*, I.L.R., 1 Bom., 641; *Srinivasammal v. Vijayammal*, 2 M. H.C.R., 37; *Subbayya v. Chelamma*, I.L.R., 9 Mad., 477; *Subbayya v. Surayya*, I.L.R., 10 Mad., 251.

(6) *Watson & Co., v. Ramchund*, I.L.R., 18 Cal., 10 P.C.

(7) *Brojsoondery v. Luchmee*, 11 W.R., 13 O.A., 20 W.R., 95. P.C.

(8) *Shamlall v. Hurosoondery*, 5 W.R., 29.

(9) *Ram Pershad v. Sreehuree*, 18 W. R., 399.

(10) *Muddun Lall v. Komul*, 8 W. R., 43.

(11) *Ganga v. Brindabun*, 3 W. R., 142; *Ram Coomar v. Jogender*, I.L.R., 4 Cal., 56.

(12) *Manohar v. Lakhmiram*, I.L.R., 12 Bom., 247.

idol and temple should be regarded as one created for public charitable purposes.⁽¹⁾ But where neither the general public, nor any section of the people have any interest either in the erection and maintenance of a temple or in the performance of the prescribed duties, so that the original grantor and grantee and their descendants are alone to be benefited, the endowment does not become public merely because persons are fed at *gurupuja* and a water *pandal* is maintained during the hot season.⁽²⁾ But a temple always resorted to by a certain section of the public, and to which there was attached a *dharamsala*, and a *sadavari* for giving alms out of the surplus funds to the travellers, cannot but be regarded as intended for public, religious and charitable purposes.⁽³⁾ A bequest by a Hindu for the performance of ceremonies⁽⁴⁾ and giving feasts to Brahmans is a meritorious act.⁽⁵⁾ A trust, if otherwise valid, is not rendered invalid by reason of the recital in the deed as to the testator's desire to establish a perpetuity.⁽⁶⁾

470. It may be observed that the personal law of the Hindus and Mahomedans being intimately connected with their religion, allows of gifts in perpetuity to religious objects to an extent which would clearly be opposed to the rule as to perpetuities. Even bequests, which would in England be regarded as for superstitious uses, are permitted in their case.⁽⁷⁾ But the fact remains that such bequests are in the nature of exceptions to the rule and must be carefully watched, lest under the guise of dedicating the property to pious uses a perpetuity, equally abhorrent to Hindu and Mahomedan ideas, be created which the courts will in no wise enforce. Of course, where the testator has clearly earmarked a portion of his property for charitable purposes, effect will be given to his wishes.

471. And in order to see what his real intention was, reference may be made not only to the will, but also to other cognate documents, and in fact to any record and surrounding circumstances disclosing or tending to disclose his unmistakable intention.⁽⁸⁾ A testatrix after appointing four executors, made over to them by her will "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned;" and after directing them to preserve certain houses as a family house, and giving certain specific bequests, disposed of the residue of her estate thus: "As regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just." But it was held by the Privy Council that, according to the true construction of the above clauses, there was no absolute gift to the executors as individuals. The residue was not severed from the trust with which the testatrix had clothed all

(1) *Manohar v. Lakshmaram*, 1 L. R., 12 Bom., 247.

(2) *Sathappayyar v. Periasami*, 1 L. R., 14 Mad., 1 (7).

(3) *Jugal Kishore v. Lakshmandas*, 1 L. R., 23 Bom., 659 (664); *Raghubar v. Kesho*, 1 L. R., 11 All., 18 F. B.

(4) *Chunder Monee v. Motilall*, 5 C. L. R., 496.

(5) *Lakshmishankar v. Vajjanath*, 1 L. R., 6 Bom., 24.

(6) *Kally Prosonno v. Gopee Nath*, 7 C. L. R., 241.

(7) *Mullick v. Mullick*, 1 Knapp., 245; *Juggut Molini v. Mt. Shokhee Money*, 14 M. I. A., 289; *Fatmabibi v. The Advocate-General*, 1 L. R., 6 Bom., 42; *Colgan v. The Administrator-General*, 1 L. R., 15 Mad., 424 (446).

(8) *Permanandas v. Venayekrao*, 1 L. R., 7 Bom., 19, P.C.; *Bhughobutty v. Gooroo Prosonno*, 1 L. R., 25 Cal., 112.

her property in the hands of executors, but although a trust was intended to be created, it failed for want of adequate expression of it.⁽¹⁾ Lord Eldon has laid down the same principle for he says: "If the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, or is not expressed at all, or fails, the next-of-kin take."⁽²⁾

472. Mahomedan Endowments.—The law relating to trusts is of great antiquity in the Mahomedan law, and is said to owe its origin to the Prophet himself, who is said to have enjoined on owners the duty to tie up their property, and devote its produce for ever and ever to human beings. *Wakf* (3) is then the dedication of property either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings. The constitution of *wakf* naturally implies creation of a perpetuity, for even in cases where the object of the *wakf* fails, the reversion is to be applied for the benefit of the poor. And according to Hanafi law there can be no valid *wakf* for a limited time. If it be created for even a limited period, the limitation as to time fails, and the *wakf* takes effect as a perpetual dedication. *Wakf* is then another exception to the rules as to remoteness, and the law regards it with tenderness inasmuch as it is usually a bequest to the deserving poor. But from this very fact it is often made a cloak for concealing the ulterior design to defeat the provisions of the rule. According to the Shia law⁽⁴⁾ the first prerequisite of a valid *wakf* is that there should be a specific dedication to religious or charitable uses. If, therefore, the nature of the transaction discloses that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family, the *wakf* is invalid.⁽⁵⁾ The following is an example of an ill-disguised attempt to create a perpetuity: "I have made a *wakf* of the remaining four annas in favour of my daughter B and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist then in favour of the poor and needy."⁽⁶⁾ In the following case a more elaborate attempt was made, but it fared no better. One M, a Shia Mahomedan, drew up an instrument, by which he purported to make a *wakf* of the whole of his property. This instrument beyond the bare statement that the property was constituted *wakf*, contained no specification of the purposes to which it was to be devoted. The settler, however, after naming himself, as the *mutwalli* of the *wakf* property during his life went on to declare, that the precise purposes of the dedication, and the mode in which the *wakf* property was to be managed would be set forth in a will which the settler was about to execute. But he added that the future will should always be acted on after his death, and, so far as he himself was concerned, he laid down no rules for the management of the *wakf* property. A will was also concurrently drawn up, and it provided for the succession to the office of *mutwalli* after the death of the testator, and laid down certain "rules of practice" to be observed with reference to the management of the endowed property. These rules enjoined no more than the observance of certain customary ceremonies which the testator was wont to perform,

(1) *Yeap Cheah v Ong Cheng*, 1 L.R., 6 P. C. 381.

(2) *Morice v. Bishop of Durham*, 10 Ves., 535.

(3) Lit. (Arab) "tying up or detaining."

(4) *Hamid v. Mujawar*, 1 L.R., 24 All., 257.

(5) *Hamid v. Mujawar*, 1 L.R., 24 All., 257; *Syeda v. Mughal*, ib., 231; *Agha Ali v.*

Allaf Hasan, 1 L.R., 14 All., 429; *Mahomed Hamidullah v. Latfal Hug*, 1 L.R., 6 Cal., 744; *Pathukutti v. Avathalakutti*, 1 L.R., 13 Mad., 66; *Abdul v. Hussen*, 10 B.H.C.R., 7; *Mahomed v. Mahomed*, 5 Bom., L.R., 624.

(6) *Mahomed Hamidullah v. Latfal Hug*, 1 L.R., 6 Cal., 744 (748), following *Abdul v. Hussen*, 10 B.H.C.R., 7 (18).

but one rule provided for the payment *first of all* of the settler's debts by curtailment of expenditure. The *wakfnama*, while reciting that the *wakf* was created "in order to obtain benefit in the next world" also directed that the property therein comprised should "under no circumstances be made the subject of inheritance." This clause was inserted avowedly with the view of preventing its disruption by being made subject to the law of inheritance and which had been the fate of the property belonging to the settler's other four brothers. It was thus clear that under the guise of a *wakf* the settler attempted to establish a perpetuity in favour of his own descendants as beneficiaries.⁽¹⁾

473. The same principle was extended to a Parsi bequest of the income from a one-third share of a bungalow in Bombay to be devoted in perpetuity to "the performance of the *haj rozzar* ceremonies and the consecration of the *nirangdin*, and the recitation of the *yezashin* and the annual *ghamhar* and *dosla* ceremonies," which ceremonies were shown to be performed among Parsis rather with a view to the private advantage of individuals than for the public benefit. It was also provided that the property was not to be sold or mortgaged. It was held that since the benefit, if any, was to accrue to only a limited few and not to the public, the bequest was not saved by the rule.⁽²⁾

474. An Armenian resident in this country is bound by the rule enacted in the Act. He cannot say that because the rule as to perpetuity is inapplicable to Hindus and Mahomedans, the rule itself had no application to India, for the rule being founded on public policy must be regarded as a part of the territorial law of England in all her Colonies and Dependencies. Hence a bequest by an Armenian, in 1836, of a certain fund "that the income thereof be given for perpetual masses for the benefit of my soul and for the souls in purgatory" was held to be void as not falling within the exemption in favour of charitable bequests.⁽³⁾

A devise of "two plantations, in which the graves of the family are placed, to be reserved as the family burying place, and not to be mortgaged or sold is void as a devise in perpetuity. Similarly a direction 'that a house for performing religious ceremonies to my late husband and myself be erected' is void."⁽⁴⁾ "Although it certainly appears, that the performance of these ceremonies is considered by the Chinese to be a pious duty, it is one which does not seem to fall within any definition of a charitable duty of use. The observance of it can lead to no public advantage, and can benefit or solace only the family itself."⁽⁵⁾ Such bequests bear a close analogy to a gift by a Roman Catholic widow of property for masses to the repose of her deceased husband's soul and of her own, which, though not falling within the statute as to superstitious uses, was still held not to be a charitable use.⁽⁶⁾ It is to be observed that in this respect a pious Chinese is in precisely the same predicament as a Roman Catholic who has devised property for masses for the dead, or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives.

(1) *Hamid v. Mujawar*, I. L. R., 24 All., 257 (262, 263); see s. 129 Comm., *post*.

(2) *Limji v. Bapuji*, I. L. R., 11 Bom., 441 (447, 448); following *Cocks v. Manners*, L. R., 13 Eq., 574; *Attorney-General v. Haber-dasher's Co.*, 1 My. & K., 420.

(3) *Colgan v. Administrator-General*, I. L.

R., 15 Mad., 424 (446).

(4) *Yeap Cheah v. Ong Cheng*, L. R., 6, P. C., 391.

(5) *Yeap Cheah v. Ong Cheng*, L. R., 6 P. C., 396.

(6) *West v. Shuttleworth*, 2 My. & K., 694.

All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.⁽¹⁾

475. Cy pres Doctrine.—Charities, it is said, are so highly favoured in law that gifts to charities have always received a more liberal construction than the law will allow in case of gifts to individuals.⁽²⁾ In the case of charitable bequests, where from the objects being uncertain, or the persons who are to take not being *in esse*, or the bequest being incapable of being carried into exact execution, or for other like causes, a literal execution becomes inexpedient or impracticable, the Court will carry out the will as nearly as it can according to the original purposes, or, as the technical expression is, *cy pres* 'near to it.' The applicability of this doctrine was much canvassed in a case in which the testator, a Parsi, had left a sum of money for the purpose of erecting a meeting hall for the exclusive use of the Parsis. The endowment was found to be inadequate, and a hall could not be erected for twenty years. The question then raised was whether the object of the testator could not be carried out *cy pres* by sanctioning diversion of the fund into other channels, and the Court held that it had the power, and in consultation with the members of the Parsi community it ordered the fund to be utilized in erecting a hospital.⁽³⁾

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

476. Analogous Law.—This section corresponds with section 104 of the Indian Succession Act, ⁽⁴⁾ and has been adopted from the English Statute known as the Thellusson Act, ⁽⁵⁾ which was passed to prevent accumulation of income. The English act was the outcome of the decision in a case of that name,⁽⁶⁾ in which one Peter Thellusson in 1796 A.D. disposed of his immense property by which he excluded his issue from enjoyment, directing that the income from his estate should be accumulated. As there was no statute to prevent this, his directions had to be carried out, although it was felt to be monstrous that the property should be tied up for nine lives. By the statute

(1) *Yeap Cheah v. Ong Cheng*, L. R., 6 P. C., 391 (396); following *Richard v. Robson*, 31 L. J., (Ch.), 896; *Hoare v. Osborne*, L. R. 1 Eq., 586.

(2) *Mills v. Farmer*, 1 Mer., 55, 96; *Mogridge v. Thackwell*, 7 Ves., 36; 2 Story's Eq. Jur., 1165.

(3) *Hormasji*, I. L. R., 32 Bom. 214 (246).

(4) Act X of 1865.

(5) 39 & 40 Geo. III, c. 98. See also Conveyancing Act, 1881, 44 & 45 Vic., c. 41, s. 42 (5); *Thellusson v. Woodford*, 4 Ves., 227, affirmed on appeal, 11 Ve., 112; 4 R. R., 205; Appeal in 8 R. R., 104 (1805 A. D.).

(6) *Thellusson v. Woodford*, 4 Ves., 227.

subsequently passed the period of accumulation under wills was limited to the term of twenty-one years from the death of the testator. Certain exceptions are, however, made for the payment of *bona fide* debts ⁽¹⁾ of the testator or of any other person.

477. The corresponding section of the Indian Succession Act runs thus :—

Effect of direction for
accumulation.

"104. A direction to accumulate the income arising from any property shall be void; and the property shall be disposed of, as if no accumulation had been directed.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator, the direction shall be valid in respect only of the income arising from the property within one year next following the testator's death and income shall be disposed of respectively, as if the period during which the accumulation has been directed to be made had elapsed.

Illustrations.

- (a) The will directs that the sum of Rs. 10,000 shall be invested in Government securities, and the income accumulated for 20 years, and that the principal together with the accumulations, shall then be divided between A, B and C. A, B and C, are entitled to receive the sum of Rs. 10,000 at the end of the year from the testator's death.
- (b) The will directs that Rs. 10,000 shall be invested, and the income accumulated until A shall marry and shall then be paid to him. A is entitled to receive Rs. 10,000 at the end of a year from the testator's death.
- (c) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years and that the accumulation shall be then paid to the eldest son of A. At the death of the testator, A has an eldest son living, named B. B shall receive at the end of one year from the testator's death, the rents which have accrued during the year, together with any interest, which may have been made by investing them.
- (d) The will directs that the rents of the farm of Sultanpur shall be accumulated for ten years and that the accumulation shall then be paid to the eldest son of A. At the death of the testator A has no son. The bequest is void.
- (e) A bequeaths a sum of money to B, to be paid to him, when he shall attain the age of 18, and directs the interest to be accumulated till he shall arrive at that age. At A's death the legacy becomes vested in B and so much of the interest as is not required for his maintenance and education is accumulated, net by reason of the direction contained in the will, but in consequence of B's minority."

The trustee of a minor is, however, empowered to accumulate his ward's income for the benefit of his ward ⁽²⁾ And a similar provision is made in the English Conveyancing Act, 1881. ⁽³⁾

478. The marginal note to the Bill shows that the draftsmen had settled the section in view of an English precedent ⁽⁴⁾ from which, however, no perceptible principle has been borrowed. In the case referred to out of the accumulation made, the court ordered the withdrawal of £40,000 for rebuilding the family mansion house on condition that the fund be recouped by setting aside certain sums out of its rents. ⁽⁵⁾ But such a direction in the case of immoveable property may or may not be valid according as it does or does not satisfy the first

(1) *Ib.*, s 2; *Mathews v. Keble*, L. R., 3 Ch., 691.

(2) S. 41. Indian Trusts Act (II of 1882).

(3) 44 & 45 Vict., c. 41, s. 42.

(4) *Donaldson v. Donaldson*, 3 Ch., D., 748.

(5) *Donaldson v. Donaldson*, 3 Ch. D., 749 (748). The motion was agreed to by all the parties, but the Court's order was necessary as a minor beneficiary under the settlement was affected.

proviso of the exception, the word "or" denoting that the two clauses are to be read distributively. Although this section is based upon the English law,⁽¹⁾ it should be noted that it does not in all respects coincide with it, for it does not make the same proviso to be found in the English Statute which does not extend (i) to any provision for payment of debts,⁽²⁾ or (ii) for raising portions for children,⁽³⁾ or (iii) to any direction touching the produce of timber or wood, or (iv) to a trust to expend part of the income of landed estate in maintaining the property in good repair.⁽⁴⁾ The statute does not extend to Ireland.⁽⁵⁾

In both countries the provisions of the section would apply equally to charities,⁽⁶⁾ but they have no application to Hindu law or to a transfer by operation of law in which an accumulation may legally take place.⁽⁷⁾

In England the statute applies also to leaseholds,⁽⁸⁾ and the validity of a gift or devise of a leasehold estate would be judged by the law of the country in which the property is situate and not by the law of the grantor's domicile.⁽⁹⁾

479. Principle.—If unlimited accumulations were allowed as in *Thellusson's* case, it would lead to considerable mischief and hardship upon nearer descendants and relations, and it would, moreover, engender a public evil by placing property for too great a length of time, often arbitrarily fixed by ambitious testators, out of the reach of commerce.

480. Limits of Accumulation.—The absurdity of allowing unrestricted accumulations cannot better be made evident than by a recital of the facts of the case which gave rise to the restrictive legislation. There the testator devised his real estates of the annual value of about 5,000*l.*, and other estates directed to be purchased with the residue of the personal estate, amounting to over 6,00,000*l.*, to trustees and their heirs, etc., upon trust during the lives of the testator's sons, *A*, *B* and *C*, and of his grandson *D*, and of such other sons as *A* now has, or may have, and of such issue as *D* may have, and of such issue as such sons may have, as shall be living at his decease or born in due time afterwards; and during the life of the survivor, to receive the rents, and profits and from time to time to invest the same, and the produce of timber, etc., in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendants then living of *A* in tail male, remainder to the second, etc., and of all and every other male descendant or descendants then living, who shall be capable of taking as heir in tail male and of the persons to whom a prior estate is limited of *A* successively in tail male, remainder in equal moieties, to the eldest and every other male lineal descendant or descendants then living of *B* and *C* as tenants-in-common in tail-male, in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail male, and the remainder to the trustees, etc. The other two lots were directed to be conveyed to the

(1) In the marginal note to the Bill of 1879 the following case is cited as the authority—*Donaldson v. Donaldson*, 3 Ch. D., 743.

(2) 39 & 40 Geo. III. c. 98, s. 3.

(3) *Bateman v. Hodgkin*, 10 Beav., 426; *Barrington v. Liddel*, 2 DeG. M. & G., 480; *Edwards v. Tuck*, 3 DeG. M. & G., 40.

(4) *Vine v. Raleigh* [1891], 2 Ch., 13.

(5) *Freke v. Carbery*, L.R., 16 Eq., 461.

(6) *Harbin v. Masterman* [1894], 2 Ch.,

184 (192, 199), explaining *Saunders v. Valtier*, 4 Beav., 115; *Gosling v. Gosling* Joh. 265 (272); *Weatherall v. Thornburgh*, 8 Ch. D., 261; *Talbot v. Jevvers*, L.R., 20 Eq., 255.

(7) *Bryan v. Collins*, 16 Beav., 17; *Tench v. Cheese*, 24 L.J. Ch., 716.

(8) *Freke v. Carbery*, L.R., 16 Eq., 461.

(9) *Ibid.*

male descendants of *B* and *C*, in the same manner, and with similar limitations, to the male descendants of their brothers, and to the trustees in fee; and it was directed that the trustees should stand seised, upon the failure of male lineal descendants of *A*, *B* and *C*, as aforesaid upon trust, to sell and pay the produce to His Majesty, his heirs and successors, to the use of the sinking fund; and accumulation till the purchases or sales can take place to go to the same purpose, with a direction that all the persons becoming entitled shall use the surname of the testator only. The trusts of this eccentric will had to be enforced, ⁽¹⁾ as there was no law against it, but, as already stated, steps were soon taken to enact against the recurrence of similar dispositions which would be as heartless as they would be insensible.⁽²⁾

481. Under the statute a trust for accumulation contrary to its provisions is void only for the excess, if it is capable of being clearly distinguished.⁽³⁾ Where the invalid part is struck out, the property so released constitutes a portion of the residue undisposed of, and belongs to the testator's next-of-kin.⁽⁴⁾ The same provision has been enacted in the section, under which only the invalid direction is void, and the property is to be disposed of as if no accumulation had been directed. The invalidity does not affect the gift, but only extinguishes itself. But where the limitations of an estate, which are valid, have annexed to them trusts of accumulation which are in their creation invalid by reason of their indefiniteness, the Court, when dealing with the instrument, will not support the trust for accumulation so far as the testator might have carried them, but will reject them altogether.⁽⁵⁾ For the purpose of construing the nature of a devise, it is permissible to refer to the other prior trusts with which it may be connected.⁽⁶⁾

482. The statute does not permit accumulation during a minority, and any time to elapse between the death of the testator and the commencement of the minority, or in favour of any person who would not for the time being, if of full age, be entitled to the annual produce of the fund.⁽⁷⁾ Where a testator directs the accumulation of a fund to commence at a time subsequent to his decease, the accumulation becomes void at the expiration of twenty-one years (in India eighteen years) from his decease, although at that period there has been on the whole less than twenty-one years of accumulation.⁽⁸⁾ Hence where a testator gave annuities to *A* and *B* respectively, charged on money in the funds, and he directed that when either died, the annuity should accumulate until the death of the survivor. *A* died some time after the death of the testator, *B* being still alive. In such a case

(1) *Thellusson v. Woodford*, 4 Ves., 227, O. A., 11 Ves., 112.

(2) Cases decided before the Thellusson Act are now only of historical value. They are *Rendlesham v. Roberts*, 23 Beav., 321; *Curtis v. Sukhin*, 11 L. J., (N. S.), Ch., 380; *Southampton v. Hertford*, 2 Ves., & B., 54. (Before 39 & 40 Geo. III, c. 98, accumulation might have been co-extensive with, but could not exceed the limits of, an executory devise, but a limitation to vest only in the first descendant of person in being who might attain 21, was too remote—*ib.*, 61 at p. *Bacon v. Proctor*, T. & R., 31; *Boughton v. James*, 8 Jur., 329, O. A.; *Broughton v. Broughton*, 1 H. L. C., 406 (trusts for accumulations disallowed as they might endure

beyond the legal period).

(3) *Wilson v. Wilson*, 20 L. J. (N. S.), Ch., 365; *Bassil v. Lister*, *ib.*, 641; *Longdon v. Simson*, 12 Ves., 295; *Griffith v. Vere*, 9 Ves., 129.

(4) *McDonald v. Bryce*, 7 L. J., (N. S.), Ch., 173; *Oddie v. Brown*, 28 L. J. Ch., 542; *Mathews v. Keble*, L. R., 3 Ch., 691; L. R., 4 Eq., 467; *Simmons v. Pitt*, L. R., 8 Ch., 978; *Weatherall v. Thornburgh*, 8 Ch. D., 261; *Talbot v. Jevers*, L. R., 20 Eq., 255.

(5) *Kerr v. Dungannon*, 1 Ir. Eq. R., 343.

(6) *Evans v. Hellier*, 5 Cl. & F., 114, affirming *Shaw v. Rhodes*, 1 My. & Cr., 125.

(7) *Ellis v. Maxwell*, 10 L. J. (N. S.), Ch., 266.

(8) *Webb v. Webb*, 2 Beav., 493.

the accumulation will cease at the expiration of twenty-one years from the testator's decease and not from twenty-one years from the decease of A. The section has no application to a transfer by operation of law. Although the grant may contain no express direction to accumulate, yet if an accumulation necessarily takes place by reason of the form in which the property is given, the case would fall within the rule.⁽¹⁾ A direction in a devise of freehold on trust for the first and other sons successive in tail-male, that "if any person, beneficially entitled, should be under twenty-one, the trustee should apply a competent part of the rents, etc., for his maintenance, and invest the remaining part, so that the same might accumulate and be invested from time to time, and settled to the same uses as the devised estate is void."⁽²⁾ Of course, there is nothing in the rule to prevent the creation of several interests to take effect successively. Thus the grantor may provide for the enjoyment of A until B attains twenty-five, but a provision that the property should accumulate until E attains the age is void.⁽³⁾ The rule against accumulation is like the rule against perpetuity directed against the postponement of enjoyment. And although by force of the rule the invalid direction is cut out, in point of disposition the language of the instrument must remain precisely the same as if there had been no such excision.⁽⁴⁾

483. Hindu Law on Accumulations.—A direction to accumulate is not opposed to the policy of Hindu law. On the other hand, such a direction is usually to be found inserted in Hindu wills, and the practice is certainly of long standing, and has a peculiar fascination for middle-class donors who, from a feeling of false pride, seldom consider the value of their gift if presently conveyed as sufficient, and therefore provide for its augmentation by a direction here prohibited before its transfer to the objects to their bounty.⁽⁵⁾ But a Hindu testator cannot direct the accumulation of the income of his estate for an indefinite period if there is no beneficial interest created in the property in order to render the gift whether under the will or *inter vivos* valid.⁽⁶⁾ But there is nothing in the general principles of Hindu law, or public convenience, to prevent a Hindu testator devising his self-acquired property by way of remainder, or executory devise, upon an event which is to happen on the close of a life in being.⁽⁷⁾ Of course, a Hindu can only direct accumulation of only his own self-acquired property over which he has full power of disposition. His power over the ancestral property is necessarily limited, and he can no more provide for its accumulation than he can change the course of its devolution after his death. And even in the case of his self-acquired property he is not at liberty to provide for its arbitrary accumulation. As Norman, J., observed in a case; "a testator cannot, in giving his property by will, impose conditions in contravention of the objects for which property exists, or contrary to the policy of the law. For instance, suppose an estate were given to a man

(1) *Tench v. Cheese*, 24 L.J. Ch., 716.

(2) *Browne v. Houghton*, 15 L.J. (N.S.), Ch., 391; *Scarisbrick v. Skelmersdale*, 19 L.J. (N.S.), Ch., 126.

(3) *Tribhovandas v. Smith*, I.L.R., 20 Bom., 316; O.A., I.L.R., 21 Bom., 349; *Krishnarao v. Benabai*, I.L.R., 20 Bom., 57 (583); *Jamnabai v. Dharsey*, 4 Bom. L.R., 893 (902); following *Amrito v. Surnomoyee*, I.L.R., 24 Cal., 589.

(4) *Green v. Gascoign*, 34 L.J. Ch., 268.

(5) *Soorjeemoney v. Denobundhoo*, 6 M.I.A., 526; *Sonaton v. Sreemutty Juggutsoon-*

dree, 8 M.I.A., 66; *Bissonauth v. Sreemutty Bamasonultery*, 12 M.I.A., 41 (in all of which the point was impliedly conceded); *Amrito Lall v. Surnomoyee*, I.L.R., 24 Cal., 589; O.A., I.L.R., 25 Cal., 662 (in which the decree was reversed on another point); O.A. affirming the appellate decree, I.L.R., 26 Cal., 996 P.C.; *Rajendra Lall v. Raj Coomari*, I.L.R., 34 Cal., 5.

(6) *Amrito Lall v. Surnomoyee*, I.L.R., 25 Cal., 662.

(7) *Soorjeemoney v. Denobundhoo*, 9 M.I.A., 123.

on condition that it should be allowed to relapse into a jungle, or never be cultivated, no one could doubt that such a condition would be void.”⁽¹⁾ So it has been held that a provision in a will postponing the enjoyment of the property by the son beyond the period of minority is invalid,⁽²⁾ and a trust to accumulate for ninety-nine years, without any direction as to its disposition after the limitation was declared void.⁽³⁾ But all these cases appear to have been decided with reference to the rule against perpetuity. Accumulation as such was not held invalid by the Privy Council on appeal from a case determined by the Calcutta High Court⁽⁴⁾ and in which it was pointedly contended at the Bar that the clause in the will directing accumulation was *per se* invalid.⁽⁵⁾ A direction for accumulation can only be carried out by the intervention of trust, and as has been before stated, trusts were not unknown to the Hindu law, though it is true, there has been no such development of the elementary principles as has taken place under the fostering care of English Equity.⁽⁶⁾ But while a disposition may not be invalid because it transgresses the rule against accumulation, it must always be considered with reference to the rule that a Hindu cannot be permitted to do indirectly by the intervention of trust what could not be done directly, or in any other manner. A direction for accumulation for all time or until it aggregated three lacs or any other certain amount has been therefore declared to be repugnant and void.⁽⁷⁾ If a direction to accumulate up to three lacs would be good, there is no reason why a similar direction to accumulate up to twenty crores before division should not also be good. But in such cases the devise fails not because the direction is *per se* invalid, but because it is arbitrary or repugnant to the nature of the interest created,—because it creates a perpetuity, or because if the direction were held valid it may lead to divisions being made amongst persons unborn at the time of the testator's death, or because of uncertainty, it being impossible to ascertain at the time of the testator's death who would be entitled to participate in the several divisions of accumulations directed to be made, since it cannot be ascertained as to when the accumulations would attain the requisite amount to become visible. It may then be impossible to say within what degree of relationship the descendants of any deceased son would be when the time for division might arrive. A direction for accumulation which is perpetual, or too remote, or transgresses the other recognized canons of Hindu law would naturally fail. A direction that the trustees should accumulate the income until the testator's widow should adopt a son and that son should attain the sixteenth year, does not infringe any of the rules and has been declared to be valid.⁽⁸⁾

(1) *Kumara v. Kumara*, 2 B. L. R. (O.C.), 11 (25).

(2) *Brammaji v. Jages Chandra*, 8 B. L. R., 400; *Mokund v. Gonesh*, I. L. R., 1 Cal., 104; *Cally Nath v. Chunder Nath*, I. L. R., 8 Cal., 378.

(3) *Per Peacock, C. J.*, in *Kumara v. Kumara*, 2 B. L. R. (O. C.), 11 36.

(4) *Shrokmoy v. Monoharri*, I. L. R., 7 Cal., 269; O. A., I. L. R., 11 Cal., 684, P.C.

(5) *Shrokmoy v. Monoharri*, I. L. R., 7 Cal., 269; O. A., I. L. R., 11 Cal., 684, P.O., p. 690.

(6) Even the *fidei commissum* of Roman law was hardly a trust, though under its guise many of the objects which the testator had in view making his will could be effected.

But a *fidei commissum* should not on that account be confounded with the English system of trusts, in which there is present the double in or under which every species of property has to be viewed, viz., the trustee on the one hand, who is declared by the law to be the absolute and uncontrolled owner, and the *cestui que trust*, on the other, who has a right in equity to interfere in the ownership, and compel the trustee to abandon all or nearly all his rights in his favour. *Krishna-ramani v. Ananda*, 4 B. L. R., 231 (246).

(7) *Per Peacock, C. J.*, in *Krishnaramani v. Ananda*, 4 B. L. R., 231 (277).

(8) *Amrito Lall v. Surnomoye*, I. L. R., 24 Cal., 589 (overruled on another point), O. A. in I. L. R., 25 Cal., 662; O. A. to P.C.,

484. Exception.—The exception allows limited accumulation only in two cases, namely (i) where the property is immovable, and (ii) where accumulation is directed to be made *from* the date of the transfer. In either case the direction is valid in respect only of the income arising from the property within one year next following such date.

In computing the period of one year *from* the date of transfer, the day of transfer is to be excluded.⁽¹⁾

The exception is awkwardly worded, for as it is, it would seem that if accumulation is directed to be made *not* from the date of the transfer, but from a subsequent date, but ending with the year from the date of the transfer, the direction should be invalid.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested Interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen, the interest shall pass to another person.

485. Analogous Law.—This section defines a “vested interest” as section 21 defines its correlative “contingent interest.” The term is used in the same sense in the Indian Succession Act, where a legacy is said to be vested in interest when its payment or possession is postponed;⁽²⁾ but when its vesting depends upon a specified uncertain event, the interest of the legatee is, until the condition has been fulfilled, “contingent.”⁽³⁾ It would equally serve as a definition of the term as used in the Indian Registration Act.⁽⁴⁾ The difference between a vested and a contingent interest will have to be discussed presently.

The explanation is the same as that appended to section 106 of the Indian Succession Act.

486. Principle.—The difference between the two interests is that while the vested interest takes effect from the date of transfer and does not

I.L.R., 26 Cal., 996, P.C. (both the Courts having held against adoption no opinion was expressed on the other questions decided by Jenkins, J., in I. L. R., 24 Cal., 529), followed in *Jamnabai v. Dharsey*, 4 Bom. L. R., 893 (908, 903).

(1) *Semble* in *Webb v. Webb*, 2 Beav., 493; *Gorst v. Lowndes*, 11 Sim., 434; *Lester v.*

Garland, 15 Ves., 248.

(2) S. 106, Indian Succession Act (X of 1865).

(3) *Ib.*, s. 107.

(4) S. 17, Act III of 1877; Act XVI of 1908; *Bhan Singh v. Thakur Das*, (1908) P. R. No. 89; *Abdool v. Goolam*, I. L. R., 30 Bom., 304 (315, 316).

depend on a period or event that is uncertain, contingent interest is *contingent* upon the happening of a *contingency* which may or may not take place. The difference between the two interests is the difference that whilst the one is unconditional and only the enjoyment is postponed, the other is solely dependent upon the fulfilment of the condition which may or may not be fulfilled. In the one, the gift itself is immediate, but the enjoyment is postponed, but in the other there is no gift at all, but merely a promise of having one. The latter may develop into the former, but until it does so it is a mere chance, and is as such inalienable. (§ 203) The word *vested* is sometimes used in the sense of *payable*, as where the shares of members of a class are directed to be *vested* at a particular time,⁽¹⁾ there being a gift over to the other members of a class of the shares of those dying before that time without issue. Thus, where A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.⁽²⁾ But where an estate is bequeathed to A until he shall marry, and after that event, to B, B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.⁽³⁾ The law is said to favour the vesting of estates,⁽⁴⁾ the effect of which principle seems to be that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such an object comes into being or the terms thereof will permit⁽⁵⁾ (§ 488). Estates and interests may be (a) vested in possession—as where there is a present right to the immediate possession or enjoyment; (b) vested in interest—where there is a present indefeasible right to the future possession or enjoyment. Therefore, an interest may be vested, although there may not be a right to present possession, and it may be that the transferee may never enjoy possession or the vested right may subsequently be divested. Thus, where there is a gift to an infant with remainder over in the event of his dying under twenty-one, the infant has a vested interest subject to be divested on his death under that age.⁽⁶⁾

487. The question whether particular words convey vested or contingent interest is often a question of construction.⁽⁷⁾ In construing whether certain words convey a definite specific interest, the words used to transmit the interest must be construed in their plain ordinary meaning. Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India, where the English mode of creating interests is but of recent origin.⁽⁸⁾ Thus, where in a will, sufficiently direct words of present gift were used, the direction to postpone enjoyment was rejected as repugnant, and the interest was held to be vested.⁽⁹⁾ Vesting in possession is not postponed merely because the estate

Question one of construction.

(1) *Williams v. Haythorne*, L. R., 6 Ch., 782.

(2) S. 106, ill. (a), Indian Succession Act.

(3) S. 107, ill. (f), Indian Succession Act.

(4) *Carlton v. Thompson*, L. R., 1 Sc. Ap., 232; *Taylor v. Graham*, 2 App. Cas., 1287.

(5) 1 Jarm., 799; *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304.

(6) S. 106, ill. (f), Indian Succession Act; *O'Mahoney v. Burdett*, L. R., 7 H. L., 388; *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304; *Branstrom v. Wilkinson*, 7 Ves., 421; *Saunders v. Van-tier*, Cr. & Ph., 240; *Lister v. Bradley*, 1 Haro

10; *Merry v. Hull*, L. R., 8 Eq., 619; *Gimblett v. Purton*, L. R., 12 Eq., 427; *Simmonds v. Cook*, 29 Beav., 455; *Pinbery v. Elkan*, 1 P. W., 563; *Barnes v. Allen*, 1 Bro. C. C., 181.

(7) *Kally Nath v. Chunder Nath*, I. L. R., 8 Cal., 878.

(8) *Harris v. Brown*, I. L. R., 28 Cal., 621 (634), P. C.; *Le Mesurier v. Wajid*, I. L. R., 29 Cal., 890 (901), F. B.

(9) *Kally Nath v. Chunder Nath*, I. L. R., 8 Cal., 878; following *Singleton v. Gilbert*, 1 Cox, 68; *Hill v. Chapman*, 3 Bro. C. C., 391.

is subjected to trusts or charges.⁽¹⁾ So where the *ultimate* object of the testator was clearly to make a gift of the property to the donee described as an executor, but directed that a sufficient fund from it should be provided during the lifetime of his wife and to pay a certain sum, and charged the property with payment of another sum to his other wife, it was held that since the interest was devised to the so-called executor not for, but *subject* to, a particular purpose, he was not a mere trustee but a deviser of an estate subject to a charge. The testator vests the property in the executors, but assumes postponement of their beneficial interest in it until his younger wife's death. Intermediately they are only to have the management of it, and, presumably, to accumulate the income other than that required for the purposes prescribed.⁽²⁾

488. The mere postponement of the beneficial enjoyment, is then no

True criterion. criterion for judging the nature of the interest conveyed.

There is a distinction between cases where the event in which the gift is to take effect is uncertain, and those in which it is certain, though future. In cases of the latter description, where the payment or enjoyment is postponed by reason of circumstances connected with the estate or for the convenience of the estate, as it has been termed, for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be vested. Thus under a gift by a testator A or at the decease of the testator's wife, A's interest vests at the testator's death.⁽³⁾ There is no reason why the circumstance that the person, who is ultimately to have the beneficial enjoyment of the bequest, is intermediately in the position of a mere manager, should make any difference in the vesting in interest at the moment of the testator's death. So where the testator provided in his will—"When I die, my wife named Suraj is owner of that property. And my wife has power to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death my daughter Mahalakshmi is owner of the said property after that (death)." The question having arisen as to the nature of the interest bequeathed to the daughter, it was held that the daughter's estate was not contingent on her surviving the widow, and that therefore she took a vested remainder which, upon her death passed to her heirs. "The gift over is not expressed as a contingency by the testator, but as a certainty and that, therefore, there is no room or basis for the argument. The words which gave the widow such ample power over the property are, we think, only intended to enlarge the Hindu widow's ordinary power and to provide that she is to be perfectly untrammelled in its enjoyment and management so long as she lives, but that the estate is still to pass to Mahalakshmi on her death."⁽⁴⁾ But where the testator directed that his widow should adopt a son who should have the estate on arriving at the age of sixteen years for his own absolute use, and that if the widow should not adopt, the two trustees named therein should have the property for their own use to be devoted to any charity they might think proper, it was rightly held that the property vested in the trustees immediately on the testator's death, and that though the estate vested in them, the widow's death without adoption did not change their character as

(1) *Kally Nath v. Chunder Nath*, I. L. R., 8 Cal., 878.

(2) *Subramaniam v. Subramaniam*, I. L. R., 4 Mad., 124; *King v. Denison*, 1 Ves. & B., 272.

(3) *Blamire v. Geldart*, 16 Ves. J., 314; followed in *Subramaniam v. Subramaniam*, I. L. R., 4 Mad., 124; *Jairam v. Kuverbai*,

I. L. R., 9 Bom., 491. An executor as such takes no estate in the property of the deceased. *Manuklal v. Manchersh*, I. L. R., 1 Bom., 269.

(4) *Lallu v. Jagmohan*, I. L. R., 22 Bom., 409 (413); followed in *Chunilal v. Bai Muli*, I. L. R., 24 Bom., 420; *Satcowrie v. Govind*, 2 I. J., (N. S.), 56.

trustees, the words "for their own use" being limited by the subsequent words directing how the fund was to be expended.⁽¹⁾

489. Time of Vesting.—A bequest in favour of a person simply, that is, without any intimation of a desire to suspend or postpone its operation, confers a vested interest.⁽²⁾ The time of vesting is that fixed by the testator. If he directs that the interest shall vest at a particular time or on the beneficiary attaining a certain age, it vests on the fulfilment of those conditions.⁽³⁾ After vesting, the transferee is entitled to the income arising therefrom during the period of suspense, if there is no prior interest.⁽⁴⁾ Thus, where a testator by will constituted his two disciples, *S* and *J* (aged 18 and 11 years respectively), his heirs, "subject to the conditions written below," and directed that out of the net income of his estate his trustees should expend Rs. 500 every year for the maintenance of each disciple, or pay that amount to each disciple every year; and that when *J* should attain the age of thirty years, the trustees should give to *J* the net residue of his property remaining at that time, or in case of *J*'s decease, should give the same to *S*. It was held that the directions for postponement of enjoyment after the coming of age of the devisee must be disregarded, and that (subject to the payment of Rs. 500 a year to *S*) the income of the property including all income accrued since his majority, must be paid to *J*, the respondent retaining the *corpus*, until *J* should attain the age of thirty years in accordance with the directions of the will.⁽⁵⁾

490. Death of Transferee.—This clause expressly declares that a vested interest is not defeated by the death of the transferee whose representatives will be entitled to its benefit in the same way as if the transferee had not died. Even in the case of contingent interest, it has been held in England, that where the contingency on which the vesting depends is a collateral event, the death of the transferee does not work exclusion, but simply substitutes and lets in his representative for himself.⁽⁶⁾

491. From the above it is clear that a vested interest is divisible and transferable.⁽⁷⁾ Thus where a Hindu testator, after the death of his widow, gave a moiety of his property to his brother *A*, and on his death to *A*'s two sons, *B* and *C*, and *A* having died in the lifetime of the testator's widow, a complete division of all *A*'s property was agreed upon by *B* and *C*. *B* died in the lifetime of the testator's widow, and on the latter's death, *B*'s widow claimed her husband's share. And it was held that since *B* and *C* had each taken as tenants-in-common, and each had a vested interest in a one-fourth share, though the actual enjoyment was postponed until the death of the widow: and that the claim of *B*'s widow was not barred by the doctrine of Hindu law that a widow succeeding as heir to her husband cannot recover property not in the possession of her husband, which doctrine was held to be inapplicable to the case of

(1) *Jannabai v. Dharsey*, 4 Bom. L. R., 893 (902).

(2) *Harris v. Brown*, 1 L. R., 28 Cal., 631 (634), P. C.

(3) *Glanvill v. Glanvill*, 2 Mer., 38; *Knight v. Cameron*, 14 Ves., 369.

(4) *Soshi v. Tarokessur*, 1 L. R., 6 Cal., 121; *Gosain v. Gosain*, 1 L. R., 13 Bom., 463; following *In re Bann Isaacson v. Webster*, 16 Ch. D., 47; *Gosling v. Gosling*, Johns, 265;

Re Grove's Trusts, 3 Gif., 575; 1 Jarm., 845.

(5) *Shoshi v. Tarokessur* 1 L. R., 6 Cal., 121.

(6) *Jarman on Wills* at p. 861; *Ellokasee Dasse v. Durponarain*, 1 L. R., 5 Cal., 59.

(7) *Ellokasee Dasse v. Durponarain*, 1 L. R., 5 Cal., 59; *Soorjinoney v. Denobundho*, 9 M. I. A., 323; *In re Hill's Trusts*, L. R., 12 Eq., 302 [quoted in *Ellokasee Dasse v. Durponarain*, 1 L. R., 5 Cal., 59 (63)].

property in which the husband had a vested interest until a will or deed, though the actual enjoyment thereof was postponed during the lifetime of another.⁽¹⁾

492. Explanation.—This clause guards against an inference that may be made against the interest being vested from—(i) a provision whereby the enjoyment is postponed,⁽²⁾ (ii) or whereby a prior interest in the same property is given or reserved to some other person,⁽³⁾ (iii) or whereby income arising from the property is directed to be accumulated,⁽⁴⁾ or (iv) from a provision that on the happening of a particular event the interest shall pass to another person.⁽⁵⁾ It will be seen that in no case mentioned above is the vesting contingent upon the happening of an uncertain future event.

493. Hindu and Mahomedan Law.—Sections 106 and 107 of the Succession Act have been made applicable to Hindus⁽⁶⁾ and the law therein laid down, and which corresponds to sections 19 and 21 of this Act, will therefore equally apply to them in territories where the Hindu Wills Act is in force. In expounding Hindu wills the Court should presume that the holder did not intend to depart from the general law beyond what he explicitly declares. Apart from testamentary dispositions and gifts and settlements *inter vivos* neither this section nor section 21 has any application to Hindus and Mahomedans, since the right of a son or daughter or other heir of a person to inherit his property is not one of such estates. It is neither a vested nor a contingent right. It may possibly be "the chance of an heir-apparent succeeding to an estate,"⁽⁷⁾ but it is not an "interest" whether vested or contingent at all within the meaning of this section.⁽⁸⁾

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to enjoyment thereof immediately on his birth.

When unborn person acquires vested interest on transfer for his benefit.

494. Analogous Law.—There is no section corresponding to this in the Succession Act. The section itself, like many others in the Act, is out of place and might with advantage be transposed after sections 13 and 14 which deal with an interest created in favour of unborn persons. As it is, the section is in harmony with the English law.⁽⁹⁾

495. Principle.—Generally speaking property cannot be transferred nor an interest therein created in favour of a person not in existence; but there are certain exceptions which the law allows in favour of unborn persons. These are stated in this and in sections 13 and 14. The effect of these sections then

(1) *Rewun v. Radha*, 4 M. I. A., 137; explained in *Padnada v. Nagammal*, I. L. R., 11 Mad., 258; this last case was overruled though on a different point in *Jogeswar v. Ram Chandra*, I. L. R., 23 Cal., 670. P. C.

(2) *Kally Nath v. Chunder Nath*, I. L. R., 8 Cal., 878.

(3) *Ib.*

(4) *Gosain v. Gosain*, I L.R., 13 Bom.,

(5) *Pratery v. Elken*, 1 P.W., 563; *Barnes v. Allen*, 1 Bro., C. C., 18.

(6) S. 2, Hindu Wills Act XXI of 1870.

(7) S. 6 (a) *ante*.

(8) *Abdool v. Goolam*, 7 Bom. L.R., 742 (750, 751).

(9) *Lewis v. Waters*, 6 East, 336; *Goodright v. Jones*, 4 M. & Sel., 88; *Doe v. Dacre*, 8 T.R., 112.

is that interest created in favour of an unborn person will take effect upon his birth, provided that it does not offend against the rule as to perpetuities, and the interest extends to the whole of the remaining interest of the grantor.⁽¹⁾

496. Construction of Gift to unborn Person.—The only rule this section is intended to enact, is that an interest created in favour of an unborn person will take effect, if it does take effect as a *vested* interest, even though the transferee may not even then have become entitled to an immediate enjoyment.

In the case of a bequest made for the benefit of an unborn person the property is not payable until the birth of the person, and the intermediate income would then necessarily accumulate, for his benefit,⁽²⁾ which would not be the case if the bequest had been contingent.⁽³⁾ A gift to an unborn person may confer only a life-estate.⁽⁴⁾ The contrary was laid down in a case⁽⁴⁾ but "the fallacy has probably arisen from the terms in which the general rule ordinarily laid down, namely, that you cannot give an estate for life to an unborn person, with remainder to his issue, which has been read as two distinct propositions, the one affirming the invalidity of a limitation to the issue; though, in fact, all that is meant to be averred is, that a limitation to the children or issue of an unborn person, following a gift to such unborn person is bad, as it clearly is, since such children or issue may not come *in esse* until more than twenty-one years after a life-in-being."⁽⁵⁾

Accordingly, there is nothing against the creation of even a long succession of life-estates to unborn persons and their issues, if subjected to the restriction, that in order to take they *must* come into existence during the lives-in-being and twenty-one years afterwards.⁽⁶⁾ Since a life-estate may validly be created in favour of an unborn person, a remainder expectant on such gift may also be validly made provided it is to take effect in favour of persons who are competent objects of gift.⁽⁷⁾ But whatever the nature of the interest, and whosoever, may be the donee, the rule against perpetuity requires that the estate must vest within the prescribed period.

A gift to after-born children in this connection would also include the existing children in the category of posthumous children on the ground that it is impossible to suppose that the father would provide for after-born children, leaving children *in esse* unprovided for.⁽⁸⁾ And if there is no object *in esse* at the death of the testator, the gift will embrace *all* the children who may subsequently come into existence, by way of executory gift.⁽⁹⁾

497. Hindu Law.—It has already been pointed out before that Hindu law does not sanction transfer in favour of an unborn person,⁽¹⁰⁾ and consequently the provisions of this section are inapplicable to it.

(1) *Cadell v. Palmer*, 7 Bli., 202.

(2) *Gibson v. Lord Montfort*, 1 Ves., 485.

(3) *Baughton v. Harrison*, 3 Atk., 329; *Shave v. Cudliffe*, 4 B.C.C., 144.

(4) *Hayes v. Hayes*, 4 Russ., 311. Cf. *Hampton v. Holman*, 5 Ch. D., 183 (189).

(5) 2 Jarm., 279.

(6) *Cadell v. Palmer*, 10 Bing., 140.

(7) *Routledge v. Dorril*, 2 Ves. J., 366; *Evans v. Walker*, 3 Ch. D., 211.

(8) *White v. Barber*, 5 Burr., 2703, overruled in *Doe d. Blackiston v. Haslewood*, 10 C.B., 544, but restored in *In re Lindsay*, 5 Ir. J., 97; *Goodfellow v. Goodfellow*, 18 Beav., 356.

(9) *Weld v. Bradbury*, 2 Vern., 705; *Shepherd v. Ingram*, Amb., 448; *Armitage v. Williams*, 27 Beav., 346.

(10) *Ram Lall v. Kanai Lall*, I.L.R., 12 Cal., 663; see also notes to ss. 13 & 14, *ante*.

21 Where on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event; in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein, upon attaining a particular age and the transferrer also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

498. Analogous law.—This section corresponds with section 107 of the Succession Act. A contingent contract is also defined in similar terms in the Indian Contract Act⁽¹⁾ and its effect is stated in its two following sections. The definition of "contingent interest" here given would apply equally to that term as used in Section 17 of the Indian Registration Act.⁽²⁾

499. Principle.—In discussing the meaning of the term 'vested interest,'⁽³⁾ much has been incidentally stated respecting this species of interest. As stated in the first clause, such an interest is conditional on the happening or not happening of a specified uncertain event or contingency. So long as this does not happen or does not become impossible, the interest remains contingent, after which it becomes a vested interest. Thus, where a legacy is bequeathed to *D*, in case *A*, *B* and *C* shall all die under the age of 18, *D* has a contingent interest in the legacy, until *A*, *B* and *C* all die under 18, or one of them attains that age.⁽⁴⁾ So, where *A* transfers property to *C* to take effect if a certain ship does not return, and the ship sinks, *B*'s interest, which was contingent on the sinking of the ship, becomes vested as soon as the ship sinks, since its return then becomes impossible.⁽⁵⁾

500. Meaning of Words.—"Contingent interest:" "A gift is not more or less contingent—a contingency is a contingency. The event upon which the contingency depends may be more or less probable, but you do not make the contingency more or less contingent. It is contingent, and that is the definition of it."⁽⁶⁾ Of course the event may be much more probable in one case than in another, but in point of law both are contingent interests which cannot be differentiated according to the quality of the contingency.

501. Contingent and Vested Interest Distinguished.—There is a marked difference between contingent interest and vested interest subject to be divested. In the former the transfer is *not complete*, until the specified

(1) S. 31, Act IX of 1872.

(2) S. 17, Act III of 1877; Act XVI of 1908; *Bhau Singh v. Thakar Das*, (1908) P.R., No. 89; *Abdool v. Goolam*, 7 Bom. L.R., 742 (750).

(3) See s. 19, Comm. §§ 485—489.

(4) S. 107, illus. (a), Succession Act.

(5) Cf. s. 33, illus., Indian Contract Act (IX of 1872).

(6) Per Lord St. Leonards in *Egerton v. Brownlow*, 4 H.L.C., 1 (220, 221).

uncertain event does or does not happen ; in the latter the interest is complete, but on the happening of an event it may be divested. Thus, gift to *A*, if or when he attains a certain age, and if he dies under that age, to another, vested in *A* immediately. But estate in *A* is *contingent* under gift to a widow for life if she marries *A*, or to *A* if or when he attains an age, or with express direction to vest at, or not before, a specified age, or to him when he attains an age, and performs stated conditions precedent, and if he dies under that age, gift over to another. But a direction that *A* shall secure payment of annuities given by the will, is not a condition precedent. A gift to children, who attain an age, is contingent. So, also, a gift to *B* if he takes a name, or if he refuses to marry *A*.⁽¹⁾

502. But Lord St. Leonard has in a considered judgment laid down that the difference between a condition precedent, and a condition subsequent, was more imaginary than real. "What can it signify," he said "whether you introduce the contingency before the limitation, which shall prevent the limitation taking place, or you let it to take effect *modo et forma* in which it is given, with a positive, clear, and distinct declaration, that upon a given event it shall cease? Suppose it to vest, where is the magic, where is the harm of its vesting? Suppose it to vest in the person, who is heir male, let it vest, in the person who is so for the time, and it is then divested. It is but a momentary operation. My Lords, the law is so benignant in this country that the law sometimes contradicts itself in order to preserve estates. The very doctrine of conditions subsequent was introduced in favour of men's dispositions, and to save estates which might be prevented from arising by illegal conditions from the destruction which awaited them if the conditions were held to be precedent."⁽²⁾ With infinite deference to the learned Lord Chancellor, the distinction between the two terms seems to be clear, and consists in the fact that while the one is made to *precede* the vesting of an estate, the non-performance of the other *determines* an estate antecedently vested. The first affects the *acquisition* of the estate, whereas the second affects merely its *retention*. The question is then one of intention, and to eliminate the distinction between the two terms would be to eliminate the distinction the existence of which cannot be doubted.

A contingent gift or interest has a real existence, capable as much as a vested interest or estate, of being operated upon by a condition subsequent, and being made to cease and become void.⁽³⁾

503. So under the Hindu law, a gift made to several sons with the proviso that, if any one die leaving no male issue, his share should go over to the other and not to the widow or daughter of the deceased son, was held valid, the donees being in existence, and on the happening of the contingency the sons were entitled to additional benefit.⁽⁴⁾ Apart, however, from gifts, settlements and testamentary dispositions of one's own property there is no room in Hindu or Mahomedan law for the creation of vested or contingent interests⁽⁵⁾, as all such property devolves upon the heirs in accordance with the personal law. And since in the case of Mahomedans the expectant right of an heir-apparent is a mere possibility of succession and

(1) *Festing v. Allen*, 5 Hare, 573 ; In re *Eddel's Trusts*, L.R., 11 Eq., 559 ; *Brackenbury v. Gibbons*, 2 Ch. D., 417.

(2) *Egerton v. Brownlow*, 4 H. L. C., 213, 214.

(3) *Egerton v. Brownlow*, 4 H. L. C., 1.

(4) *Soorjeemoney v. Debendro*, 9 M. I. A., 123 ; *Soshi Shikuressur v. Tarokessur*, I. L. R., 6 Cal., 121 ; O. A., I. L. R., 9 Cal., 952, P. C.

(5) *Abdool v. Goolam*, I. L. R., 30 Bom., 304 (315, 316).

cannot pass by succession, bequest or transfer, so long as the right has not actually come into existence by the death of the present owner, it follows that such a mere *spes successionis* is no "interest" at all whether vested or contingent within the meaning of section 19 of this Act.

504. Interests Apparently Contingent.—At the threshold of the law of vested and contingent interest it is necessary to once more state that the law always favours the investing of estates ⁽¹⁾ and from which it follows that a disposition of property takes effect immediately, unless its terms do not permit of it. And even if words of futurity occur in a gift it does not necessarily rebut the presumption in favour of vesting, for it may be still a question whether its terms point merely to deferred possession or enjoyment, or are far reaching enough to postpone the vesting. Words importing contingency do not of themselves create a future estate if they intrinsically refer merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting. And so the words "if," "when," "as soon as," have been in a long series of cases held from the context not really to import a contingency in the sense of a condition precedent to the vesting but to mean a proviso or condition subsequently operating as a defeasance of an estate vested. Thus where a testator devised lands to A during his natural life, and from and after his decease to his eldest son if he should have arrived at the age of twenty-one years, and in default of his having a son then over. A died leaving an eldest son, a minor, and the question arose as to the nature of the estate conveyed to the son of A. It was contended that the estate was contingent, and that until the contingency happened, the estate should go to the heir, but the Court held that on the death of A, the eldest son took an estate in fee liable to be divested on his death under the age of twenty-one years, with an executory devise over in that event to A in tail. In delivering his judgment, James, L. J., said, "It must be conceded that the words of gift to the son's eldest son, standing alone and unaffected by any preceding or subsequent context, would have been a mere gift of a future contingent interest. But these words do not stand alone. They are preceded by the life-estate to Thomas (A), and they are followed by the words 'and in default of his having a son (in which the word 'his' must, I apprehend, refer to the tenant for life), I give and bequeath the same to the eldest son of my natural son Henry for ever.' A man cannot have an estate from the death if he is not to have it for several years after the death, and possibly not at all; and to construe the words as contingent we should have to strike out the word 'from' and in order to make for the testator a most unreasonable will. But taking the word 'from' in its natural meaning, and taking the words apparently contingent to have the meaning which has been given to them in so many cases, the whole thing becomes sensible and intelligible."⁽²⁾

505. What Limitations imply Contingency:—Similarly, a devise to a person, *when* he should come of age, has been held to refer to the determination of a prior estate.⁽³⁾ There is really no difference between *when* a person comes of age and *if* he shall come of age—the estate being in both cases contingent upon the devisee attaining that age.⁽⁴⁾ Similarly, the devise upon

(1) *Taylor v. Graham*, 3 App. Cas., 1287; *Carlton v. Thomson*, L. R., 1 Sc. Ap., 232.

(2) *Andrew v. Andrew*, 1 Ch. D., 410 (417, 418).

(3) *Boraston's case*, 3 Rep., 19; *Doe d. Wight v. Coddall*, 9 East, 400.

(4) *Grant's case*, 10 Rep., 10a; *Lampet's case*, 10 Rep., 46b, 50a; *Phipps v. Ackers*, 9 Cl. & F., 583 (591); *Andrew v. Andrew*, 1 Ch. D., 417; *Love v. Love*, 7 L. R., Ir., 306 (309). In re *Francis* [1905], 2 Ch., 295.

trust of land towards the maintenance of the testator's daughter *until* she should attain the age of twenty-five, and from and after her attaining that age, then upon trust for his said daughter was similarly construed.⁽¹⁾ In such cases the prior interest extends over the whole period for which the devise in question is postponed. "Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend upon on the fact of the prior interest taking effect; in such cases it is considered that the testator merely uses these expressions of apparent contingency or descriptive of the estate of events under which he conceives the ulterior gift will fall into possession (the supposition being that the successive interests will take effect in the order in which they are expressed), and not with the design of making the vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession."⁽²⁾ Thus where the testator provided that in case *F B* should come to the possession of the said estate hereinbefore limited to him, and should die leaving issue, the said issue to take in like manner, it was held that the words "should come to the possession" did not constitute a condition which, not having happened, prevented *F B*'s son from taking under the will.⁽³⁾ Similarly, a gift after the death of an annuitant *J*, to *B* during her natural life, but in case of the death of *E* during the lifetime of *J*, then to *M* for life, and after the decease of both *E* and *M* then over, it was held that there was a sufficient indication of the testator's intention to give a life-estate to *M* after the death of *E*, although *E* did not die in the lifetime of *J*.⁽⁴⁾ In such cases the courts have held that the expression of the contingency was intended by the testator to imply that the subsequent gift was not to take effect in derogation of the preceding estate. The result of the authorities is thus stated by Wood, V. C.: "The true way of testing limitations of that nature is this: can the words, which in form import contingency, be read as equivalent to subject to the interests previously limited?" Take the simplest case: a limitation to *A* for life, remainder to *B* for life, and upon the decease of *B*, if *A* be dead, then to *C* in fee. There the limitation to *C* is apparently made contingent on the event of *A* dying in lifetime of *B*. Nevertheless, inasmuch as the condition of *A*'s death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to *A* for life, remainder to *B* for life, and on *B*'s death, subject to *A*'s life-interest if any, to *C* in fee. That is an intelligible principle of construction; but in order to its application the condition upon which the limitation over is made dependent, must involve no incident, but what is essential to the determination of the interests previously limited. For instance, if the limitation be to *A* for life, remainder to *B* for life, and if, at the death of *B*, *A* shall have died at the age of twenty-one, or 'without children' then to *C* in fee, here in either case, room is left for contingency. The condition of *A*'s dying in the first case under twenty-one, and in the second, without children, is an event which may or may not have happened when the life-estates in *A* and *B* are determined; and until it has happened, the limitation over is contingent not merely in appearance but in reality. To these cases, therefore, the principle of construction I have referred to would obviously apply."⁽⁵⁾

(1) *Doe d. Cadogan v. Ewart*, 7 Ad. & El., App. 35 (38).
636.

(2) 1 Jarm., 806.

(3) *Edgeworth v. Edgeworth*, L. R., E. & I.

(4) *Betty Smith's Trusts*, L. R., 1 Eq., 79.

(5) *Maddison v. Chapman*, 4 K. & J., 719.

506. Standing alone a devise to a person if he shall attain a particular age is always contingent, but if it be followed by a limitation over, the latter is regarded as explanatory of the sense in which the testator intended the devisee's interest in the property to depend upon his attaining the specified age.⁽¹⁾ Thus a devise to *A* when he attains twenty-one and if he die before, then over, will vest immediately.⁽²⁾ But on the other hand a trust to "pay and divide between the present children" of a person "and any other children who may hereafter be born as and when they shall respectively attain the age of twenty-five years" if stood alone would confer no more than contingent interests on the children.⁽³⁾ Again, where a testator gives residue to several persons on their attaining the age of twenty-one years in equal shares, and directs the income during their respective minorities to be applied for the maintenance of all indiscriminately, the gift is not vested, but it would be otherwise if the direction be to apply the income of the respective shares of each for his or her own maintenance.⁽⁴⁾ Of course, if an express declaration has been made that the devisee shall not take a vested interest until he attains a certain age, there can then be no question but that the interest conveyed is contingent,⁽⁵⁾ and the same result follows from a declaration that the devisee shall take a vested interest at a future period.⁽⁶⁾ Then again, when the creation of the interest is subject to a condition precedent to be performed by the donee the interest is manifestly contingent until the condition is fulfilled.⁽⁷⁾ But while in such cases the courts are reluctant to interfere merely on the ground that the literal construction of the gift would lead to absurd and inconvenient consequences still in cases where the instrument has not been drawn up in clear and technical language, the court may in extreme cases relieve the hardship by adopting a construction more favourable to it,⁽⁸⁾ but in doing so, the court cannot ignore the plain meaning of the terms used and conjecture what would have been the testator's meaning if his attention had been drawn to the absurd consequences. And in no case has it power to refuse to give effect to the plain language of the gift, notwithstanding the absurd consequences,⁽⁹⁾ unless, indeed its literal construction would have the effect of rendering nugatory a purpose clearly expressed by the donor, in which case the court will struggle to avoid such a construction.⁽¹⁰⁾ Accordingly "and" which would have left a daughter without any provision has been construed as "or." ⁽¹¹⁾

507. A clear vested interest is not divested unless the express contingency upon which it was to be divested has happened. Thus a bequest to *A* for life and after his decease to *B* and *C* in equal moieties; and in case of the decease of either in the lifetime of *A*, the whole to the survivor of them living at her decease. *B* and *C* having both died in *A*'s lifetime, it was held that the divesting clause had no operation.⁽¹²⁾ A clause divesting a previous vested interest must be strictly construed, and the principle has been extended even to contingent interests.

(1) 1 Jarm., 809

(2) *Doe d. Hunt v. Moore*, 14 East., 601.

(3) *In re Mervin* [1891], 3 Ch., 197 (201).

(4) *In re Gosling*; *Gosling v. Elcock* [1902], 1 Ch. 945.

(5) *Russell v. Buchanan*, 7 Sim., 628.

(6) *Glanvill v. Glanvill*, 2 Mer., 38.

(7) *Phipps v. Williams*, 5 Sim., 44.

(8) *Denn d. Radcliffe v. Bagshaw*, 6 T. R., 512; cf. *Jenkins v. Hughes*, 8 H. L. C., 571.

(9) *Holmes v. Cradock*, 3 Ves., 317; *Clarke v. Butler*, 13 Sim., 401; *Maddison v. Chapman*, 4 K. & J., 709.

(10) *Quicke v. Leach*, 13 M. & W., 218.

(11) *Doe d. Usher v. Jessep*, 12 East., 288; *Grey v. Pearson*, 6 H. L. C., 61; *Secombe v. Edwards*, 28 Beav., 440; *Reed v. Braithwaite*, L. R., 11 Eq., 514.

(12) *Harrison v. Foreman*, 5 Ves., 207; *Marriott v. Abell*, L. R., 7 Eq., 478.

508. Exception.—The exception here made is also to be found in the Indian Succession Act. It is based on the principle that, "where the principle is given at a distant epoch, and the whole income is given in the meantime, the court leaning in favour of vesting has said that the whole thing is given; but if there occurs an interval or gap, which separates the gift of the interest from the principal, it is not vested."⁽¹⁾ The distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but, if it appears to relate to the time of payment only, the legacy vests *instantly*.⁽²⁾

In England it appears that a gift of a fixed sum for maintenance will not vest a legacy, although it may be equivalent to interests on the legacy.⁽³⁾ But under this exception the interest would clearly vest. English cases,⁽⁴⁾ therefore, are not authorities in India on this point.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

509. Analogous Law.—This section corresponds with section 108 of the Indian Succession Act, which runs as follows:—

Vesting of interest in bequest to such members of a class as shall have attained particular age.

"108. Where a bequest is made only to such members of a class as shall have obtained a particular age, a person who has not attained that age cannot have a vested interest in the legacy."

Illustration.

A fund is bequeathed to such of the children of A as shall attain the age of 28, with a direction that, while any child of A shall be under the age of 18, the income of the share to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A who is under the age of 18, has a vested interest in the bequest.

510. Principle.—The section deals with gifts to a contingent class, and therefore it follows that, unless the condition of the transfer is fulfilled, the wishes of the transferor cannot be carried out. As observed by Best, C.J., that unless the requisite age is attained, no child completely answers the description of those who are to be transferees.⁽⁵⁾ So a gift to children who shall have attained 21, or to such children as shall have attained that age is contingent, and no child before attaining that age can have a vested interest.⁽⁶⁾ It would appear that if at the time when the persons to take have to be ascertained, those who have not attained the prescribed age would be excluded.⁽⁷⁾

511. Gift to Children.—Where a will contains an immediate gift to the children of a living person, and nothing more, and there are children living

(1) *Per* Page-Wood, V. C., in *Pearson v. Dolmant*, L. R., 3 Eq., 321; see also *Gosavi v. Ivel Carnac*, I. L. R., 13 Bom., p. 463.

(2) 1 Jarm., 837.

(3) *Broughton v. Broughton*, 1 H. L. C., 406.

(4) Such as *In re Parker*; 16 Ch. D., 44; *In re Grimshaw's Trusts*, 11 Ch. D., 406.

(5) *Duffield v. Duffield*, 3 Bli. (N.S.), 216

(333).

(6) *Bull v. Pritchard*, 1 Russ., 213; *Leake v. Robinson*, 2 Mer., 363; *Thomas v. Wilberforce*, 31 Beav., 299; *Williams v. Haythorne*, L. R. 6 Ch., 782; *Ballin v. Ballin*, I. L. R., 8 Cal., 218.

(7) *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304; see s. 108, *illus.*, Indian Succession Act.

at the death of the testator, those children only take.⁽¹⁾ If, however, the period of distribution is postponed, the gift will apply not only to the children living at the death of the testator, but also to those born before the period of distribution,⁽²⁾ those living at the death of the testator taking vested interests liable to be divested *pro tanto* by the birth of each additional child.⁽³⁾ The same rule has been applied when the period of distribution is postponed until the attainment of a given age by the children, in which case, too, the gift will apply to those who are living at the death of the testator, and who come into existence before the first child attains that age, that is, the period when the fund becomes distributable in respect of *any one* object, or member of the class, the result being the same, even if the term used be "all the children."⁽⁴⁾ This rule is founded on the reason that while the court goes as far as it can to comprehend every one, until one attains the period, at which his share vests in him and to which he becomes entitled and whereupon the other children will have their shares necessarily carved out.⁽⁵⁾ The same principle applies to cases where the gift is contingent, when all who come into existence before the first member attains a vested interest will, if the contingency is satisfied as regards them, be entitled to a share.⁽⁶⁾ Now since in such cases the distribution is made as soon as the eldest child attains the requisite age, it necessarily follows that the children born after the vesting in possession of any of the shares are excluded. "The rule," said Lord Eldon, "has gone upon an anxiety to provide for as many children as possible with convenience. Therefore any coming *in esse*, before a determinate share becomes distributable to any one, is included."⁽⁷⁾ And it may be added that if the period of distribution is postponed till the youngest child attains the requisite age, the gift might never take effect, for some of the elder children may then have died. To postpone then the period of distribution by reason of the possible addition to the number of children by future births would be to make the gift unascertainable at least during the whole life of their parent, and thus inflict a hardship on the objects of the gift which the donor could not have contemplated.

512. No doubt, if the testator has clearly provided for the admission of

Exception.

all the children, or where the gift runs through the whole line of objects, born and unborn, the contrary construction will have to be adopted *ex necessitate rei*. Thus for example, a gift to children, when the youngest attains a prescribed age,⁽⁸⁾ or when they "should severally attain twenty-one" or "when and so soon as all and every his said grandchildren should have attained twenty-one."⁽⁹⁾ must all be so construed.

513. The section draws a pointed attention to this exception.⁽¹⁰⁾ Its general tenor is consistent with the English law, for it only enacts that where the transfer is made in favour of *such members only as shall attain a particular*

(1) *Viner v. Francis*, 2 Cox., 190; *Davidson v. Dallas*, 14 Ves., 576; *In re Mervin* [1891], 3 Ch., 197.

(2) *Andrews v. Partington*, 3 Bro. C.C. 401; *In re Emmet's Estate*, 13 Ch. D., 484.

(3) *Oppenheimer v. Henry*, 10 Hare, 141; *Baldwin v. Rogers*, 3 De M. & G., 649.

(4) *Ellison v. Avey*, 1 Ves., s. 111; *Whitebread v. Lord St. John*, 10 Ves., 152 (154).

(5) *Per Lord Eldon, L.C.*, in *Whitebread v. Lord St. John*, 10 Ves., 152 (154).

(6) *Whitebread v. Lord St. John*, 10 Ves., 152; *Gilbert v. Boorman*, 11 Ves., 238; *Clarke*

v. Clarke, 8 Sim., 59; *Gillman v. Daunt*, 3 K. & J., 48; *In re Mervin* [1891], 3 Ch., 197 (203).

(7) *Barrington v. Tristram*, 6 Ves., 345 (349).

(8) *Hughes v. Hughes*, 3 Bro. C. C., 35 (134).

(9) *Mainwaring v. Beevor*, 8 Hare, 44.

(10) *Maseyk v. Fergusson*, I.L.R., 4 Cal., 304; distinguishing and doubting *Sham v. Hobbs*, 3 Drew., 93; following *Williams v. Clark*, 4 De. G. & S., 472.

age, the interest shall not vest in any member of the class until he attains that age. But if any member of the class has attained the requisite age, his interest therein must vest in him, and which will necessarily carve out the shares of the other members, although, the period of distribution in their case will be postponed. A testator gave his residuary estate to trustees upon trust to invest and "to pay, transfer, or divide the same rents, between or among the children of my brothers A and B respectively, to be paid, transferred to, and divided among them in the proportion and at the times hereinafter mentioned; that is to say, the share of each and every son of my said two brothers shall be double that of each and every daughter, and the shares of each son shall be paid to him or them respectively upon his or their attaining the age of twenty-one years, and the share of each daughter to be paid to her or them on her or their respectively attaining that age or previously marrying, with benefit of survivorship between and among all the said sons and daughters." The testator left him surviving his two brothers and a sister C. A and B both died before the eldest of the testator's nephews or nieces attained twenty-one or married. In a suit instituted by the widow and executrix of A to have it declared that the above bequests were void, it was held that the bequests were valid, that the legatees took vested interests subject to be divested on death before the contingencies in the will happened and that the period of distribution alone was postponed.⁽¹⁾

514. In England, it has been held that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply to those who are living at the death of the testator and who come into existence before the first child attains that age, that is, the period when the fund becomes distributable in respect of any one object, or member of the class, the result being the same, even if the term used be "all the children."

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

515. **Analogous Law.**—This section is somewhat similar to section 111 of the Indian Succession act ⁽²⁾ to which are appended five illustrations to exemplify the principle, and which runs thus:—

"111. Where a bequest is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

Bequest contingent upon specified uncertain event, no time being mentioned for its occurrence.

Illustrations.

(a) A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator the legacy to B does not take effect.

(1) *Maseyk v. Fergusson*, I.L.R., 4 Cal., 304; distinguishing and doubting *Shum v. Hobbs*, 3 Drew., 93; following *Williams v.*

Clark, 4 De G. & S., 472.

(2) Act X of 1865.

(b) A legacy is bequeathed to *A*, and, in case of his death, without children to *B*. If *A* survives the testator or dies in the lifetime leaving a child the legacy to *B* does not take effect.

(c) A legacy is bequeathed to *A* when and if he attains the age of 18, and, in case of his death, to *B*. *A* attains the age of 18. The legacy to *B* does not take effect.

(d) A legacy is bequeathed to *A* for life, and, after his death, to *B*, and, "in case of *B*'s death without children," to *C*. The words "in case of *B*'s death without children" are to be understood as meaning "in case *B* shall die without children during the lifetime of *A*." (1)

(e) A legacy is bequeathed to *A* for life, and, after his death to *B*, and, "in case of *B*'s death" to *C*. The words "in case of *B*'s death" are to be considered as meaning "in case *B* shall die in the lifetime of *A*."

The first four illustrations appended to section 111 of the Indian Succession Act, are taken from the four cases supposed by Sir John Romilly, M. R. (2) The fourth canon there laid down, and forming illustration (d) has since been overruled by the House of Lords. (3) The correct rule now as to the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition.

516. Principle.—This section presupposes the existence of (a) a terminable antecedent interest, and (b) a subsequent contingent interest. The object of this rule is to prevent property from remaining without an owner. Thus, suppose property is given to *A* for life with a gift over to *B*, if *C* marries *D*. Here, unless *C* marries *D* during the continuance of *A*'s life-interest, the gift over to *B* would fail, because, suppose that *C* does not marry *D* during *A*'s lifetime, the estate would remain without an owner, for *B* cannot succeed, because of the contingency, and public policy requires that no property should remain without an owner.

517. When a Contingent Remainder fails.—The rule is a relic of the ancient rule for the creation of a contingent remainder, which required that the seisin or feudal possession should never be without an owner to render services to the lord, (4) a rule which was usually expressed in the maxim that every contingent remainder must have a particular estate of freehold to support it. (5) And contingent remainders could have been defeated by destroying or determining the particular estate upon which they depend before the contingency happened by which they became vested. Thus when there was a tenant for life, with several remainders in contingency, he might have, not only by his death, but by alienation, surrender, or other methods, destroyed and determined his own life-estate, before any of those remainders vested; with the result that he could thereby utterly defeat them all. Similarly, a tenant for life, with remainder to his eldest son unborn in tail, might have defeated the remainder in tail to his son, by surrendering up his life-estate before the birth of any son for his son not being *in esse*, when the particular estate determined, the remainder could not then vest, and as it could not vest then, it never could vest at all. In such cases, therefore, it became necessary to have trustees appointed to preserve the contingent remainders, in whom there was vested an estate

(1) This illustration being based on the 4th canon in *Edwards v. Edwards*, 15 Beav. 357, which has since been overruled in *Ingram v. Soutten*, L. R. 7 H. L. 408 (416) is no longer consonant with English law. To be so consonant the words "during the lifetime of *A*" should be omitted, and the words "at

any time" substituted therefor.

(2) *Edwards v. Edwards*, 15 Beav., 357; S.C., 51 E.R., 576.

(3) *O'Mahoney v. Burdett*, L.R., 7 H.L., 388; (398); *Ingram v. Soutten*, ib., 408 (416).

(4) *Abbiss v. Burney*, 17 Ch. D., 211 (229).

(5) 2 Black. Comm., 171, 172.

in remainder for the life of the tenant for life, to commence as soon as is determined. If, therefore, his estate for life determined otherwise than by his death, their estate, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency.⁽¹⁾ A similar devise would prevent the ulterior estate from lapsing in the case supposed in the section. The rule itself is an arbitrary rule and was condemned by Jessel, M. R., ⁽²⁾ as an arbitrary feudal rule, one of the legacies of the middle ages and which eventually led to its abolition. "It always disappoints the intention," he said, "because every settler, or testator, intends the contingent remainder to take effect."⁽³⁾ But so long as the rule remained, the intention of the testator was often defeated. Thus where in a case the testator made a bequest to A for 120 years in trust for B if B should so long live, and subject thereto to C for life with remainder to A upon trust to preserve contingent remainders, with remainder to the use of all the children of B and C who should be living at the decease of the survivor of them, and the issue then living of such of the children as should then be dead, and the respective heirs and assigns of such children. C died in the lifetime of B. It was held that the testator clearly intended to create a succession of legal limitations in settlement, but that the court could not hold that A had the particular estate of freehold to support the contingent remainder to the children simply because but for such an estate the gift to the children would fail.⁽⁴⁾

518. Old Feudal Rule.—A somewhat similar rule was formerly⁽⁵⁾ in force in England where the bequest over in the event of the death of the preceding legatee was said to refer to the event occurring in the lifetime of the testator, this construction being made *ex-necessitate rei*, from the absence of any period to which the words could be referred, as a testator was not supposed to contemplate the event of himself surviving the objects of his bounty.⁽⁶⁾ The object of this and similar other cases was to prevent lapsing.⁽⁷⁾

519. It will be observed that the principle enunciated in this section is somewhat different from the rule of construction laid down in section 111 of the Indian Succession Act, although the Law Commissioners refer to this section in their statement of objects and reasons ⁽⁸⁾ in this connexion. The principle of this section has already been stated. The reason for the rule laid down in section 111 of the Succession Act may be thus explained:—"Where a gift of the absolute interest in property to one person is followed by a gift of it to another in a particular

(1) 2 Black Comm., 171, 172.

(2) *Cunliffe v. Braucker*, 3 Ch. D., 393 (399).

(3) *Ibid.*, 399.

(4) *Cunliffe v. Braucker*, 3 Ch. D., 393 (401).

(5) *I. e.*, before the passing of the Act amending the law as to contingent remainders, 1877 (40 & 41 Vict., Ch. 33, which now provides as follows:—"Every contingent remainder created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing

or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or other executory limitation.") The English Act came into force on the 2nd August 1877.

(6) *Cambridge v. Rous*, 8 Ves., 13.

(7) See 2 Jarm., 782.

(8) Dated 10th May, 1877, under "Settlements."

event, the disposition of the Courts is to put such a construction on the gift over as will interfere as little as possible with the prior gift. When death is spoken of as a *contingent event*, a gift over on the event of death may well be considered to mean, not death at any time, but death before a particular period *e. g.*, the period of distribution, and thus the gift may be read as a gift by way of substitution and not of remainder."⁽¹⁾ This may be illustrated by the four cases supposed by Romilly, M. R.⁽²⁾ In the first class there is a gift to *A* and if he shall die to *B*. If these words be construed literally, we have, in the first place, an absolute gift, and then a gift over in the event of death, an event not contingent but certain. To avoid the repugnancy of an absolute giving and an absolute taking away, the Court was forced to read the word "in case of death" as meaning in case of death before the interest vests. In the second case (supposed in illustration (*b*)), however, there is a distinction since the event on which the legacy is to go over is not a certain but a contingent event, since it is not in the case of the death of *A*, but in the case of his death without children. In such cases therefore, it has always been held that if at any time, whether before or after the death of the donor, *A* should die without leaving a child, the gift over takes effect vesting the legacy in *B*.⁽³⁾ So where the testator disposed of his property thus: "My three sons shall be entitled to enjoy all the moveable and immoveable properties left by unequally. Any one of the sons dying sonless, the surviving son shall be entitled to all the properties equally." Here a legacy given to the survivors was contingent on the happening of a specified uncertain event, and the question is whether the period of distribution is necessarily the time of the testator's death or it is the death of the first taker. It has been held that the proper construction to put on the clause is that the period contemplated for the death of either of the sons sonless was in the lifetime of the testator, and that therefore the original gift to the three sons in equal shares would become indefeasible on the testator's death.⁽⁴⁾ This case was, however, decided with reference to section 111 of the Indian Succession Act extended to apply to cases governed by the Hindu Wills Act, 1870.⁽⁵⁾

520. Hindu Law otherwise. The rule here enacted has not been applied to the construction of Hindu wills, and it will not therefore apply to the construction of transfers made by a Hindu. And so the Privy Council has held⁽⁶⁾ since the passing of this Act, but without reference to it, that a gift in remainder, expectant on the termination of an estate for life, does not fail, but is accelerated, by reason of the gift of such prior life-estates not taking effect.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

(1) Hawkins on Wills, p. 254; In re *Waugh* [1903], 1 Ch., 744.

(2) *Edwards v. Edwards*, 15 Beav., 357.

(3) *Farthing v. Allen*, 2 Madd., 310; *O'Mahony v. Burdett*, L. R., 7 H. L., 388 (395); *Ingram v. Soultan*, L. R., 7 H. L., 408.

(4) *Norendranath v. Kamaltasini*, I. L. R., 23 Cal., 563 (567, 571), P. O. See ill. (*b*),

S. 111, Indian Succession Act.

(5) S. 2, Act XXI of 1870, which applies only to Bengal, and the towns of Madras and Bombay.

(6) *Ajudhia v. Rahman*, I. L. R., 10 Cal., 482, P. C., (case decided by P. C., on 17th November (1883) following *Lainson*

Illustration.

A transfers property to *B* for life, and after his death to *C* and *D*, equally to be divided between them, or the survivor of them. *C* dies during the life of *B*. *D* survives *B*. At *B*'s death the property passes to *D*.

521. Analogous Law.—This section corresponds with section 112 of the Indian Succession Act,⁽¹⁾ which runs as follows:—

Bequest to such of certain persons as shall be surviving at some period not specified.

112 Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appear by the will."

Illustrations.

(a) Property is bequeathed to *A* and *B*, to be equally divided between them, or to the survivor of them. If both *A* and *B* survive the testator, the legacy is equally divided between them. If *A* dies before the testator, and *B* survives the testator, it goes to *B*.

(b) Property is bequeathed to *A* for life, and after his death to *B* and *C*, to be equally divided between them, or to the survivor of them. *B* died during the life of *A*; *C* survives *A*. At *A*'s death the legacy goes to *C*.

(c) Property is bequeathed to *A* for life and after his death to *B* and *C*, or the survivor, with a direction that, if *B* should not survive the testator, his children are to stand in his place. *C* dies during the life of the testator; *B* survives the testator, but dies in the lifetime of *A*. The legacy goes to the representative of *B*.

(d) Property is bequeathed to *A* for life, and after his death to *B* and *C*, with a direction that, in case either of them dies in the lifetime of *A*, the whole shall go to the survivor. *B* dies in the lifetime of *A*. Afterwards *C* dies in the lifetime of *A*. The legacy goes to the representative of *C*.

The rule is generally in accordance with the English law, the strictness of which has been softened by the addition of the words "unless a contrary intention appears from the terms of the transfer," and which would here allow a wider latitude for construction.

Since the interest does not vest before the occurrence of the event, section 19(2) would obviously be inapplicable.

522. Principle.—The interest thus created is to a contingent class which has to be ascertained at the time of distribution. Therefore, it would be fair and in accordance with the wishes of the transferer that only the survivors should participate in the transfer.

In such a case the legacy vests and is divested upon the death of the legatee.⁽²⁾ If all the legatees predecease the tenant for life, their representatives will take, for the event which was to divest them not having happened, the original gift remains.⁽³⁾ The case of a gift to a class of persons to be ascertained at some uncertain period will also be governed by this section, the survivors alone taking to the exclusion of those dead or yet unborn.⁽⁴⁾

523. Meaning of Words.—"Surviving at some period" refers to the time when the payment or distribution is to be made,⁽⁵⁾ and the word "surviving"

v. *Lainson*, 5 DeGex M. & G., 754; 18 Beav., 1; see also *Jull v. Jacobs*, 3 Ch., D., 703; 1 Jarm., 574. (These are early authorities; later cases have, however, ruled differently, see § 467, 460 ante.)

(1) Act X of 1862.

(2) *Bachman v. Bachman*, 1 L.R., 6 All., 583.

(3) *Henderson's Test. Succ.*, (2nd Ed.),

p. 116; *Brown v. Kenyon*, 3 Mad., 410; *Re Santer's Trusts* 1 Eq., 675; *Harrison v. Moreman*, 5 Ves., 207.

(4) *Nandi v. Sitaram*, 1 L.R., 16 Cal., 677, P.C.; *Rai Bishen Chand v. Mt Asmaida*, 1 L.R., 6 All., 560; see also notes and cases cited under s. 15 ante.

(5) *Stevenson v. Gullan*, 18 Beav., 590; *Howard v. Collins*, 5 Ek., 349.

means being alive at the time of the event indicated. It has the same meaning as the words such as "survive" or "survivors."⁽¹⁾

524. Limitation to Survivors.—This section lays down only a rule of construction to be followed in the absence of any explicit terms in the grant shewing a contrary intention to the effect that the transferrer had intended that other persons should also participate, the benefit of the grant would only enure to those who were alive at the time when the preceding interest determined. The rule is thus a natural corollary of the principle which has been before enunciated and which is an integral part of the English law of Real Property (§§ 444—446). According to the corresponding rule of the English law the term "survivor" is construed strictly, indeed so strictly and literally as sometimes to defeat the real intention of the transferrer. Thus where the testator settled an annuity on his wife for life, directing that after her death, the principal shall be paid to his children, that is, one-half to his son *A* and the other half to his daughters *B* and *C* if living at the death of their mother, and if any of them predeceased her, then the same share to their children equally at the age of twenty-one, or on marriage, but if any of them should die before attaining that age, then that share was to be given to the survivors. The mother died, then *C* died leaving issue, and afterwards died *B* under twenty-one, but without issue, and the question arose whether *C*'s children were entitled to any part of the share of *B*, but it was held that on the face of the deed they had no such right, although it was most probably the testator's intention, and the Court accordingly declared *A* as the only surviving child entitled to the whole of *B*'s share.⁽²⁾ Similarly in another case of a residuary bequest to the testator's nephews and nieces *per stirpes* equally for their lives, and after the death of either it being provided that the share of the principal should be paid equally to and among the children of such of his said nephews and nieces as should die; and if any die without leaving any child or children, that share to go to and among the survivors or survivor of them in manner aforesaid. It was held that on the construction of the bequest while on the death of one without a child his share would go to the survivors for their respective lives only, and will pass to their children respectively with the original shares, but upon the death of the last survivor without a child his shares, both original and accrued, would be undisposed of notwithstanding another has left a child.⁽³⁾ But, on the other hand, more recent authorities have refused to read "survivors" literally, so as to exclude the children of a tenant for life who died previously. And the principle more in accord with the section was stated by the Lord Chancellor in the following words. "I entirely approve of the rule now generally acted on of giving to the word 'surviving' its ordinary and natural meaning and not construing it to mean 'other'. The Courts have no right to alter the language of a testator, merely to effect what they conjecture him to have intended to say when that is at variance with what he has in fact said. But the words of a will after all are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the Court to execute the intention, however inartificially

(1) *Corneck v. Wedman*, 7 Eq., 80; *Gee v. Liddell*, 2 Eq., 341; *Davidson v. Dallas*, 14 Ves., 576; *In re Sharpe's Estate*, 8 D.G. & S., 458.

(2) *Ferguson v. Dunbar*, 3 Br. C.C., 468 n.

(3) *Milson v. Awdry*, 5 Ves., 465 (468). A similar view was taken in *Davidson v. Dal-*

las, 14 Ves., 576; *Crowder v. Stone*, 3 Russ., 217; *Wilmot v. Wilmot*, 14 Ves., 578; *Ranelagh v. Ranelagh*, 2 Mv. & K., 441; *Winterton v. Crawford*, 1 R. & My., 407; *Cromek v. Lumb*, 3 Y. & O., 565; *Lee v. Stone*, 1 Ex., 674; *DeGaragnol v. Liardet*, 32 Beav., 608.

expressed"(1). The word "survivor" has been accordingly construed to mean "other," and so in a bequest to "the surviving sisters and their respective children," it was held to include the children of all the sisters and not only of those surviving(2).

525. In cases where, after similar limitations, there is a gift over on the death of all the tenants for life without leaving children or issue, it is settled by a long series of authorities that the children of a tenant for life may participate in the share of another tenant for life who died without issue after their parent.(3) On the other hand, if there is no gift over, and the share of the tenant for life dying without issue is expressed to be given to the survivors for their respective lives and after their deaths to their children, only children of the survivors would take, and children of a tenant for life who died previously would be excluded.(4)

526. The trend of the authorities would then appear to establish the following propositions :—(i) Where the gift is to A, B, etc.,

Result stated. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over ; (ii) if to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent : (iii) they also participate, although there is no gift over where the limitations are to A, B, etc., equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares(5).

If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable takes the whole(6). This view has been held to govern Hindus as well.(7)

527. Sometimes it is difficult, nay, impossible, to distinguish the two classes of interests. If, for example, there be a gift which

The two interests when almost indistinguishable.

exhausts the whole interest, and then, upon the occurrence of a particular event, a substituted gift to A, B, and C, and the survivors and survivor of them ; if A, B, and C are all dead when the event occurs, their representatives will take in equal shares, but if the survivor of A, B and C survives the event, he will take the whole. In such a case "the Court sees an intention to give, in one event in one direction, and in another event in another ; and what difference can it make whether you call these vested interests, defeasible in a certain event, or contingent and transmissible interests, except perhaps this, that the Court is less

(1) *Smith v. Osborne*, 6 H L.C., 375 (393).

(2) *Whytehead v. Boulton*, 41 Ch. D., 525 (529).

(3) *Waite v. Littlewood*, L.R., 8 Ch., 70 ; *Wake v. Varah*, 2 Ch. D., 348 ; *Badger v. Gregory*, L.R., 8 Eq., 78.

(4) See *Re Horner's Estate*, 19 Ch. D., 186 ; *In re Benn*, 29 Ch. D., 839 ; *Whytehead v. Boulton*, 41 Ch. D., 525. Malins, V.C., has in a considered judgment in *In re Arnold's Trusts*, L.R., 10 Eq., 252, collected all the cases, and reviewed them in conformity with

the view expressed in the text. But this view is at variance with *Wake v. Varah*, 2 Ch. D., 348 (355, 357, 358) ; see also 2 Jarm., 709, 710.

(5) *Per Kay, J.*, in *Whytehead v. Boulton*, 41 Ch. D., 525 (531, 532).

(6) *Humphrey v. Tayleur*, 1 Ambler, 138 ; followed in *Nandi Singh v. Sitaram*, I.L.R., 16 Cal., 677 (682), P.C.

(7) *Nandi Singh v. Sitaram*, I.L.R., 16 Cal., 677 (682), P.C.

disposed to divest a vested estate than to say the estate does not vest till the event occurs one way or the other."⁽¹⁾ So where there is a gift to *A* for life, with remainder in case *A* died unmarried, between *B* and *C*, or such of them as should be then living, and the lawful children of such of them as should be then dead, for the share of the deceased father or mother only, and *B* and *C* died in the lifetime of *A* who died unmarried, *B* left issue but *C* left no issue, and the question arose whether the estate conveyed to the representatives of *C* was vested or contingent, Lord Langdale who decided the case⁽²⁾ held that there was no estate vested till the death of *A*, and that therefore the representatives of *C* took nothing, but Wood V. C., in a later case threw out as his opinion that although the interests were in a sense contingent, they were nevertheless transmissible.⁽³⁾ Even in a clearly contingent interest, when it is followed by other limitation, it may be a question whether the contingency is confined to the particular interest or extends to a series of limitations. "The rule in these cases seems to be that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, by, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency, and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations."⁽⁴⁾

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(a) *A* lets a farm to *B* on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) *A* gives Rs. 500 to *B* on condition that he shall marry *A*'s daughter *C*. At the date of the transfer *C* was dead. The transfer is void.

(c) *A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is void.

(d) *A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is void.

528. Analogous Law.—This section is the same as sections 113 and 114 of the Indian Succession Act and sections 23 and 36 of the Indian Contract Act. So it has been laid down by Coke that where a condition precedent annexed to a devise was of real estate is, or becomes impossible of performance the devise fails, even though there be no default or laches on the part of the devisee himself.⁽⁵⁾ But it is otherwise with a condition *subsequent* which does not defeat the devise, but makes it absolute as soon as it is rendered impossible. Thus where the devise, made on condition that the devisee should marry a

(1) In re *Sander's Trusts*, L.R., 1 Eq., 675 (684); *Sturgess v. Pearson*, 4 Mad., 411; *Harrison v. Foreman*, 5 Ves., 207; *Wagstaff v. Crosby*, 2 Coll., 746.

(2) *Willis v. Plaskett*, 4 Beav., 208.

(3) In re *Sander's Trusts*, L.R., 1 Eq. 675 (684).

(4) 1 Jarm., 830.

(5) Co. Litt., 206 (b).

certain person on or before she attained the age of twenty-one years, and the person named died before she attained that age, it was held that the fulfilment of the condition having become impossible by the act of God, it was not broken,⁽¹⁾ but if in the above case the condition had been a condition *precedent*, it is certain that the result would have been different.

The rules here laid down generally apply also to moveable property.

529. Principle.—It being the obvious policy of the law to discourage transfers into which impossible or illegal conditions play a part, it has been enacted that an interest dependent upon such a condition shall fail. The condition only is not void in which case it would produce no effect, but it has the effect of nullifying the transfer itself. The transfer becomes illegal because a condition upon the performance of which it depends is or has become illegal. The subject has been already discussed at length to which reference must be made for further information.⁽²⁾

530. Meaning of Words.—“*Dependent upon a condition*” is not the same as a condition attaching to the transfer, for in such a case the transfer is good, although the condition is ignored as if non-existent.⁽³⁾ The condition contemplated is a condition *precedent* as contra-distinguished from a condition *subsequent*. “*Dependent*” means that the condition must be performed before the estate can vest or be enlarged.⁽⁴⁾

“*Fails*” the interest “*fails*” means that in the event mentioned no interest is ever vested in the transferee. “*Condition*” means the condition *precedent*. Condition and contingency are often used synonymously. In general, however, the word contingency has reference to the happening of an event, whereas the word condition has reference to the doing or forbearance from doing of some act.⁽⁵⁾ ‘*If the fulfilment is impossible:*’ the condition itself may not be illegal or impossible, but if its fulfilment is impossible or illegal, the section would apply. An illegal condition, *e.g.*, not to alien, not to marry or to abstain from a criminal prosecution is illegal, but its fulfilment may not be impossible.

531. Conditions—Precedent, Subsequent, and Impossible.—Conditions are of two kinds—conditions precedent, and conditions subsequent. The former precede the vesting of estate; the latter are to be performed after the estate has become vested, and if not performed, may, in many cases, cause interests already vested to be divested, or to be altogether void.⁽⁶⁾ Where the condition is precedent, the estate is not in the grantee until the condition is performed, but where the condition is subsequent, the estate vests immediately in the grantee and remains in him till the condition is broken.⁽⁷⁾ Whether the condition is precedent or subsequent is a point for construction in each case.⁽⁸⁾ As a rule where the condition precedent is impossible, the transfer is void; but where it is a condition subsequent, it is valid, the condition being ignored.⁽⁹⁾ A condition is none the less impossible, if it was possible in its creation, but has since become impossible.⁽¹⁰⁾

(1) *Thomas v. Howell*, 1 Salk., 170; *Graydon v. Hicks*, 2 Atk., 16. Cf. as to legacy *Walker v. Walker*, 29 L. J. Ch., 856.

(2) S. 6 (h) (2), *ante*, and 264.

(3) S. 6 (h) (2), *ante*, and 264, *et seq.*

(4) 1 Steph. Comm., (8th ed.), 309.

(5) *Henderson's Test. Succ.* (2nd ed.), p. 118.

(6) See 2 Black. Comm., 156; Co., Litt.,

206.

(7) *Wynne v. Wynne*, 2 M. & G., 8, p. 14; Bro. Aler. Tit. Condition, pl. 67 (a), quoted in *Henderson's Test. Succ.* (2nd ed.), 118.

(8) *Acherley v. Acherley*, Wills, 153; *Duffield v. Duffield*, 3 Bli. N. S., 260 (381); *Robinson v. Wheelwright*, 6 DeG. M. & G., 535.

(9) 2 Jarm., 12.

(10) *Ib.*, p. 13.

532. Of such a condition illustration (a) is an example. A condition may be impossible of fulfilment either at the time the interest is created, or it may become so subsequently. In either case the interest would fail,⁽¹⁾ unless its fulfilment has been made impossible by the act of the party benefiting thereby.⁽²⁾ But the rule is the same if it has become impossible by the act of God.⁽³⁾

533. This is the same as "illegal", see notes under section 6 (h) 2, *ante*.
Forbidden by law. The fulfilment of a condition may be forbidden by any law of the land, and it is not necessary that the prohibition should be express.⁽⁴⁾ Fulfilment of conditions in restraint of marriage,⁽⁵⁾ or by which one is restrained from exercising a lawful profession, trade or business of any kind,⁽⁶⁾ or from enforcing his rights by the usual legal proceedings⁽⁷⁾ is forbidden by law. Uncertain agreements⁽⁸⁾ and wagering covenants also fall into the same category.⁽⁹⁾ Transfers may not only be forbidden by law but also by a condition in the license with the like result.⁽¹⁰⁾ Certain officials connected with Courts of Justice are prohibited from acquiring any interest in property sold at such sale.⁽¹¹⁾ Hindu law forbids the sale of a boy for adoption or payment of any consideration in the shape of an annual allowance to his natural parents.⁽¹²⁾ And to the same class belong also agreements in restraint of marriage.⁽¹³⁾ Impartible and inalienable estates cannot be assigned, nor can a certificated holder of an estate under Act XL of 1858 mortgage it,⁽¹⁴⁾ without sanction of the Civil Court.⁽¹⁵⁾ So if a party to a private partition agrees to relinquish his right in the *sir* land, his agreement is not enforceable in law,⁽¹⁶⁾ because such an agreement would, if allowed, defeat the provisions of section 7 of Act XII of 1881.⁽¹⁷⁾ Similar provisions have been recently made in the Central Provinces.⁽¹⁸⁾ If such transfers were permitted by law, it would have the effect of rendering its own enactment nugatory.

534. And to the same class belong also transfers which, if permitted, would lead to fraud on the public⁽¹⁹⁾ or on the Government.⁽²⁰⁾ And for the same reason transfers made by an insolvent in fraud of his creditors are held to be void.⁽²¹⁾ Similarly, a mortgage executed in favour of some creditors on condition that they should all give him time has been held to be void;⁽²²⁾ and where the dissentient creditors instituted a suit, the Privy Council held that "it would be proper and right

(1) *Lowther v. Cavendish*, 1 Ed., 99; *Priestley v. Holgate*, 3 K. & G., 286.

(2) S. 34, *post*.

(3) 2 Jarm., 13.

(4) *Forster v. Taylor*, 5 B. & A., 387; *Hormasji v. Pestanj*, 1. L. R., 12 Bom., 422.

(5) S. 26, Indian Contract Act.

(6) *Ib.*, s. 27.

(7) *Ib.*, s. 28.

(8) *Ib.*, s. 29.

(9) *Ib.*, s. 30.

(10) *Debi Prasad v. Rupram*, 1. L. R., 10 All., 577.

(11) S. 136, *post*, and Civil Procedure Code (Act XIV of 1882), s. 292; o. 21, r. 73, Civil Procedure Code 1908 (Act V of 1908).

(12) *Isham Kishore v. Harris Chandra*, 13 B. L. R. (A. C.), 42.

(13) *Sitaram v. Aheree Heralnee*, 11 B. L. R., 129.

(14) Bengal Minors Act extended to U. P., C. P., Oudh and the Punjab.

(15) *Chunman Singh v. Subran Kuar*, 1. L. R., 2 All., 902; *Manji Ram v. Tara Singh*, 1. L. R., 3 All., 852; *Ram Chander Chakrabarty v. Brijonath*, 1. L. R., 4 Cal., 929.

(16) *Kashi Prasad v. Kedarnath Sahu*, 1. L. R., 20 All., 219, F. B.; (*Ram Prasad v. Dina Kuar*, 1. L. R., 4 All., 515, dissented from); *Gaya Singh v. Udit Singh*, 1. L. R., 13 All., 396.

(17) N.W.P., Rent Act.

(18) The Central Provinces Tenancy Act (IX of 1898), s. 45.

(19) *Begbie v. Phosphate Co. Ltd.*, 1 Q.B. D., 679.

(20) *Willis v. Baldwin*, 2 Doug., 450.

(21) *Blacklock v. Dobie*, 1. L. R., 1 C.P., 265.

(22) *Ajudhia v. Sidh Gopal*, 1. L. R., 9 All., 330, P.C.

for them (the mortgagors), if one creditor was endeavouring to obtain a preference over the others, to stop payment, and to see that their property was equally divided amongst their creditors."⁽¹⁾ It would appear that where this objection does not exist the transfer would be maintained.⁽²⁾ The law on the subject will be found exhaustively treated elsewhere.⁽³⁾

535. Implies Injury to the Person or Property of Another.

—Under this head fall transfers in favour of servants in consideration of their influencing their masters.⁽⁴⁾ Transfers made *pendente lite* are bad as both forbidden by law,⁽⁵⁾ and as implying injury to the litigating plaintiff.⁽⁶⁾ So also is every agreement which "clogs the equity of redemption."⁽⁷⁾

536. Immoral or opposed to Public Policy.—Transfers which encourage a crime or desertion by wife of her husband are void,⁽⁸⁾ as are also transfers by way of bribe,⁽⁹⁾ or for the purpose of prostitution,⁽¹⁰⁾ though not in consideration of past cohabitation.⁽¹¹⁾ But where a person has been long in possession of property acquired in consequence of an immoral transfer it was held that such possession could not be disturbed.⁽¹²⁾ Sale and brokerage of public or sacerdotal offices are both illegal and opposed to public policy.⁽¹³⁾

So are also transfers made to foreign enemy,⁽¹⁴⁾ and transfers encouraging smuggling or illegally compromising offences which cannot be lawfully compounded; as also transfers restraining rights of free enjoyment and alienation of property; and generally all transfers which are calculated to cause loss to the public and are *contra bonos mores*, are absolutely void.⁽¹⁵⁾

537. Conditions, Valid and Void.—A bequest to a person on condition that if she should become a nun she should forfeit the legacy is valid and the legatee would forfeit the legacy if the condition is broken,⁽¹⁶⁾ and similarly a condition not to interfere with the management of the trustees was enforced.⁽¹⁷⁾ A condition to assume a particular name⁽¹⁸⁾ may be satisfied by assuming it without a license from the Crown.⁽¹⁹⁾ A condition that the donee shall reside in a particular house is valid, and may be fulfilled by residing personally to some extent, but the fulfilment of such a condition must in a great measure depend upon the intention of the donor and on the construction of the terms of the deed in which the intention has been expressed. The validity of a condition in restraint of marriage in England in a great measure depends upon the nature of the property to which it is attached. In regard to devises of real estate it is

(1) *Per Sir R Couch*, in *Ajudhia v. Sidh Gopal*, 1 L.R., 9 All., 330 (338) P.C.

(2) *Ratan v. Ardeskir*, 1 L.R., 4 Bom., 70; *Shankarappa v. D Kamayya*, 3 M.H.C. R., 231; *Abdul v. Mir Mahomed*, 10 Cal., 616; *Ranjilbhai v. Vinayak*, 1 L.R., 11 Bom., 666.

(3) S. 6, *ante*, and s. 53, *post*.

(4) *Vinayakrao v. Ransordas*, 1 L.R., 7 Bom., 91.

(5) *See* s. 52, *post*.

(6) *Simpson v. Lamb*, 7 E. & B., 84.

(7) *See* Comm. under s. 60, *post*; *Coote Mort.*, 19; *Jennings v. Ward*, 2 Vern., 520; *Willet v. Winnel*, 1 Vern., 488.

(8) *See* illustns. (c) and (d); *Bai Bijli v. Nana*, 1 L.R., 10 Bom., 162; *Sitaram v. Aheree*, 11 B.L.R., 129; *Ram Sarup v. Bela*, 1 L.R., 6 All., 313.

(9) *Harrington v. Victoria Graving Dock*

Co., 3 Q.B.D., 549 (551).

(10) *Pearce v. Brookes*, L.R., 1 Ex., 213.

(11) *Dhira Kuar v. Bikramjit*, 1 L.R., 3 All., 787; *Man Kuar v. Jasodha*, 1 L.R., 1 All., 478.

(12) *Lachmi Narain v. Wilayti Begum*, 1 L.R., 2 All., 433; following *Ayerst v. Jenkins*, L.R., 16 Eq., 275.

(13) *See* s. 6, *ante*; 49 Geo. III, c. 126, s. 3 (in force in the Presidency towns); *Blackford v. Preston*, 8 T.R., 99; *Parsons v. Thompson*, 1 H. Black., 322.

(14) *De Wulz v. Hendricks*, 2 Bing., 314.

(15) *St* s. 6, *ante*, and Comm.

(16) *In re Dickson's Trust*, 1 Sim (N.S.), 37.

(17) *Colston v. Morris*, Jac., 257a.

(18) *Lowndes v. Davies*, 1 Bing. N.C., 597.

(19) *Doe d. Luscombe v. Yates*, 5 B. & Ald., 543; *Fillingham v. Bromley*, 24 L.J. Ch., 488.

settled that an unqualified restriction on marriage is absolutely void.⁽¹⁾ It being contrary to the policy of the law to restrain marriage by encouraging celibacy, the court always looks askance at such a condition.⁽²⁾ But a condition that before marriage, consent shall be taken,⁽³⁾ or that it shall not be entered into before attaining the age of twenty-one or any other reasonable age,⁽⁴⁾ or that it shall be solemnized with certain ceremonies, *e.g.*, according to the rules of the Quaker sect,⁽⁵⁾ would be enforced as not opposed to the rule. A condition not to marry a Scotchman,⁽⁶⁾ a Papist⁽⁷⁾ or a Jew⁽⁸⁾ is valid, but a condition not to marry a man of a particular profession⁽⁹⁾ or of certain means is void as too general.⁽¹⁰⁾ Again, a restraint against a second marriage has been upheld.⁽¹¹⁾ A condition against insolvency is valid only in the cases already discussed.⁽¹²⁾ A bequest of a legacy should the intended donee "humbly apply for subsistence" was held to be contingent upon the fulfilment of that condition precedent and which was not fulfilled by an application for an allowance "suitable to our dignity." Such a condition was moreover upheld as unobjectionable.⁽¹³⁾ In certain cases an onerous condition has been got round by holding it to be made *in terrorem*, but the doctrine is chiefly confined to marriage covenants and then too only in cases of conditions precedent when there is not an alternative provision, or an alternative event, or where it is not restricted to minority⁽¹⁴⁾ The acceptance of a gift or a legacy binds the party benefited to the condition as he is then estopped by his own act, which precludes him from pleading surprise or ignorance.⁽¹⁵⁾

26. Where the terms of a transfer of property imposes a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with consent of C, D and E. B marries with the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

538. Analogous Law.—This section closely corresponds with section 115 of the Succession Act, which runs as follows:—

"115. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with "

Fulfilment of condition precedent to vesting of legacy.

(1) *Perrin v. Lyon*, 9 East, 170; *Sutton v. Jewks*, 2 Ch. R., 95; *Dashwood v. Bulkeley* 10 Ves., 230.

(2) *Jones v. Jones*, 1 Q.B.D., 279.

(3) *Chauncey v. Graydon*, 2 Atk., 616.

(4) *Stackpole v. Beaumont*, 3 Ves., 89.

(5) *Haughton v. Haughton*, 1 Moll., 611.

(6) *Perrin v. Lyon*, 9 East., 170.

(7) *Duggan v. Kelly*, 10 Ir. Eq. R., 295.

(8) *Hogson v. Halford*, 11 Ch. D., 959.

(9) 1 Eq. Ca. Abr., 110.

(10) *Keily v. Monck*, 3 Ridg., P.C., 205.

(11) *Barton v. Barton*, 2 Vern., 308 (widow); *Allen v. Jackson*, 1 Ch. D., 299 (widower). The rule has been established as a rule of law because it was thought agreeable to public policy—*Per Mellish, L. J.*, in *Allen v. Jackson*, 1 Ch. D. 399 (405).

(12) S. 12, and § 412, *ante*.

(13) *Veerabhadra v. Chiranjivi*, I.L.R., 28 Mad., 173 (181), P.C.

(14) *Osborn v. Brown*, 5 Ves., 527.

(15) *Attorney-General v. Christ's Hospital*, Tambl., 393; *Gregg v. Coates*, 23 Beav., 33.

(a) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B. C is present at the marriage. D sends a present to A, previous to the marriage. E has been personally informed by A of his intentions, and has made no objections. A has fulfilled the condition.

(b) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(c) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(d) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(e) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(f) A makes his will, whereby he bequeathes a sum of money to B, if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(g) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy.

The section is in harmony with the English cases.⁽¹⁾ It should be noted that the section relates only to the performance of conditions precedent. Section 29 deals with conditions *subsequent*, which must be *strictly* fulfilled, and regarding which the section has no application.

539. Principle.—This section is founded on the principle which favours the early vesting of estates.⁽²⁾ Where literal performance has become impossible or impracticable, law assumes that the condition has been entirely fulfilled, if, in fact, it has been fulfilled substantially in accordance with the wishes of the testator. Thus, where the condition is as to consent, it may be inferred from conduct or from the surrounding circumstances, the maxim being *qui tacit satis loquitur*.⁽³⁾ So oral consent would be sufficient where consent in writing was proscribed.⁽⁴⁾

540. Meaning of Words.—"A condition before the person can take an interest:" means a condition precedent as opposed to the condition subsequent. "*Substantially*," means in greater part, or as far as it is possible, or in other words *cy pres*.

541. Substantial Compliance.—Consent of the majority, where one trustee or executor disclaims, has been held to be sufficient.⁽⁵⁾ Consent will be presumed after the expiration of many years, where no claim is made by the persons entitled to take after the forfeiture.⁽⁶⁾

(1) *Montague v. Beaucherk*, 3 B. P. C., Tam., 277; *Page v. Hayward*, 1 Salk., 570; *Gulliver v. Ashby*, 1 W. Bl., 607; *Davis v. Lowndes*, 1 Bing. N.C., 597; *Doe d. Duke of Norfolk v. Hawke*, 2 East., 481.

(2) See ante, § 377; *Scott v. Tyler*, W. & T. L. C., 146.

(3) "He who is silent speaks sufficiently." The same maxim is also thus stated: *Qui tacet consentire videtur*, i.e., "He who is silent is assumed to consent;" "silence gives

consent."

(4) *Campbell v. Lord Netterville*, cited in *Williams on Executors*, p. 1145; see also s. 115, illus. (a) *Succession Act*, but *contra* in *Clarke v. Parker*, 19 Ves., 2. As to oral consent, see *Scott v. Tyler*, W. & T., L.C., p. 199.

(5) *Worthington v. Evans*, 1 Sim. & Stu., 165.

(6) *In re Birch*, 17 Beav., 368.

542. As a rule, it has been held to be sufficient if the wishes of the transferor can be carried out *cy pres*.⁽¹⁾ And this is especially so where it appears that the transferor more looked to the end rather than to the means by which the condition is to be fulfilled. Ignorance of the condition is no excuse for not fulfilling it.⁽²⁾ For a person who takes under an instrument cannot plead want of knowledge of its contents as an excuse for non-compliance.⁽³⁾ A condition not to dispute a will has been sometimes regarded as *in terrorem* only and, as such, it is ineffectual unless there is a gift over,⁽⁴⁾ but recent authorities are in favour of upholding it.⁽⁵⁾ Indeed, the *in terrorem* plea is seldom heard of outside matrimonial and probate Courts. The party alleging breach must prove it.⁽⁶⁾

543. Hindu Law.—Under the Hindu law, conditional bequests are valid, and the conditions must be performed, unless they are repugnant to the nature of the grant, or are immoral or illegal (§§ 260—269, 533—537).

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together under circumstances which made it impossible to prove that she died before him. The disposition in favour of B does not take effect.

544. Analogous Law.—The first part of this section corresponds with section 116, and the latter part with section 117 of the Succession Act. The illustration (b) has been taken from an English case.⁽⁷⁾

The rule is applicable both to moveable as well as immoveable property.⁽⁸⁾

(1) *Henderson's Test Suco.*, 120.

(2) *In re Hodge's Legacy*, 16 Eq., 92; *Astley v. Earl of Essex*, 18 Eq., 290.

(3) *Porter v. Fry*, 1 Vent., 199, followed per Sir G. Jessel, M.R., in *Astley v. Earl of Essex*, 18 Eq., 290 (297).

(4) *Powell v. Morgan*, 2 Vern., 90.

(5) *Cooke v. Turner*, 14 Sim., 498; *Evan-*

turel v. Evan-turel, L.R., 6 P.C., 1.

(6) *Wilkinson v. Dyson*, 10 W.R., (Eng.) 681.

(7) *Underwood v. Wing*, 4 DeG. M. & G., 633.

(8) *Per Lord Romilly in Evastaff v. Austin*, 19 Beav., 691; *Jull v. Jacobs*, 8 Ch. D., 703 (712).

545. Principle.—The principle underlying this section is thus explained by Williams:—"Instances have frequently occurred in which the Court has concluded from the context of the will, that the intention of the testator is effectually fulfilled by regarding a clause of apparent condition as a clause of conditional limitation, so as to require, as in the case of a gift on a condition that the very event on which the gift is made contingent must be fulfilled with strict exactness, but paying regard, in the construction to the substantial effect of the contingency specified and so to the real interests of the testator."⁽¹⁾

546. Doctrine of Acceleration.—Where the intention of the parties can be clearly ascertained effect is given to it, but otherwise to prevent against lapse, it is sufficient if their intention is substantially carried out. If the transferer provides against failure, the ulterior disposition will take effect in case of failure, although it may not have occurred in the manner contemplated by the parties. But where [as in illustration (b)] the intention is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition does not take effect unless the prior disposition fails in that manner. In such a case the failure of the prior interest in a particular manner is a condition precedent to the transfer and must be fulfilled.⁽²⁾

547. But where, on the other hand, in a series of consecutive limitations a particular estate be void in its creation from being limited to a person incapable by law of taking or refusing to take, the remainders immediately expectant on such estate are accelerated, and the interest in question descends to the heir. And the result would be the same if the previous estate is revoked by the donor, for there is no difference in principle between the case where a person gave an estate which failed, and the case where he directed himself that it should fail.⁽³⁾ This view is quite in accordance with the section, and has been propounded in several English cases, ⁽⁴⁾ the principle of which has been applied by the Privy Council to the case of a Hindu testator, who held that a gift in remainder expectant on the termination of an estate for life, does not fail, but is accelerated by reason of the gift of such prior life-estate not taking effect.⁽⁵⁾

548. In this case their Lordships followed an English precedent decided by Lord Romilly, in which a testator gave an estate to his son A for life, and from and after his decease to his children. A's life-estate being subsequently taken away, it was argued that the children of A could not take while he was alive, that it was an executory devise, and they were therefore incapable of taking during his lifetime, but it was held that the life-estate being out of the way, the remainder takes effect as if there had been no life-estate.⁽⁶⁾ The fact that gifts are made by the donor to his wife and "her assigns" does not prevent the rule from operating if the condition under which it was made has been violated.⁽⁷⁾ Shortly stated, the principle of these cases may be stated to be, that a gift to A for life, and from and after the decease of A to B, C and D, means from and after the determination of the estate; and whether the estate is determined by revocation or by death or by the incapacity of the donee to

(1) Williams on Executors, 1133. See *In re Smith's Trust's* L.R. 1 Eq., 79; *Mackinnon v. Sewell*, 2 M. & K., 202. See also notes to s. 21, ante.

(2) See notes under s. 21, ante.

(3) *Fell v. Biddulph*, L. R., 10 P. C., 701.

(4) *Shep. Touch.*, 435, 451; *Fuller v.*

Fuller, Cro. Eliz., 423; *Lainson v. Lainson*, 18 Beav., 1; *Jull v. Jacobs*, 3 Ch. D., 703.

(5) *Ajudhia v. Rakhman*. I.L.R., 10 Cal., 482 (483), P. C.

(6) *Jull v. Jacobs*, 3 Ch. D., 708 (712).

(7) *Craven v. Brady*, 3 Ch., 296 (298), O. A. from L.R. 4 Eq., 209.

take, or by any other circumstance, the life-estate being out of the way, the remainder takes effect, having only been postponed in order that the life-estate may be given to *A*.

549. Ulterior Disposition when Valid.—This section again lays down a rule of construction applicable to transfers made by means of a written instrument. The normal rule is that where the donor creates two interests, the latter depending upon determination of the prior, the manner in which the prior interest created is immaterial unless the donor had indicated his intention to the contrary. Where, however, this has not been expressly done, it is often difficult to ascertain the real intention of the donor. And for this purpose the principles deducible from the case-law become important. Thus, in a case the testatrix after giving an annuity to *A*, being apparently desirous that the division of her property should not take place till after the death of the annuitant, directed that, as to two fifths of the residue, the interest thereof shall be paid to *B* during her life; but in case of the death of the said *B* during the lifetime of the annuitant, the same interest shall be paid to *C*, during her life; and after the decease of both of them, the said *B* and *C*, the trust-funds were to go over. *B* received the interest during her life, and survived the annuitant, and the question arose whether the Court can construe the disposition as giving to *C* a life-interest by implication. It was held that the testatrix had that intention having regard to the fact that there being an actual gift to one of the two persons, and a gift over after the death of both of them.⁽¹⁾ It should be added that *C* here took a life-interest, although the expressed event in which she was to take was not the event that occurred. So in another case the testator gave to *S K* certain real estate for life charged with annuities, "but in case the annuitants, or any of them, should survive *S K*, he then gave the estate to the eldest surviving son of *S K*, charged with the said annuities." *S K* survived all the annuitants, and the court read the words "in case the annuitants, or any of them, should survive *S K*," as if they had not stood where they were, but had been inserted immediately before the word "charged."⁽²⁾ In another case the testator, believing his wife to be *en ventre*, devised this estate to the child, *en ventre sa mere*, and if such child should die under age, then over. The wife was not with child, and the question was, whether the devisee over should take, and it was so held, the Court holding it to be a conditional limitation on there being no child of the father by his wife that should reach majority. There being no such child, the devisee over was entitled.⁽³⁾ Where the expression of a contingency is simply intended by the testator to imply that the subsequent gift is not to take effect in derogation of the preceding estate, the Court will give effect to it. In construing the autograph deed of an ignorant man the usual meaning of technical language may be disregarded, but no word which has a clear and definite operation can be struck out.⁽⁴⁾

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are

Ulterior transfer conditional on happening or not happening of specified event.

(1) In *re Smith's Trust*, L.R., 1 Eq., 79.

(2) *Key v. Key* 4 DeG. M. & G., 73.

(3) *Wing v. Augrave*, 8 H.L.C., 183 (200), *Hall v. Warren*, 9 H.L.C., 420 (430), animad-

verting on *The Attorney-General v. Hodgson*, 15 Sim., 146; *Philpott v. St. George's Hospital*, 21 Beav., 134.

(4) *Hall v. Warren*, 9 H.L.C., 420.

subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

550. Analogous Law.—With the necessary verbal variations this section is exactly the same as section 118 of the Indian Succession Act, and which makes the same provision applicable to bequests over. The scope of the section will best be understood by comparing the following illustrations added to the analogous section :—

(a) A sum of money is bequeathed to *A*, to be paid to him at the age of 18, and if he shall die before he attains that age, to *B*. *A* takes a vested interest in the legacy, subject to be divested and to go to *B* in case *A* shall die under 18.

(b) An estate is bequeathed to *A*, with a proviso that, if *A* shall dispute the competency of the testator to make will, the estate shall go to *B*. *A* disputes the competency of the testator to make a will. The estate goes to *B*.

(c) A sum of money is bequeathed to *A* for life and after his death, to *B*, but if *B* shall then be dead, leaving a son, such son is to stand in the place of *B*. *B* takes a vested interest in the legacy subject to be divested if he dies leaving a son in *A*'s lifetime.

(d) A sum of money is bequeathed to *A* and *B*, and if either should die during the life of *C* then to the survivor living at the death of *C*. *A* and *B* die before *C*. The gift over cannot take effect, but the representatives of *A* take one-half of the money, and the representative of *B* takes the other half.

(e) *A* bequeathes to *B* the interest of a fund for life and directs the fund to be divided at her death equally among her three children, or such of them as shall be living at her death. All the children of *B* die in *B*'s lifetime. The bequest over cannot take effect, but the interests of the children pass to their representative.

The section is not subject to section 26. which deals with conditions precedent, whereas this section refers only to condition subsequent and is inapplicable to the former. The rule here enunciated is taken from the English cases.⁽¹⁾

551. Principle.—The wording of this section shows that the conditions contemplated by it are those superadded or conditions subsequent, and are therefore subject to the limitations and rules already discussed (§ 531). The cases contemplated by this section are those where the interest vests and is divested upon the happening of a contingency. This section is intended to validate such transfers as are not opposed to the rules contained in the several sections therein named. It alters the interest or the order of limitation originally prescribed.

552. Contingent Limitations.—An interest created with a condition *superadded*, for its defeasance is necessarily a vested interest, and it is none the less so, because the condition subsequent has the effect of destroying the preceding interest. Strictly speaking, such alternative clauses are not conditions at all, but they are rather contingent limitations with a series of shifting or secondary uses, limited upon those contingent limitations.⁽²⁾ But they are commonly spoken of as conditions and have been so designated in the section. It has been said that a condition subsequent is odious in law, and must be submitted to a strict construction; that is, you are not to give a favourable construction to a proviso, the object of which is to defeat an estate already created;

(1) *Denn v. Slater*, 5 T.R., 335; *Doe d. Neville v. Rivers*, 7 T.R., 276; *Doe d. Ellis v. Ellis*, 9 East., 382.

(2) *Egerton v. Brownlow*, 4 H. L. C. 1 (208).

but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it. Ordinarily, we must give the usual meaning to every expression used on the face of the document. But if it is found that the expressions are vague or irrelevant or otiose, it will then be a case for getting at the substance, and for which purpose it is then permissible to mould words to particular purposes. But since the object is to give them a meaning which expresses and effectuates the intention of the author of the deed, departure from their ordinary sense is only necessary when any other construction is impracticable.⁽¹⁾ Of course, where the donor has been his own conveyancer, the same rigid rule of construction would be obviously inapplicable. A court of construction must find its conclusions upon just reasoning and not upon mere speculative doubts.⁽²⁾

Contingent limitations may assume a variety of forms. The donor may provide for the cessor of interest on the donee marrying or not marrying a person or class of persons named,⁽³⁾ or the clause may relate to the death of the donee before a certain age⁽⁴⁾ without male issue⁽⁵⁾ or to a change of religion,⁽⁶⁾ or to any other contingency not in itself immoral or illegal. A contingent interest may, as much as a vested interest be operated upon by a superadded condition, and made dependent thereon to cease or become void.⁽⁷⁾

553. Limits of Performance.—The general nature of a condition subsequent has been before set out. The section now deals with the rule which has been incidentally referred to before, namely, that a condition subsequent being intended to defeat vested interest must be narrowly watched and strictly construed, and it must therefore be so expressed as not to leave any doubt as to the precise contingency intended to be provided for. A condition which is illegal or impossible *ab initio* is ignored as if non-existent; thus, a clause that the donee shall kill a man or perform an impossible feat or do an illegal act, shall take an absolute estate independently of the condition. But where a condition is only partially impossible, it would appear that the non-performance of only the impossible portion is excused.⁽⁸⁾ A condition subsequent does not affect a person without notice, unless he claims under the deed, in which case notice will, of course, be imputed to him.⁽⁹⁾ In all other cases notice must be distinctly proved.⁽¹⁰⁾ Again, a condition which is repugnant to the nature of the property to which it is annexed is absolutely void.⁽¹¹⁾ A condition is incapable of performance, if it has so become at the time it could be performed. Thus, a clause in a gift to the donor's daughter that she should marry his nephew at or before she attained the age of twenty-one years, and the nephew died before she attained that age, was held to have been fulfilled since its performance had become impossible by the act of God.⁽¹²⁾

(1) *Per* Lord St. Leonards in *Higerton v. Brownlow*, 4 H.L.C., 1 (208, 209).

(2) *Soorjeemoney v. Denobundhoo*, 6 M. I. A., 526 (1553).

(3) *Page v. Hayward*, 2 Salk, 570.

(4) *Bromfield v. Crowder*, 1 N. R., 313 (325), affirmed in *Doe d. Hunt v. Moore*, 14 East, 604; *Doe v. Moore*, ib., 601; *Phipps v. Ackers*, 9 Cl. & F., 593; *Maseyk v. Ferguson*, 1 L. R., 4 Cal., 304.

(5) *Soorjeemoney v. Denobundhoo*, 6 M. I. A., 526.

(6) *Seymour v. Vernon*, 33 L. J. Ch., 690; *In re Dickson's Trust*, 1 Sim., N.S., 37; *Re*

Call's Trusts 2 H. & M., 52.

(7) *Egerton v. Brownlow*, 4 H. L. C., 1; *In re Harrison's Estate*, 5 Ch., 412; *In re F.mouth*, 23 Ch. D., 164.

(8) *Collett v. Collett*, 35 Beav., 312.

(9) *Re Hodges' Legacy*, L. R., 16 Eq., 92; *Powel v. Rawle*, L. R., 18 Eq., 243; *Astley v. Earl of Essex*, ib., 290.

(10) *Doe d. Kenrick v. Lord Beaucherk*, 11 East., 667; *Doe d. Taylor v. Crisp*, 8 Ad. & El. 778.

(11) S. 10, 11, *ante*.

(12) *Thomas v. Howell*, Salk., 170.

Again, a vested gift is not divested unless all the events which are to precede the vesting of the subsequent gift have happened. A devise to A, a natural son then under age, and the heirs of his body, and "if he die before twenty-one and without issue," then over to other relations, and ultimately to the testator's own right heirs, was construed to mean that the limitation over did not take effect unless upon the happening of both events, *i.e.*, the son's dying before twenty-one, and without issue, and his death after attaining the requisite age alone would not confirm the remainder over.⁽¹⁾ The subject will be found more fully dealt with elsewhere (§§ 524—527).

554. Exception: Duress.—If the condition cannot be fulfilled or is violated on account of duress, it does not forfeit the interest. Thus, where a testator by his will directed that, if any, of the female members of his family, either from mis-understanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother. Pigot and Banerjee, JJ., held that although the police help was properly and legally given, there was a plain case of duress at the time of leaving, and that the absence of the girl ought not to work the forfeiture.⁽²⁾

A condition that the legatee should not dispute the will in England was not enforced, being regarded as merely *in terrorem*,⁽³⁾ but this doctrine has only been applied in the case of devises of personal estate and that too in the limited cases before discussed (§§ 541, 542). In the case of real property it is otherwise.⁽⁴⁾ If the contingency contemplated does not happen, the interest is, of course, not divested.⁽⁵⁾

Fulfilment of condition subsequent. **29.** An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

555. Analogous Law.—This section and its illustration correspond with the section and illustration (c) of section 119 of the Succession Act, which extends the same rule to bequests. The illustration is adapted from the three illustrations thereto appended. The English cases lay down an indetical rule and furnish apt illustrations of the doctrine here codified.⁽⁶⁾

(1) *Doe d. Usher v. Jessep*, 12 East, 289; *Grey v. Pearson*, 6 H. L. C., 61; *Secombe v. Edwards*, 28 Beav., 440; *Reed v. Braithwaite*, L. R., 11 Eq., 514; *Wall v. Tomlinson*, 16 Ves., 413.

(2) *Tin Couri v. Krishna*, I. L. R., 20 Cal., 15 (17); following *Clavering v. Ellison*, L. R., 7 H. L. C., 707 (723).

(3) *Cleaver v. Spurling*, 2 P. W., 528.

(4) *Cooke v. Turner*, 15 M. & W., 727. In *re Nourse*; *Hampton v. Nourse* [1899], 1 Ch., 63.

(5) In *re Santer's Trusts*, 1 Eq. 675; *Elliot v. Smith*, 22 Ch. D., 236; *Finch v. Lane*, L. R., 10 Eq., 501.

(6) *Clavering v. Ellison*, 7 H. L. C., 707. *Kiallmark v. Kiallmark*, 26 L. T. Ch., 1. *Harvey Bathursh v. Stanley*, 4 Ch. D., 272.

556. Principle.—This is in accordance with the English law where it is held that a condition subsequent must be strictly fulfilled. ⁽¹⁾ (§§ 501—507.) It will not occasion forfeiture if the fulfilment of the condition becomes impossible, ⁽²⁾ if it is reasonably fulfilled. ⁽³⁾

Prior disposition not affected by invalidity of ulterior disposition

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband to C, B is entitled to the farm during her life, as if no condition had been inserted.

557. Analogous Law.—This section and its illustration correspond with section 120 and illustration (b) of the Succession Act, and which runs as follows:—

Original bequest not affected by invalidity of record.

120. If the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations.

(a) An estate is bequeathed to A for his life, with a condition superadded that if he shall not, on a given day, walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

(b) An estate is bequeathed to A for her life, and if she do not desert her husband to B, A is entitled to the estate during her life, as if no condition had been inserted in the will.

(c) An estate is bequeathed to A for life and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 92, and A is entitled to the estate during his life. The section is a corollary of the last section.

558. Principle.—Invalid conditions being void are ignored, and the principle being to give effect to the transfer as far as possible, the prior disposition cannot be affected by the existence of a repugnant and separable condition or by the invalidity of the ulterior disposition.

559. Causes of Invalidity of ulterior Disposition.—The ulterior disposition may be invalid because the condition on which it depends is illegal, ⁽⁴⁾ too vague, ⁽⁵⁾ or impossible, ⁽⁶⁾ too remote, ⁽⁷⁾ or because it is opposed to the rule laid down in section 13, or is otherwise inoperative. ⁽⁸⁾ The subject has been already exhaustively discussed (§§ 531—538).

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section twelve, on a transfer of property, an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

(1) See Comm. under s. 26, *ante*; *Wagstaff v. Crossley*, 2 Coll., 746; *Re Sander's Trusts*, 1 Eq., 675; *Clavering v. Ellison*, 3 Drew., 451.

(2) *In re Brown's Will*, 18 Ch. D., 61.

(3) *Asley v. Earl of Essex*, L.R. 18 Eq.,

290; *Wynne v. Fletcher*, 24 Beav., 430.

(4) *Ridgway v. Woodhouse*, 7 Beav., 437.

(5) *Fillingham v. Bromley*, T. & R., 530.

(6) *Aislabie v. Rice*, 3 M. H. C. R., 256.

(7) *Ring v. Hardwick*, 2 Beav., 352.

(8) S. 25, *ante*.

Illustrations.

(a) A transfers a farm to B for his life with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B provided that, if B shall not go to England within three years after the date of the transfer his interest in the farm shall cease. B does not go to England within the term specified. His interest in the farm ceases.

560. Analogous Law.—This section and its two illustrations correspond to section 121 and illustrations (a) and (c) of the Succession Act. The rule laid down in this and the preceding section departs from the English cases relating to personal property, wherein it is laid down that such conditions being merely *in terrorem* are void. (1) Under this section then transfer may be made subject to any condition other than those specified in section 12, viz., condition as to forfeiture in case of insolvency and restrictions on the transferee's right to alienate.

561. Principle—The condition here mentioned is a condition subsequent and must be construed subject to the provisions of sections 14 and 23. It must not be invalid as laid down in the next following section.

562. A gift to a person on condition that if he marries under the age of twenty-five without the consent of a person named, the estate shall cease to belong to him is valid under the section, and the donee will forfeit the estate if he breaks the condition. (2) A proviso that, if the donee becomes a nun she shall forfeit the estate, is similarly enforced. (3)

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

563. Analogous Law.—This section is the same as section 122 of the Succession Act.

564. Principle.—This section merely lays down that a condition precedent must be valid before it can operate. Section 25 enumerates the conditions that are invalid. For the principle of this section, reference must be made to that section. An invalid condition precedent invalidates a transfer, though invalid condition subsequent does not.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

565. Analogous Law.—This section corresponds with section 123 of the Succession Act, and section 34 of the Contract Act.

(1) *Evanturel v. Evanturel*, 6 P. C., 11; *Rhodes v. Muswell Hill Land Co.*, 29 Beav., 560; *Warbick v. Varley*, 30 Beav., 347.

(2) S. 121, ill. (b), Indian Succession Act.

(3) *Ib.*, ill. (d) & (e), are borrowed from *Re Dickson's Trust*, 1 Sim. (N. S.), 37, which was, however, a case of personality merely.

The two illustrations appended to section 123 of the Succession Act are instances of—(i) when the fulfilment of the condition is rendered impossible, and (ii) when its fulfilment is indefinitely postponed. These illustrations run as follows—

Illustrations.

(a) A bequest is made to A, with a proviso that unless he enters the army, the legacy shall go over to B. A takes holy orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(b) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect.

Illustration (b) does not harmonize with the English law (§567).

566. Principle.—The principle embodied in this section has been already explained in the discussion under the preceding sections. In this section the contingency is only the act of the person on which the transfer depends, and the transfer fails on account of his own acts.

567. English and Indian Law compared.—Illustration (b) quoted above is not in consonance with the English law on the subject. Thus, in a case⁽¹⁾ where a testator, after giving certain legacies to J and M, added "If either of these girls should marry into the families of G or R, and have a son, I give all my estate to him for life (with remainder over); and if they shall not marry," then he gave the same to other persons. Lord Thurlow held this to be a condition precedent; and that nothing vested in the devisees over while the performance of the condition by J and M was possible, which was during their whole lives; and that their having married into other families did not preclude the possibility of their performing the condition, as they might survive their first husbands.⁽²⁾

It is to be noted, however, that this view has been expressly departed from by the Indian Legislature, both in illustration (b) to section 123 of the Succession Act and in the illustration to section 34 of the Indian Contract Act.

34. Where an act is to be performed by a person either as

Transfer conditional on performance of act, time being specified.

a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall, as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But, if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall, as against him be deemed to have been fulfilled.

(1) *Randall v. Payne*, 1 B. C. C., 55.

(2) 2 Jarm., 3; see also *Lester v. Garland*, 15 Ves., 248.

568. Analogous Law.—The greater portion of this section corresponds with section 124 of the Succession Act. It is similarly enacted in the Indian Limitation Act that when any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application, against (a) the person guilty of the fraud or accessory thereto, or against (b) any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person, injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production. (1)

569. In order to constitute fraud, there must be some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts. (2) The term "fraud" has been thus defined in the Indian Contract Act (3) :—

17. Fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true ;

(2) The active concealment of a fact by one having knowledge or belief of the fact ;

(3) A promise made without any intention of performing it ;

(4) Any other act fitted to deceive ;

(5) Any such act or omission as the law specially declares to be fraudulent.

"*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

This definition, however, is by no means exhaustive. Indeed, of fraud no definition is possible. It is infinite : *crescit in orbe dolus*. Fraud may be positive or constructive. In the latter category the term is used in its widest sense as embracing such acts or contracts, as though not originating in any actual evil design or contrivance to perpetuate fraud or injury upon others, yet, by their tendency to deceive or mislead, or to violate public or private confidence, or, to injure the public interests, are equally reprehensible with positive fraud, and therefore, equally prohibited. (4)

The section is general and would apply equally to a condition whether precedent or subsequent.

570. Principle.—The justification for the rule is the broad principle that no man can take advantage of his own fraud, (5) or as Coke says, "*Fraus et dolus nemini patrocinari debent.*" (6) It is contrary to natural justice that a person who prevents a thing from being done should avail himself of the non-performance he has occasioned. The rule in the first place goes only so far as

(1) S. 18, Act XV of 1877.

(2) *Dean v. Thwaite*, 21 Beav., 621.

(3) Act IX of 1872.

(4) Story Eq. Juris., § 253. For a further discussion, see Comm. on s. 78, *post*.

(5) *Sidhee Nuzur v. Oojoodhyaram*, 10 M. I. A. 540 ; *Edwards v. Aberdon Mutual Insurance Society*, 1 Q. B. D., 563.

(6) *I. e.*, "Fraud and deceit ought not to benefit any person," 3 Co., 78. The same sense is conveyed by the maxim "*Nullus commodum capere potest de injuria sua propria.*" (No one can take advantage of his own wrong.) So *Ex dolo malo non oritur actio*. (A right of action cannot arise out of fraud.)

to undo the mischief attempted, where that can be done, and not to the extent of entirely dispensing with the observance of the condition, but where this would entail indefinite delay or inconvenience equity regards it has done, that would have been done, but for the fraud of the adversary who is thenceforward precluded from taking advantage of it. (1) No man shall gain a right by his own wrong, but this does not imply that if he had a right independently of the fraud, he shall lose it, or the power of exercising it, by a wrong done in connection with it. The rule again is inapplicable where the right of a third party is to be effected. For a man cannot by his wrongful act to another deprive a third of his right against that of other. (2)

In computing the time for the purpose of ascertaining whether the condition had been performed within the specified time, the day of the testator's death is excluded as a legatee could not be expected to begin the deliberations which was to govern the election to be ultimately made. (3)

The rule of the section may be illustrated by any of the cases which have been referred to in the foregoing discussion on conditional transfers. Thus, suppose a gift is made to a donee on condition that she marries A within a certain time, and failing which the property is gifted over to another person B, who induces A not to marry the donee so that the gift over to him may take effect. Here, if A has in consequence already married another person, the condition is fulfilled according to the last clause, but if he marries the donee, but not within the specified time during which B fraudulently prevented him from marrying, that time during which he was so prevented would be excluded in calculating whether the condition had been fulfilled within the specified period.

571. Ignorance, etc , No Excuse.—It is apparent from this section that except in case of fraud, neither ignorance, illness nor neglect on the part of the executor to inform the legatee, can excuse him for not complying with the direction so as to entitle him to the gift. (4)

Election.

35. Where a person professes to transfer property which Election when necessary. he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it ; and in the latter case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferrer or his representative as, if it had not been disposed of, subject nevertheless, where the transfer is gratuitous, and the transferrer has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

(1) *Rooper v. Lane*, 6 H.L.C., 443 (460, 461); *In re London Celluloid Co.*, 39 Ch. D., 190 (306).

(2) Cf. s. 108, Indian Contract Act (IX of 1872).

(3) *Lester v. Garland*, 15 Ves., 248; *Gorst v. Lowndes*, 11 Sim., 434.

(4) *Wickens, V.C.*, in *In re Hodges' Legacy*, L.R., 16 Eq., 92 (96); see also *Astley v. Earl of Essex*, L.R., 15 Eq., 290 (297).

Illustrations.

The farm of Sultanpur is the property of *C* and worth Rs. 800. *A* by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, *A* dies before the election. His representative must, out of the Rs. 1,000 pay Rs. 800 to *B*.

The rule in the first paragraph of this section applies whether the transferrer does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferrer professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the person interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has hereby confirmed the transfer of the estate to *B*.

If he does not, within one year after the date of the transfer, signify to the transferrer or his representatives his intention to confirm or to dissent from the transfer, the transferrer or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such

requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

572. Analogous Law.—This section corresponds with sections 167 to 177 constituting Chapter XXVII of the Indian Succession Act.

The doctrine here enunciated is one of universal application and extends to deeds as well as wills of persons of all denominations (§§ 576, 579), and its application to gifts is recognized in section 127.

573. Principle.—The principle of election may be thus stated: "that he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted dispositions; but if, on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights." (1) Election is in short, the choosing between two rights where there is a clear intention that both were not intended to be enjoyed. "The doctrine of election in equity," says Snell, "originates in two inconsistent alternative donations or benefits, the one of which the pretending donor has no power to make, without at least the assent of the donee of the other benefit. In this quality of gifts, or pretended gifts, there is an intention, which may be expressed, but which is more often implied, that the one gift shall be a substitute for the other, and shall take effect only if the donee thereof permits the other gift to also take effect, substantially in the manner and to the extent intended by the donor. The permitting donee has the right to choose; whence this head of equity is called election. The *foundation* of the doctrine is the intention of the author of the instrument; an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic* is, that, by an equitable arrangement, effect is given to a donation of that which is not the property of the donor: a valid gift in terms absolute, being qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition, whether express or implied, and although destitute of legal validity, annexed to the benefit proposed to him. To accept the benefit while he declines the burden is to frustrate the intention of the donor. To illustrate this application of the doctrine, suppose *A*, by *will* or *deed* gives (*i.e.*, affects or purports to give) to *B*, property belonging to *C*, and by the *same* instrument gives other property belonging to himself to *C*, a court of equity will hold *C* to be entitled to the gift made to him by *A*, only upon the implied condition of his (*C*'s) conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of *B*; he must consequently make his choice, or, as it is technically termed, he is put to

his election, to take either under or against the instrument." (1) If he chooses to take *under* the instrument, and therefore to conform to all its provisions, he must relinquish his property given by *A* to *B*, and receive that given to him by *A*. But if, on the other hand, he (*i.e.*, *C*) elects *against* the instrument, the question then arises whether by refusing to conform to the terms of the instrument, he is to forfeit his whole claim to the benefit intended to be conferred on him by the instrument, or only so much as will compensate *B* for the disappointment he is suffered by *C*'s election against the instrument. In such a case, it is now settled that equity would sequester the benefits intended for the person electing against the instrument in order to compensate him whom his election has disappointed, and the surplus after compensation would be restored to the refractory donee. (2)

574. It is a rule of manifest equity that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which courts of equity in particular have grounded a variety of expressions in cases both of deeds and of wills, though in cases of wills, because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires. (3) The ground of the doctrine of election is, that no person puts himself in a capacity to take under an instrument, without performing the conditions of it, express or implied. (4) In other words, no person can take by a deed, and at the same time do anything that shall destroy the deed. (5) A person shall not claim an interest under an instrument, without giving a full effect to it as far as he can, renouncing any right or property which would defeat the disposition. (6) He who takes the benefit must also bear the burden. (7) He cannot take *under* and *against* the same instrument (8)

575. The doctrine owes its origin to the civil law, which provided that in a bequest of property which the testator knew to belong to another, the legatee was entitled to recover from the heir either the subject of the bequest or, if the owner was unwilling to part with it for a reasonable price, its value. The heir on his part had the option of renouncing a burdensome inheritance, for the heir could not accept the benefit offered by the will apart from its burthen, nor, having accepted the former, could he discharge the latter by merely indemnifying the disappointed claimant, whom he was bound to satisfy to the extent provided in the will, irrespective of the benefit he had himself received. (9) It is said that the doctrine in the civil law was only confined to wills, (10) but there is no authority for this assertion. No doubt the principle was mostly requisitioned in cases arising out of wills, and in this respect the civil law differed, but little from the early English cases, but that alone does not necessarily limit its operation to wills only. At the same time in the English law, the doctrine was at first exclusively confined to wills, and was only subsequently extended to deeds.

(1) Equity (9th ed.), pp. 237, 238; *Cooper v. Cooper*, L. R., 7 H. L., 67; *In re Bradshaw* [1902], 1 Ch., 436.

(2) Snell's Equity (9th Ed.), p. 239.

(3) *Birmingham v. Kirwan*, 2 Sch. & Lef., 449; *Sinaya Pillai v. Munisami*, 1. L. R. 22 Mad., 289; *Forbes v. Amearoonissa*, 10 M. I. A. 340; *Shah Mokham Lall v. Baboo Kishen Singh*, 12 M.I.A. 157.

(4) *Monre v. Butler*, 2 Sch. & Lef., 267.

(5) *Morris v. Burrows*, 2 Atk., 629; 2 Eq.

Ca. Abr., 272.

(6) *Thellusson v. Woodford*, 13 Ves., 220.

(7) *Codrington v. Lindsay*, L. R., 8 Ch., 598. O.A.H.L., 854; *Pickersgill v. Rodger*; 5 Ch D., 163.

(8) *Dillon v. Parker*, 1 Swan., 359.

(9) Inst. Bk 2, tit. 20 s. 4, tit. 24, s. 2; Dig. Bk, 30, tit. 1, L. 30, s. 7; Cod. Bk. 6, tit. 42, l. 25; *Dillon v. Parker*, 1 Swanst., 396.

(10) *Dillon v. Parker*, 1 Swanst., 400.

"The general rule," said Lord Redesdale, "is that a person cannot accept and reject the same instrument. And this is the foundation of the law of election, on which courts of equity particularly, have grounded a variety of decisions, in cases both of deeds and of wills, though principally in cases of wills; because deeds, being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration, which is expressed, requires; and voluntary deeds are generally prepared with greater deliberations and more knowledge of pre-existing circumstances, than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect even of the language which they use. In wills, therefore, it is frequently necessary to consider the general purport of the disposition, in order to extract from it what is the intention of the testator. The rule of election, however, I take to be applicable to every species of instrument, whether deed or will, and to be a rule of law as well as of equity."⁽¹⁾ No court will enforce rights repugnant to its sense of justice.⁽²⁾ "It is a maxim not of morality but of logic, and compels elections between claims, in respect, not of the injustice, but of the technical impracticability of their contemporaneous assertion."⁽³⁾ The doctrine has often been claimed to be founded on benevolent equity.⁽⁴⁾

576. The doctrine of election is not properly a rule of positive law, but

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a rule of practice in equity, the knowledge of it is not, therefore, to be imputed as a matter of legal obligation.⁽⁵⁾ The principle is equally applicable to every species of instrument, whether deed or will, and is a rule of law as well as equity.⁽⁶⁾ It is equally applicable to the wills of Hindus,⁽⁷⁾ and to other Indian cases,⁽⁸⁾ and both to moveable and immoveable property.⁽⁹⁾ Extrinsic evidence, explanatory of a deed, in order to raise a case of election is not admissible.⁽¹⁰⁾ The doctrine does not extend to grants from the Crown.⁽¹¹⁾

577. The rule does not proceed either upon an expressed intention or

Rule presumptive.

upon a conjecture of presumed intention, but proceeds on a rule founded upon the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was or was not present to the mind of the party making the transfer.⁽¹²⁾ As a grantee can exercise his election with respect to the instrument, it follows that the grantor can also provide against its operation by a declaration inconsistent with it. As Fry, L. J., observed: "That doctrine rests, not on the particular provisions of the instrument which raises the election, but on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it, 'the ordinary intent,' to use the words of Lord Hatherley⁽¹³⁾ 'implied in every man who affects by a legal instrument to dispose of property that he intends all that he has expressed.' This general and

(1) *Birmingham v. Kirwan*, 2 Sch. & Lef. 444 (449, 450).

(2) *Wilson v. Lord John Townshend*, 2, Ves. J., 693 (696).

(3) Swanston's note to *Gretton v. Haward*, 1 Swanst., 425 note (a).

(4) *Synge v. Synge*, 9 Ch., 128.

(5) *Spread v. Morgan*, 11 H.L.C., 588.

(6) *Birmingham v. Kirwan*, 2 Sch. & Lef., 450.

(7) *Mangaldas v. Ranchoddas*, 1 L. R., 14 Bom. 438.

(8) *Forbes v. Ameeroonissa*, 10 M.I.A. 340;

Shah Makhan Lal v. Baboo Kishen Singh, 12 M.I.A., 186.

(9) *Cooper v. Cooper*, L. R., 6 Ch., 15 (99), O. A. L. R., 7 H. L., 53; followed in *In re Bradshaw* [1902], 1 Ch., 436.

(10) *Dummer v. Pitcher*, 2 Myl. & K., 262; *Clementson v. Gandy*, 5 L. J. (N.S.), Ch. 260; *Stratton v. Best*, 1 Ves., J., 285.

(11) *Cunning v. Forrester*, 2 Jac. & W., 334.

(12) *In re Bradshaw* [1902], 1 Ch., 436.

(13) *Cooper v. Cooper*, L. R., 7 H. L., 58 (71).

presumed intention is not repelled by shewing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument, but in principle it is evident that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed and general intention." (1) That the doctrine of election is based upon this *presumption* which may be rebutted by expressed intention to the contrary has been laid down in more recent cases. (2) From this it is also clear, that election is a question of *intention*, and may be express or implied, (3) and although parol evidence is inadmissible (4) election may be inferred from surrounding circumstances. (5)

578. Meaning of Words.—"Benefit shall revert to transferrer."—If the transferee does not elect, the benefit will revert to the transferrer or his representatives on the principle that it is impossible to ascertain what the transferrer would have done if he were aware of the defect in his instrument. Of course, the Court cannot speculate what would have been the transferrer's wishes under the circumstances. (6) But this rule is subject to the following exception. That is, in the case of (i) a gratuitous transfer, where the transferrer dies or is incapacitated for making a fresh transfer; or (ii) where the transfer is for consideration, the transferee is entitled to compensation equivalent to the value of the property attempted to be transferred. In such a case the balance of surplus, if any, would fall into the residuary bequest, or devolve according to the rules of intestate succession, as the case may be. (7) "*Whether the transferrer does or does not believe.*"—This clause corresponds with section 169 of the Succession Act, and reproduces the rule of English law where the only question is whether the transferrer intended that the property should go in a particular manner. (8) The Court will not speculate what he would have done if he were aware of his want of title. (9) Only, of course, the intention of the testator disposing of property of the person attempted to be put upon his election must be clear. (10)

"Benefit under it indirectly."—But the case of election arises only when the transferee is directly to be benefited by the transfer. There is, therefore, no case for election where the gift is to the legatee in his own right or where he takes as his wife's administrator. (11)

"In one capacity takes a benefit . . . may in another dissent."—The rule that a person who in one capacity takes a benefit may in another dissent therefrom, is the same as is laid down in section 172 of the Succession Act. Trustees and administrators may, of course, elect one way for their principals and in another for themselves. (12)

(1) In re Vardon's v. Trusts, 31 Ch. D., 275 (279); see also Moore v. Butler, 2 Sch. & Lef. 249, 267; Dillon v. Parker, 1 Swans., 359 at p. 401, note; Smith v. Lucas, 18 Ch. D., 531. (2) Carter v. Silver, [1891], 3 Ch., 553; Hamilton v. Hamilton, [1892], 1 Ch., 396; In re Bradshaw; Bradshaw v. Bradshaw, [1902], 1 Ch., 436; Haynes v. Foster, [1901], 1 Ch. 961.

(3) Rumbold v. Rumbold, 3 Ves., 65; Simpson v. Vickers, 14 Ves., 341.

(4) S. 92 of the Indian Evidence Act; Clementson v. Gandy, 1 Heen, 309; Stratton v. Bert, 1 Ves., 280.

(5) Dillon v. Parker, 1 Swans., 359; Spread

v. Morgan, 11 H.L.C., 589.

(6) Whistler v. Webster, 2 Ves., 370; In re Brookshank, 34 Ch. D., 163.

(7) S. 169, *ill.* (a), Succession Act; which *cf.* with illustration to this section.

(8) Thelluson v. Woodford, 13 Ves., 221.

(9) In re Brookshank, 34 Ch. D., 163; following Whistler v. Webster, 2 Ves., 367.

(10) In re Vardon's Trusts, 29 Ch. D., 124; and on appeal, 31 Ch. D., 275; Dashwood v. Peyton, 18 Ves., 27; Lord St. Leonards on Powers (8th Ed.), 579.

(11) Grissell v. Swinhoe, 7 Eq., 291.

(12) See s. 172, *ill.*, Indian Succession Act.

579. Doctrine universally applied.—The doctrine of election is a rule of equity by virtue of which the court of equity compels a recipient of the testator's bounty to conform to all the legal provisions of the will. ⁽¹⁾ The doctrine owes its origin to the necessity of having a working rule of equity for the construction of wills, but, as observed before, the doctrine, being founded on natural equity, is equally applicable to transfers *inter vivos*, and has been so applied both in England and India. It may apply to vested as well as to contingent interests, to reversionary and remote as well as to the immediate interests. ⁽²⁾ Being a rule of law, as well as of equity, it equally extends to the wills and deeds of Hindus ⁽³⁾ and to every species of property, whether moveable or immoveable, ⁽⁴⁾ to interests immediate, remote or contingent, of value or not of value. At the same time the doctrine is inapplicable to a gift which violates the law against perpetuity. ⁽⁵⁾

Where the obligation to elect has once attached to a property, it continues to attach thereto in whosoever hand it may pass as a bounty, since the instrument which gives him the benefit takes it burdened with the obligation which he cannot shake off: *Qui sentit commodum, sentire debet et onus*. ⁽⁶⁾

580. Election, express and implied:—Election may be either (a) express or positive, or (b) implied or constructive. If a testator provide in his will for a legacy of a certain sum say, Rs. 10,000, or an annuity of Rs. 1,000 per annum at the legatee's election, it is clear that the legatee would be compelled to elect between the two gifts made, for he cannot have both, and this is an instance of an express election, ⁽⁷⁾ which, however, the section does not deal with. Indeed, the principle is too obvious to require legislative sanction. Implied or constructive election is then what the section treats of, and it is usual here that the subject often presents some difficulty. But the foundation of the doctrine in both the cases is the same, namely, the intention of the author of the instrument, for the rule does not profess to go any further, and indeed, it ceases to be applicable if the intention be clear. In order to raise a case of election, it is in the first place essential that there must be a form of a gift as to property, which the donor had no power to dispose of. ⁽⁸⁾ There can be election only where the testator gives what belongs not to him but to another, to whom he gives some estate of his own, upon implied condition that the other shall part with his own estate or not take the bounty. ⁽⁹⁾ An obligation to elect arises whenever an object of testamentary bounty, is at the testator's death the true owner of the other property disposed of by the will. ⁽¹⁰⁾ In determining what are cases of election, although a transfer must be taken to have intended to dispose only of what belongs to him, there is no such rule as that where a transferrer has a limited interest in property forming the subject of a transfer, the intention to make a disposition extending beyond

(1) *In re Oliver's Settlement* [1905], 1 Ch., 191 (196).

(2) *Wilson v. Lord Townshend*, 2 Ves., J., 693 (697); *Webb v. Earl of Shaftsbury*, 7 Ves., 480; *Cooper v. Cooper*, L.R., 6 Ch., 15; O.A. L.R. 7 H. L., 53.

(3) *Mangaldas v. Ranchoddas*, I. L. R., 14 Bom., 438; *Forbes v. Ameroonissa*, 10 M. L. J. R., 340; *Shah Makhan Lal v. Baboo Kishen Singh*, 12 M. I. A., 157 (186).

(4) *Cooper v. Cooper*, L. R., 6 Ch., 15 (19), O.A.L.R., 7 H. L., 53.

(5) *Burton v. Newbery*, 1 Ch. D., 242; *Bizzey v. Flight*, 3 Ch. D., 274; *Wollaston v.*

King, L. R., 8 Eq., 165; *Wallinger v. Wallinger*, L. R., 9 Eq., 301.

(6) "He who receives the advantage, ought also to suffer the burden." *Pickersgill v. Rodger*, 5 Ch. D., 163 (173); *Messenge v. Andrews*, 4 Russ., 478, on the maxim applied to leases, see *Re Betty* [1899], 1 Ch., 821; *Re Giers* [1899], 2 Ch. 55.

(7) *Dillon v. Parker*, 1 Swanst., 394, note (b).

(8) *Attorney-General v. Earl Lonsdale*, 5 L. J., Ch., 99.

(9) *Brooms v. Monck*, 10 Ves., 597.

(10) *Cooper v. Cooper*, L. R., 6 Ch., 15.

that interest, cannot be made clear by anything short of positive declaration, in considering which the context of the deed and the aptitude of the limitations to the transferre's interest ought to be regarded. (1)

581. Limits of the Doctrine.—To raise a question of election the intent must in any case be clear; if it is, the devisee cannot take under the will, and also in opposition to it even his own property intended by the testator to go otherwise. (2) But the rule of election ought to be confined to simple and plain devises of the inheritance, and not where there are limitations. (3) Of course, in order that election may exist it is necessary that the transferer must have a decided interest in the property transferred by him. (4) The doctrine has no application where the transferer transfers nothing of his own property. (5) It is, as remarked before, the gist of the rule that the testator gives what belongs not to him but to another to whom he gives some estate of his own, upon implied condition that the other shall part with his own estate, or not take the bounty. (6) A person entitled under a will, and also by a right paramount and against it must elect, (7) and so must parties having claims under and against a will. (8) But in such cases the rule is applicable only as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will. Thus where a testatrix, having, under her marriage-settlement, power to appoint a fund in favour of the children of the marriage, by her will, in execution of the power, appointed a portion of the fund to her son *C* for life, with remainder to such persons as he should by will appoint. There was also a general residuary appointment of the settled fund, subject to all other appointments made thereof, to the testatrix's daughters, to whom benefits out of her own property were also given by the will. (9) The appointment in favour of *C*'s appointees being void for remoteness, and this portion of the settled fund went to the daughters under the residuary appointment in the will, the question arose whether the daughters should be put to their election, but it was held that there was no case for election. "It would seem a very strange thing that, in construing the same instrument the court, dealing with a clause in which a fund is expressed to be given partly to *A* and partly to *B*, should hold that the gift to *A* being void, the testator's intention is that *B* should take the whole, and then coming to another clause in which another fund is given to *B*, and no mention of *A* at all, it should hold that there is an implied condition that *B* should give back part of that which it was the testator's intention that he should take." (10) So there is no case for election in a case in which the donee of an exclusive power to appoint to her children, appointed to trustees upon trust during the life of her son *A*, to apply at discretion the whole or any part of the income for the benefit of *A* or his children, and subject thereto upon trust for *A*'s children as *A* should appoint, and in default for her daughter *B*, and after giving legacies appointed her property not thereinbefore appointed to *B*, in which case the whole was held to have been well appointed to *A*. (11) When a testamentary appointment fails for infringing the rule against perpetuities, persons taking in default of appointment are not bound to elect

(1) *Wintour v. Clifton*, 8 DeG. M. & G. 641.

(2) *Finch v. Finch*, 1 Ves., J., 534.

(3) *Forester v. Cotten*, Amb., 382; but see *Swanston*, 408n.

(4) *Crosbie v. Murray*, 1 Ves., J., 561.

(5) *M'Donnell v. M'Donnell*, 2 Dr. & War., 376.

(6) *Broome v. Monck*, 10 Ves., 597.

(7) *Wilson v. Mount*, 3 Ves., 191. In re

Bradshaw [1902], 1 Ch., 436.

(8) *Wollen v. Tanner*, 5 Ves., 218; *Blount v. Bestland*, ib., 515.

(9) *Wollaston v. King*, L. R., 8 Eq., 165.

(10) *Per* Sir W. N. James, V. C., in *Wollaston v. King*, L. R., 8 Eq., 165 (174, 175).

(11) *Wallinger v. Wallinger*, L. R. 9 Eq., 301. Cf. *In re Tancred's Settlement* [1903], 1 Ch., 715.

between their interests in the settled fund and interests in the appointor's own property given to them by the will. (1)

582. The doctrine of election has not been applied to creditors, and so it has been held that where a transferrer appropriated to the payment of debts property not so liable, and by the same instrument disposed of, in favour of other persons property which was legally liable for the payment of debts, it was held, that the creditor might take the latter in subversion of the transferrer's gift, and without having to forego their claim to the former.⁽²⁾ But in India (and for that matter now in England) ⁽³⁾ all immoveable property being assets for the payment of debts, such a case is not likely to occur.

583. In the case of election by co-owners it has been held that where a person being entitled to undivided moieties of two freehold properties, and also to an undivided moiety in a leasehold property by his will devised "all that my freehold messuage or tenements with the garden," etc., referring to one of the houses only, it was held that the words were a gift of the entirety of the house referred to and raised a case of election as against the party entitled to the other moiety and who took beneficially under the will. ⁽⁴⁾ So in another case *A* being entitled in fee to one undivided moiety of a freehold estate at *G* devised "all that his messuage, tenement, and estate situate at *G*," it was held that it amounted to a devise of the whole estate, and raised a question of election as against the party entitled to the other moiety, and who took beneficially under the will. ⁽⁵⁾

584. Personal Incompetency is a Bar.—In England it has been held that since the doctrine is founded on intention, the transferrer must be *personally* competent to dispose of the property so as to raise a case of election. Infants and *femes covertes* were thus incompetent, the former because, he has neither a disposing mind nor a disposing power, and the latter because although she has the first does not possess the second attribute of a valid disposition. But the disabilities of a married women have ceased to exist in England, ⁽⁶⁾ and the law relating to married women in India cannot be stated in a general proposition, and the nature of her peculiar estate has already been fully set out before, (§288), to which it may be added that her power to put to election depends upon her competency to make a valid disposition. And since the same rule governs a minor, it follows that, being incompetent to dispose of, he is incompetent also to raise a case of election.

585. Married Women.—In England, the doctrine of election does not apply in the case of a married woman to whom a legacy has been given with a restraint upon anticipation; because the intention of the testator who restrained her from resorting to the property from which alone compensation could be made, could not be that she should be put upon election. The

(1) *In re Beale's Settlement*, [1905], 1 Ch., 256.

(2) *Kidney v. Coussmaker*, 12 Ves., 136; *Talbot v. Earl of Radnor*, 3 Myl. & K., 252.

(3) *Rich v. Cockell*, 9 Ves., 369 (in which Eldon, L.C., held her disposition of her separate property valid—case decided in 1802 (A. D.): *Edward v. Cheyn*, 13 App. Cas., 385 (189); *Re Blake*, 60 L. T., 664. Lord Watson has contrasted the English and Scotch law on the point in the Scotch appeal of *Edward v. Cheyne*, 13 App. Cas., 385 (390), also by

Lord Macnaghten, *ib.*, p. 397. See on the general law *Blacklock v. Grindle*, L.R., 7 Eq., 215; *Coutts v. Acworth*, L.R., 9 Eq., 519. As to her capacity to elect, see *Frank v. Frank*, 3 My. & Cr., 171; *Wall v. Wall*, 15 Sim., 513; *Wilson v. Townshend*, 2 Ves., J., 693.

(4) *Padbury v. Clark*, 19 L. J. (N. S.), Ch., 533.

(5) *Fitzsimons v. Fitzsimons*, 28 Beav., 417; *Miller v. Thurgood*, 33 L. J. Ch., 511.

(6) See *ante*, §. 582.

subsequent removal of the restraint by discovery does not make the doctrine applicable because the existence of the doctrine is based upon the intention of the testator, which cannot depend upon the subsequent accident of discovery. (1) A married woman cannot by election, part with her reversionary choses in action. (2) Where each member of a class has a distinct right of election, no one is bound by the decision of the majority. (3)

586. Compensation to the Disappointed Transferee.—Election by the transferee may, of course, be in conformity with the deed, or it may be against it. In the latter case, the party disappointed of his gift by such an election would be wholly without remedy. But while it is so in law, the courts of equity treat the substituted devise not as an extinguished title, but as a trust in the devisee for the benefit of the disappointed claimants, to the amount of their interest therein, or, in the words of DeGrey, C. J., the devised interest is to be sequestered, until satisfaction is made to the disappointed donee. (4) "If," said Sir William Grant, "the will is in other respects so framed as to create a case of election then not only is the estate given to the heir under an implied condition that he shall confirm the whole of the will; but in contemplation of equity, the testator means, in case the condition shall not be complied with to give the disappointed devisees, out of the estate over which he had a power, a benefit, correspondent to that which they are deprived of by such non-compliance. So that the devise is read as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estate intended for them." (5) This doctrine of compensation is founded on the rule that the intention of the testator having become impracticable in the prescribed form, must be executed by approximation, or *cy pres*. The gift to the stranger rendered void as a gift of the specific subject, is effectuated as a gift of value, at the expense of the heir by whose interference its strict purport has been defeated. By this arrangement the intention of the testator in favour of the stranger, though defeated in form, is, in substance, accomplished. (6) This doctrine is well kept in sight in drawing up the section which provides for compensation to the disappointed transferee in the only two cases in which he is equitably entitled to compensation, namely (i) where the transfer being gratuitous, the transferrer has before the election died or has become incapable of making a fresh transfer, (7) and (ii) where the transfer is for consideration, which alone entitles the transferee to compensation, independently of the transferrer's subsequent interference. It should be noted that the rule is equally applicable whether the transferee be the renouncing party or a stranger.

587. In the case of a party electing against the transfer, there are no doubt cases decided in England, in which it has been held that a party electing against the deed forfeits thereby the whole of the benefit proposed for him. But this view

(1) *Re Wheatley Smith v. Spence*, 27 Ch. D., 606; *Haynes v. Foster*, L. R. [1901], 1 Ch., 361.

(2) *Williams v. Mayne*, 1 Ir. Eq., R., 519.

(3) *Fytch v. Fytch*, L. R., 7 Eq., 494.

(4) *Lord Darlington v. Pultney*, 2 Ves. J., 560, cited with approval by Eldon, L. C., in *Green v. Green*, 19 Ves., 665 (667).

(5) *Welbey v. Welbey*, 2 Ves. & B., 190 (191).

(6) *Dillon v. Parker*, 1 Swanst., 396 (442 note).

(7) *Blake v. Bunbury*, 1 Ves. J., 523;

Whistler v. Webster, 2 Ves. J., 372; *Lady Cavan v. Pulteney*, ib., 560; *Ward v. Baugh*, 4 Ves. 637; *Dashwood v. Peyton*, 18 Ves., 49; *Kerr v. Wauchope*, 19 Ves., 668; *Cooper v. Cooper*, L. R., 6 Ch., 15, O. A., L. R., 7 H. L. 53. The contrary view was maintained by Lord St. Leonards (Sugden on Powers, 8th Ed., p. 576) who held election against the will to operate as a forfeiture of the whole bounty of the testator, but this view is now certainly obsolete. *Dillon v. Parker*, 1 Swanst., 396 (441, 442 note).

is based upon no intelligible principle and may be said to have been now entirely abandoned. (1) "Assuming that the doctrine of election is equitable only, the infliction of forfeiture on a devisee, electing to take against the will, beyond the extent of compensation to those whom his election disappoints, would be inconsistent with the principle on which the doctrine rests. By the assumption, the devise of the testator's property has vested the legal estate in the devisee. But a court of equity (in the contemplation of which his conscience is affected by the implied condition), interfering to control his legal right, for the purpose of executing the intention of the testator, is justified in its interference, so far only as that purpose requires. In the common case of election to take against a will, containing a devise of the property of the testator to his heir, and a second devise of the property of the heir to a stranger, the express intention of the testator that the heir should enjoy the subject of the first devise, and the stranger the subject of the second, is defeated by the refusal of the heir to convey the latter. And a court of equity, therefore, restrains him in the enjoyment of the first, till the condition, under which, in the contemplation of that court, it was conferred on him is satisfied. And the undisputed intention of the testator being that the subjects of both devises should be enjoyed by the heir and the devisee, what is not transferred to the devisee must remain with the heir. A court of equity which assumes jurisdiction to mitigate the rigour of legal conditions, and substitute for a formal, a substantial performance, would act with little consistency in enforcing by the technical doctrine of forfeiture to the eventual disappointment of the testator's intention, a condition not expressed in the will, but supplied by the construction of the court for the single purpose of executing that presumed intention." (2) The doctrine of compensation, and not that of forfeiture, is then more consistent with the presumed intention of the transferor. But the rule gives the right not to the thing itself, but only to compensation out of something else. (3) The right to compensation arises when the duty to elect arises, and not when election is made. So where a beneficiary under a will being put to his election, elected to take against the will, the amount of the compensation payable to the legatees who were disappointed by the election was held to be ascertainable as at the death of the testator, and not at the time the election was made. (4)

588. But the disappointed transferee has a charge on the property for the satisfaction of his claim and which he may enforce by bringing it to sale. (5) Limitation against the transferee would in such cases begin to run when the election has been made, (6) and be governed by Article 132 of the Limitation Act, (7) where the property is immoveable. But in the case of movable property limitation would be controlled by Article 120. (8)

589. Erroneous Belief as to Ownership.—The rules which have been before discussed would apply equally whether the transferor has transferred somebody else's property with his own, through mistake or by design, for the court cannot busy itself with speculation upon what the

(1) Swanston's note to *Dillon v. Parker* 1 Swanst., 396 (441).

(2) *Ib.*

(3) *Dashwood v. Peyton*, 18 Ves., 49.

(4) *In re Hancock* [1905], 1 Ch., 16.

(5) *In Greenwood v. Penny*, 12 Beav., 403, it was held that there is no lien, but it was declared in *Codrington v. Lindsay*, L.R., 8

Ch., 578, affirmed in L.R., 7 H.L., 854.

(6) *Spread v. Morgan*, 11 H.L.C., 588.

(7) Act XV of 1877.

(8) *Doulat v. Jeevan* (1881), P.R. No. 116; *Nimchand v. Jagabandhu*, I.L.R., 22 Cal., 21, dissenting from *Villa v. Kaleekara*, I.L.R., 11 Mad., 153.

transferrer would have done if he had known one thing or the other. (1) Indeed, such an enquiry would be as futile as it would be irrelevant, for, while on the one hand, it is impossible to know with certainty that the transferrer would not have made the disposition had he been aware of his want of title; on the other hand, the question whether a person should or should not elect has nothing to do with the question whether the transferrer, in disposing of that which is not his own, was, or was not aware of his want of title. As Arden, M. R., observed :— "If the instrument is, such as to indicate what the intention was, the only question I will ask, is, did he intend the property to go in such a manner? I will not ask whether he had power to do so; and whether he would have done it if he had known, he could not without a condition have imposed upon another person. Whether he thought he had the right, or knowing the extent of his authority intended by an arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it." (2) So where the transferrer has disposed of property purporting to exercise a power which he erroneously supposed himself to possess, the donee of the power is put to election. An instrument purporting to dispose of property which belongs by paramount title to the person claiming under it, raises a case of election, and the donee cannot take under it the benefit which it gives him unless he is prepared to fulfil the gift which it purports to make of his own property. (3) But where an appointment made under a special power was held to be void for remoteness no case of election could arise, because the whole appointment being void it must be treated as being struck out of the deed. (4)

This paragraph corresponds with section 169 of the Indian Succession Act.

590. Derivative Claimants need not elect.—No case of election arises when benefit is given indirectly. For a devisee or donee who claims derivatively through another does not take under the deed, and is not bound by the equity attaching thereto. And it does not matter to him whether the true owner has or has not discharged the obligation by which he may have been bound. (5) Thus where a person elected to take a certain estate under a will purporting to dispose of both her own and her husband's property, it was held that the courtesy in favour of her husband did not raise a case of election, since his interest as a tenant by courtesy of the estate of his wife was derivative and indirect, or, as Baron Eyre said, only an emanation from the wife's estate. So where a testator being entitled to a moiety of a fund under a settlement, subject to a life-interest, erroneously recited that he was under the settlement, "subject to the trusts therein contained," entitled to the whole, and purported to bequeath the whole, and to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund, it was held that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety. (6) So one co-heir electing to take under a will, may retain a share which since the testator's death has descended to him from a deceased co-heir, although he may have to give up his own original share. (7) So if the lands of Sultanpur are settled

(1) *Whistler v. Webster*, 2 Ves. J., 367 (370).

(2) *Whistler v. Webster*, 2 Ves. J., 367 (370 371, 372); *Thelluson v. Woodford*, 13 Ves., 220; in the civil law the contrary view was taken. Inst. Bk. 2 Tit., 20, s. 4.

(3) *Beauclerk v. James*, 34 Ch. D., 16 (164).

(4) *In re Warren's Trusts*, 26 Ch. D., 208.

(5) *Lady Cavan v. Pulleny*, 2 Ves., J., 544 (561), O.A., 3 Ves., 384, followed in *Grissell Swinhoe*, L. R., 7 Eq., 291.

(6) *Grissell v. Swinhoe*, L. R., 7 Eq., 291 (295).

(7) *Wilson v. Wilson*, 1 DeG. & S., 152; *Dizon v. Samson*, 2 Y. & Coll., 566.

upon *C* for life, and after his death, upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1,000 rupees to *C*, who died intestate shortly after the testator, and without having made any election. His administrator *D*, however, elects on behalf of *C*'s estate to take under the will, and in that capacity receives the legacy of a certain sum, and accounts to *B* for the rents of the lands of Sultanpur which accrued after the death of the testator, and before the death of *C*. But he is not thereby precluded from retaining the same lands in opposition to the will. (1)

591. Then, again, it is enacted both in the section and in the corresponding section (2) of the Indian Succession Act (3) that a person who in his individual capacity, takes a benefit under a will or a transaction, may, in another character, elect to take in opposition to the will, or may dissent from the transaction. Thus where an estate is settled upon *A* for life and after his death upon *B*, and the former leaves it to *D* leaving by the same will Rs. 2,000 to *B* and Rs. 1,000 to *C*, *B*'s only son. *B* dies intestate, shortly after the testator, without having made an election. *C* takes out administration to *B*, and in that capacity elects to keep the estate in opposition to the will and to relinquish the pecuniary legacy. *C* may do this, and yet claim his legacy of Rs. 1,000 under the will. (4) Persons filling different characters, such as guardians, trustees, administrators or the like are naturally entitled to keep their individual capacity intact from their vicarious character. for the one does not merge into the other. The two characters which might have been assumed by different persons do not coalesce because of their being assumed by one person. Hence when it is said that the same person cannot take under and against the same instrument, what is implied is that he cannot take in the same capacity.

592. Exception.—The general rules before discussed are, however, subject to an exception enunciated in the section, as well as in the Indian Succession Act. (5)

The proviso is clearly an exception to the rule which disentitles a person to claim by one part of an instrument in contradistinction to another. It has been accordingly held that a legatee may decline one benefit charged with a portion given him by a will, but he is not therefore bound to decline another benefit, unclogged with any burden, given him by the same will. (6) Similarly if a legatee cannot obtain a particular benefit designed for him by a deed, without contradicting some part of it, he is not thereby precluded from claiming other benefits under it. (7) The ground of the exception is stated to be the presumption that the transferrer could not have intended to exclude the transferee from all benefits under his transfer, because he failed to conform to its one single provision. "Several cases have been and several more may be, in which a man, by his will, shall give a child, or other person a legacy or portion in lieu of satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will, for the court will not construe it as meant, in lieu of everything else, when he has said a particular thing." (8) Upon that principle it has been decided that the testator having, by express proviso, made a disposition, in the event of his not posses-

(1) S. 171, *ill.*, Indian Succession Act (X of 1865).

(2) S. 172.

(3) Act X of 1865.

(4) *Ib.*, S. 172. *ill.*

(5) Act X of 1865, s. 172, *Excep.*

(6) *Andrews v. Trinity Hall*, 9 Ves., 534.

(7) *Huggins v. Alexander*, 2 Ves., 31.

(8) *East v. Cook*, 2 Ves., 33.

sing power to devise certain estates, no implied condition arose against the heir, disappointing the devisee, but complying with the proviso. The intention being equal in favour of each part of the instrument no reason is afforded for controlling one in order to accomplish the other. (1)

593. In the English law several other exceptions are recognized, but

Other exceptions. some of these do not appear to fall into that category. Thus where the transferrer says, "I give all my estate," he does not mean to give his wife's estate which her right of dower is, and in such a case there is obviously no case of election. (2) On a similar principle where the transferrer has some present interest in the estate disposed of by him the doctrine has been held to be inapplicable. "In such a case, unless there is an intention clearly manifested in the will, or (as it is sometimes called) a demonstration plain, or necessary implication on his part to dispose of the whole estate, including the interest of third persons, he will be presumed to intend to dispose of that which he might lawfully dispose of, and of no more." (3) Again, a gift to a donee in lieu of satisfaction of a particular thing expressed does not exclude him from other benefits, although it might happen to be contrary to the will, for when the donor has said it to be in lieu of a particular thing, the court will not construe it as meaning in lieu of everything. (4) The doctrine is also inapplicable as between appointees under a power executed by will where there is an excessive execution of the power, so that it is void as to some of the appointees, and good as to others. In such cases, the appointees, whose shares are valid, will participate equally with those whose shares are void in the property of which the appointment fails. (5) But where there is an excessive revocation, the party whose interest is revoked without right is put to his election. (6) Then, again, there is no election if there is an invalid appointment, and then a sweeping appointment in the same will carrying the fund. (7)

594. Election by Conduct.—Acceptance of the benefit by the donee constitutes election in the following cases: (a) if he is aware of his duty to elect, etc., and (b) if he waives inquiry into the circumstances. It has already been stated that the doctrine of election is a rule of practice and the knowledge of it is not, therefore, to be imputed as a matter of legal obligation. Clause 9, and the next following clauses, lay down cases in which election may be presumed from conduct. The rules are in consonance with the English cases. (8) The presumption made would, it appears, be binding upon those claiming under the person electing, and the absence of evidence, in deciding whether there has or has not been election, in the case of the person dying before making election, (9) the court will be influenced by the consideration whether it was for the benefit of the person entitled to elect or disclaim. (10) The question of acceptance is ordinarily a question of fact, but under certain circumstances it may become a mixed question of law and fact. For an acceptance may not only be explicit but may also be implied from certain acts or conduct. Thus according to the

(1) *Wollaston v. King*, L.R., 8 Eq., 165.

(2) *Foster v. Cook*, 3 Bro. Ch. C., 347; *Strahan v. Sutton*, 2 Ves., 249; *Hall v. Hill*, 1 Den. & War., 107.

(3) *Story Eq. Jur.* (2nd Eng. Ed.), pp. 745 746.

(4) *East v. Cook*, 2 Ves., 23.

(5) 1 *Powell on Devises* by Jarman, 490. note (b); (*Bristow v. Ward*, 6 Ves. s. 336; *Blacklock v. Grindle*, L.R., 7 Eq., 215, cited

in *Swanston's note to Dillon v. Parker*, 1 Swanst., 405.

(6) *Cout's v. Acworth*, L. R., 9 Eq., 519.

(7) *Wollaston v. King*, L. R., 8 Eq., 165.

(8) *Worthington v. Wiginton*, 20 Beav., 67; *Dewar v. Moilard*, L. R., 2 Eq., 894.

(9) *Pramada Dasi v. Lakhi Narain*, I. L. R., 12 Cal., 60.

(10) *Harris v. Watkins*, 2 K. & J., 473.

section it may be inferred from the fact that the person was aware of the nature and extent of his rights, and that, having that knowledge, he intended to elect. (1) In order to establish a case of election by conduct, it must be shown that the person bound to elect had full knowledge of his rights, and acted with an intention to elect. (2) No person is bound to elect without a clear knowledge of the funds. (3) When a party has notice that he is bound to take under or against a will, and deals with the property given to him by the will as his own, that is a clear, deliberate act of election to take the property so given to him. (4) But in dealing with such cases it must be remembered that, though knowledge of the law is imputed to every person, yet knowledge of the rule of equity as to the doctrine of election is not. Election is a question of intention, and is to be inferred only from a series of unequivocal acts. (5) The section enumerates such acts to be (i) where the party accepts benefit with actual or constructive notice of the circumstances; (ii) such knowledge may be presumed from enjoyment of the benefit for two years: or (iii) from impossibility to replace parties in *statu quo, ante*; (iv) assent may be inferred from his failure to dissent from the transfer one year, after its date when called upon to elect. The rules of the section are in this respect entirely founded upon, and in harmony with the English law, and with the rule of estoppel to which they are akin. These rules may now be individually considered.

595. Acceptance of benefit may amount to election, "if he is aware of his

duty to elect and of those circumstances which would influence the judgment of a reasonable man." "The general effect of the decisions may be said to be, that for acts to constitute a binding election the person doing them must have the following knowledge: (i) knowledge of both the rights; (ii) knowledge of the need to elect which includes (a) knowledge that the instrument under which one benefit is given him conflicts with his other right, and also (b) knowledge that if he takes under the instrument, he must give up his other right to make compensation for it; and (iii) knowledge of the respective values of the two rights or perhaps it may suffice if there is knowledge of the right to know the values before choosing." (6) On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated not being called on to elect continues in the receipt of rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received and the party liable to elect deals with it as his own by mortgaging the same, such dealing will be unavailable to prove an actual election as against the receipt of the rents of the other property. (7) The acts of a party bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights, and an intention to elect; possession being under the circumstances equivocal as referrible to either right. The execution of deeds containing recital of the character in which the party claimed, and the execution of a power to dispose of the estates in that character, amount to conclusive evidence of election. (8) A being tenant for life of a leasehold for

(1) *Worthington v. Winton*, 24 L. J. Ch., 773; affirmed in 25 L. J. Ch., 171.

(2) *Wilson v. Thornbury*, L. R., 10 Ch., 239.

(3) *Whistler v. Webster*, 2 Ves. J., 366.

(4) *Briscoe v. Briscoe*, 7 Ir. Eq. R., 123.

(5) *Spread v. Morgan*, 11 H. L. C., 588.

(6) See *on Election*, p. 119.

(7) *Padbury v. Clark*, 19 L. J. (N. S.) Ch., 533; *Spread v. Morgan*, 11 H. L. C., 588.

(8) *Dillon v. Parker*, 1 Swanst., 359.

years, with remainder to *B*, after devising one estate to *B*, in tail, bequeathed to him the leasehold during his life with remainder over, and gave him also the residue of his real and personal property. *B* took possession of the residuary estate, suffered a recovery of the lands devised to him in tail, acted as the absolute owner of the leasehold estate, and outlived the term for which the lease was granted, having previously acquired a lien in the demised premises. It was held that *B* elected to take under the will. ⁽¹⁾

596. The general rule is that a party is not bound to elect until he is

(2) **Ignorance:** aware of all the circumstances, and the state and condition
mistake. and value of the funds are clearly ascertained; for until this is done it is impossible for him to make a discriminating and deliberate choice, which alone should bind him to reason and justice. ⁽²⁾ Hence if a party acts in ignorance or through mistake the doctrine gives way. Thus, if a person being owner of an estate *A*, and having a life-interest in another estate *B*, to which his son will be absolutely entitled on his death, executes a will giving *A* to his son and *B* to another person. And the son, ignorant of his own right to the estate *A* allows the donee to take possession, and himself enters into possession of *B*, he does not thereby confirm the bequest of *B* to another. ⁽³⁾ Again, if a person is in possession of an estate *A*, which he bequeaths to *B*, and to *C* the residue of his property. *C* was the possessor of the estate bequeathed to *B*, but being informed by the latter's executors that the value of the residuary bequest was Rs. 5,000 allows *B* to take possession of the estate. He afterwards discovers that the residue does not amount to Rs. 500. Here the election having been made under misconception of a material fact, *C* has not confirmed the bequest to *B*. ⁽⁴⁾

597. A waiver of election has in law the same result as if the election

(3) **Waiver.** had been made and the true facts ascertained. In this respect the subject is analogous to the case of a person who is affected with notice under similar circumstances (§ 119).

598. Two years' Enjoyment amounts to Acceptance.—Acceptance or waiver may be presumed from enjoyment of the benefit for two years. This rule is paraphrased from an English precedent, since followed, in which Lord Hardwicke observed of the donee: "She, on the mother's death, entered on the land, and from that time continued in possession for two years, received the rents, made no application to trustees to sell, nor brought a bill against them to sell, though she had a right to apply to them to sell, and, as *cestui que trust*, might have contracted for selling, and bound the trustees."⁽⁵⁾ The same rule is enacted in the Indian Succession Act ⁽⁶⁾.

A person may enjoy the land by only receiving its rents through his agent, although he may not exercise any other act of ownership. ⁽⁷⁾ But such possession may be explained. ⁽⁸⁾ Granting a release is sufficient evidence of owner-

(1) *Giddings v. Giddings* 3 Russ., 241.

(2) Story Eq., Jur. (2nd Eng. Ed.), 750. 751; *Edwards v. Morgan*, 13 Price, 782, affirmed, 1 Bl. N. S., 401.

(3) S. 173 *ill.* (a) Indian succession Act (X of 1865).

(4) S. 173, *ill.* (b), Indian Succession Act (X of 1865); *Kidney v. Coussmaker*, 12 Ves., 136; *Worthington v. Wigilton*, 20 Beav., 67; *Tribhuvandas v. Smith*, I. L. R., 20 Bom.,

316.

(5) *Crabtree v. Bramble*, 3 Atk., 680 (698), followed by Jessel, M.R., in *re Gordon: Roberts v. Gordon*, 6 Ch. D., 531 (535).

(6) S. 174, Act X of 1865.

(7) In *re Gordon: Roberts v. Gordon*, 6 Ch. D., 531 (535).

(8) In *re Lewis: Foxwell v. Lewis*, 30 Ch. D., 654.

ship, (1) the pertinent question in such cases is not what the party might have done, but rather whether what he has done is sufficient to enable the court to say that the party has so determined. (2)

599. Election when Parties cannot be restored status quo.—

A party cannot be allowed to disaffirm a transaction when his acts have rendered it impossible to restore the other persons affected by his claim to the same situation, as if the acts had not been performed, or the acquiescence had not existed. The rule so stated corresponds with that enunciated in the Indian Succession Act from which the illustration appended to the clause has been taken. (3) Where a party has been even partially benefited by a transaction, he may have to restore to the party injured the benefit which he has derived before he would be allowed to change his position. (4)

600. Time for Election.—The penultimate clause lays down another rule corresponding with section 176 of the Indian Succession Act, (5) but it differs from the English cases. In England there is no time for limitation of the right to elect, and it continues, notwithstanding acquiescence, during almost any given lapse of time, unless it can be shown that injury would result to third persons, and that they would be placed in a much worse condition than if the party entitled to elect had elected early; and, further, that he knew he had a right of election, and knew not merely the existence of the instrument giving it, but the consequences of the instrument on his rights. (6) Following this principle it has been held that where the guardian of the defendant mortgagor is found to have mortgaged his property without sanction of the court necessary to validate the transaction, the mortgagor may avoid the mortgage, but only on the condition of restoring any benefit received by him thereunder to the person from whom it has been received. And the fact that the person who has received the benefit is the defendant does not alter his position. (7) But, of course, if time is limited for election, failure to elect within that time would be construed as renunciation of the benefit. (8)

601. An election once made is final and binds both the party and his representatives, (9) but if the election has not been explicit, the latter may renounce the benefit, provided that the other party can be restored to the same position as if the benefit had not been accepted. (10) Where each member of a class has a distinct right of election, no one is bound by the decision of the majority. (11)

602. Disability.—The last paragraph corresponds with section 177 of the Indian Succession Act. In case of disability, the election is postponed until the disability ceases, or until the election is made by some competent authority. Thus, in the case of a minor, the period for election will be postponed during the minority unless the minor is represented by a qualified

(1) In re *Davidson*; *Martin v. Trimmer*, 11 Ch. D., 341; *Mulloy v. Bigg*, L.R., 18 Eq., 246, O.A. 1 Ch. D., 385.

(2) Per V.C. (afterwards Lord Cranworth) in *Harcourt v. Seymour*, 2 Sim. (N.S.) 12 (45); *Dixon v. Gayfer*, 17 Beav., 433. A slight act will do. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris v. Watkins*, 2 K. & J., 473.

(3) S. 175, Act X of 1965.

(4) *Griffith-Boscawen v. Scott*, 26 Ch. D. 358; *Rogers v. Jones*, 3 Ch. D., 688; *Douglas*

v. Douglas, L.R., 12 Eq., 617.

(5) Act X of 1865.

(6) *Brice v. Brice*, 2 Moll., 21.

(7) *Snaya Pullai v. Munisami*, I.L.R., 22 Mad., 289.

(8) *Dillon v. Parker*, 1 Swanst., 385 (447); *Dewar v. Maitland*, L.R., 2 Eq., 834.

(9) *Tribhovandas v. Smith*, I. L. R., 20 Bom., 316, reversed on appeal on a different point, I. L. R., 21 Bom. 349.

(10) *Dillon v. Parker*, 1 Swanst., 385.

(11) *Fytch v. Fytch*, L. R., 7 Eq., 494.

guardian, in which case, he can elect. In England, in such a case, the practice is for the Court to elect for the infant. (1)

603. Hindu Law.—Being a rule founded upon the highest principles of equity, (2) the doctrine of election applies equally to Hindus, (3) and persons governed by other personal laws. A Hindu widow died, making a will in respect of property which she had inherited from her husband, and by which she bequeathed a legacy to *A* and the immoveable property to *B*, both the heirs of her husband. *A* sued for the legacy under the will and for half the immoveable property as her heir, but it was held that he should be put to his election whether to take the legacy under the will, or half the property as heir of the testator's husband. (4) "The law limits the widow's interest," observed Sargent, C. J., "in that she inherits from her husband to the beneficial use of it during her life and disposal of it for certain purposes, and it is on that account she cannot devise it." (5) But in order to raise a case of election intention to dispose of property not his own must be clearly expressed. (§ 578).

A testator settling a sum of money on his wife for maintenance and disposing of the remainder to another person disposed of his ornaments, also ornaments described as "my own and my wife Motivahu's ornaments," but it was held that the clause could not embrace her *stridhan* ornaments so as to raise a case of election. (6) The heir taking under the will cannot afterwards set up his rights based upon his heirship. (7) The donee electing to accept a sum of money bequeathed to him as in repayment of a debt, could not again claim the same amount once again as a legacy. Having, however, failed to obtain it as a debt he is not precluded from afterwards claiming it as a legacy. (8)

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the

Appointment of periodical payments on determination of interest of person entitled.

transferee, to accrue due from day to day, to be apportionable

(1) *Morrison v. Bell*, 5 Ir. Eq. Rep., 354; *Ashburnham v. Ashburnham*, 13 Jur., 1111; *Gretton v. Haward*, 1 Swanst., 413; *Elerington v. Elerington*, 6 Mad., 117 (infant put to his election under the will, and a reference to the master to ascertain what election would be most to his benefit); *Harvey v. Ashley*, 3 Atk., 617 (minor wife); *Broughton v. Broughton*, 2 Ves., 12 (election postponed till majority); *Seton v. Smith*, 11 Sim., 59 (when compelled to elect immediately). If an infant have conflicting titles under a settlement and under a will, he may be put to his election at once notwithstanding his infancy as the Court will elect for him (*Morrison v. Bell*, 5 Ir. Eq. R., 354).

(2) *In re Bradshaw* [1902], 1 Ch., 436.

(3) *Mangaldas v. Ranchoddas*, I. L. R., 14 Bom., 438; *Bai Mamubai v. Dossa Morarji*, I. L. R., 15 Bom., 443; *Tribhovandas v.*

Smith, I. L. R. 20 Bom., 316, reversed on appeal on a different point, I. L. R., 21 Bom., 349; *Rajamannar v. Venkata Krishnaya*, I. L. R., 25 Mad., 361 (364, 365).

(4) *Mangaldas v. Ranchoddas*, I. L. R., 14 Bom., 438; following *Talbot v. The Duke of Shrewsbury*, 2 W. & T. L. C., 378; *Welby v. Welby*, 2 V. & B., 187; *Rich v. Cockell*, 9 Ves. 370; *Blacklock v. Grindle*, L. R., 7 Eq., 215; *Hearle v. Greenbank*, 3 Atk., 715; *Sheddon v. Goodrick*, 8 Ves., 481.

(5) *Managaldas v. Ranchoddas*, I. L. R., 14 Bom., 438 (441).

(6) *Bai Mamubai v. Dossa Morarji*, I. L. R., 15 Bom., 443 (452).

(7) *Tribhovandas v. Smith*, I. L. R., 20 Bom., 316, O. A., reversed on a different point, I. L. R., 21 Bom., 349.

(8) *Rajamannar v. Venkata Krishnaya*, I. L. R., 25 Mad., 361 (364, 365).

accordingly, but to be payable on the days appointed for the payment thereof.

604. Analogous Law.—Analogous provisions are contained in sections 298 to 300 of the Succession Act relating to apportionment of annuities on death, which are also incorporated with sections 118 and 119 of the Probate and Administration Act.⁽¹⁾ This section is however directly condensed from sections 2 to 4 of the English Apportionment Act, 1870,⁽²⁾ which after reciting that rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and that to remedy the mischiefs and inconvenience thereby occasioned, diverse statutes had to be passed, proceeds to enact as follows:—

(2) From and after the passing of this Act all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

(3) The apportioned part of any such rent, annuity, dividend, or other payment be payable, or recoverable in the case of a continuing rent, annuity or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before and in the case of a rent annuity of other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

(4) All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns, respectively of persons whose interests determined with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances). As they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to payments reserved out of or charged on lands or other hereditaments shall not be resorted to for any such apportioned part forming part of an entire or continuing rent, including such apportioned part shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other persons by the executors or other parties entitled under this Act to the same by action at law or suit in equity. (3)

605. The Act extends to all dividends alike, including even those accruing due under instruments executed before the Act.⁽⁴⁾ The section does not refer to *interest* due on money lent which from its nature accrues due from day to day, and is therefore apportioned as a matter of course.⁽⁵⁾ As the section is obviously confined to apportionment on transfer, and as between the transferrer and transferee, it has no application as between the landlord and tenant.⁽⁶⁾ So if a landlord dispossess his tenant in the middle of the year, he has no right to recover proportionate rent from him, as it depends upon the nature of the tenure, as, if it be an agricultural tenure, the question would be whether the tenant has enjoyed all the year's profits, or has been prevented from enjoying any by the landlord's interference.⁽⁷⁾ There may be however apportionment of rent as between the landlords as on the severance of coparcenership.

(1) Act V of 1881.

(2) 33 & 34 Vict., C. 35.

(3) 33 & 34 Vict. C. 35 (S. 1 defines the short title, S. 5 relates to the interpretation of terms defined as in § 609, *post*; Ss. 6 and 7, declare the act to be inapplicable to policies of assurance, and stipulation made to the contrary respectively.

(4) *Per* Mallins, V.C., in *In re Cline's Estate*, L. R., 18 Eq., 213; *Re Thacker*, 28 L. T. (N. S.), 56.

(5) See S. 8, & § 366 *ante* and *Comm. post*.

(6) *Janki Bai v. Bayabai*, 16 C. P. L. R., 55, but see § 612 *post*.

(7) *Bunsee Dhur v. Bheem Lall*, 24 W. R., 219.

In England the scope of the English statute has been held to be much wider as warranting apportionment of rent as between the landlord and tenant, so that if tenancy is determined in the middle of a quarter, the landlord is entitled to apportioned part of the rent for the recovery of an actual period of occupation, whereas before the Act the whole of the quarter's rent was lost to him. (1)

The rule here enacted has been held to apply only to transfers by act of parties, and not to those made by operation of law. If therefore, the lessor's interest is transferred by operation of law, the transferee cannot claim any apportionment of rent (2).

606. In Calcutta the section has been held to be subject to the provisions of section 2 (d). (3) On the other hand, in Madras, it is held to embody a rule of equity which is more widely applicable. (4) According to the former view, since the section has no application to a transfer made by operation of law, there can be no apportionment of rent where the lessor's interest is transferred even by operation of customary law; so where by the custom of a Raj family, the eldest son succeeded to the Raj and the second son became *Hikim*, and as such entitled to certain customary property, his right to collect rents from the tenants and mortgagees in possession from his predecessor, would be for the whole year, if they were payable after he became *Hikim*, and neither the mortgagee nor the tenants could claim apportionment between the preceding and succeeding *Hikims*. (5)

607. In saving a contract of local usage to the contrary, the section follows the English Act, under which it has been held that a bequest of shares in a limited company, coupled with a declaration that the shares so bequeathed shall carry the dividend accruing thereon at the testator's death, had the effect of excluding the operation of the Act. (6) It is not necessary that the contract to exclude the rule should be explicit, for if it is otherwise clear, the rule will give way. So where testator directed that the whole of the income of stocks, out of which his wife was entitled to an annuity, should be paid to her during widowhood, it was held that he had expressly stipulated within the meaning of section 7 of the Act, that it should not apply. (7) Nor is the Act applicable to rent, annuities, dividends, and other payments in the nature of income, which have accrued due before the happening of the event by reason of which it is proposed to apply it. Thus the Act does not apply to rent payable in advance. And so where the plaintiff let a house to the defendant at a yearly rent payable quarterly in advance *inter alia* on condition that if the rent fell into arrear for fourteen days, the plaintiff shall be at liberty to re-enter on giving notice, upon the breach of which he re-entered and sued to recover the unpaid rent, it was held that he was entitled to a decree for the amount. (8)

608. Principle.—In its application to contracts in general, it is a well-known rule of common law that a contract is not apportionable, the reason being that the consideration being dependent on the performance of the entire act, law cannot apportion what is from its nature not apportionable (§ 226).

(1) *Swansea Bank v. Thomas*, 4 Ex. D., 94. (The judgment is all too meagre and proceeds upon the sole ground that the words of S. 2 are wide enough to include such a case, *ib.*, 96).

(2) *Mathewson v. Shyam Sunder*, I. L. R. 33 Cal. 766 (788).

(3) *Satyendra Nath v. Nilkantha*, I. L. R., 21 Cal., 383 (386); *Mathewson v. Shyam*

Sunder, I. L. R., 33 Cal., 786.

(4) *Lashminaranappa v. Melothiraman*, I. L. R., 26 Mad., 540.

(5) *Mathewson v. Shyam Sunder*, I. L. R., 33 Cal., 786.

(6) *Lysaght v. Lysaght* [1898], 1 Ch., 115.

(7) *Stone v. Meredith* [1898], W. N., 49.

(8) *Ellis v. Rowbotham* [1900], Q. 740.

And the same rule appears to have been extended to payments made under a contract. And in this respect equity appears to have been content with following the law, (1) although instances are not wanting of its interference in isolated cases. (2) But the principle that an entire contract cannot be apportioned was always conceded on the ground that the performance of a contract being a complex event depending on the execution of various acts, execution of only some acts cannot entitle the party to a proportionate benefit. (3) In the cases enumerated in the section, however, apportionment has been allowed as indispensable having regard to the nature of the property, justice, and convenience. The rule as to apportionment operates only as between the transferrer and transferee, and therefore it does not affect the liability of the person who would still be liable as if there had been no apportionment. In other words, supposing that a property belonging to *A*, in possession of *B*, is sold to *C*, *B* would continue to be liable to *A*, and *A* and *C* cannot each claim from him an apportioned part of the rent. If, therefore, *B* has paid rent for several years in advance to *A*, *C* cannot claim rent for those years from him. (4)

609. Meaning of Words.—Lord Coke remarked that the word "apportionment" cometh of the word *partio*, *quasi partio*, which signifieth a part of the whole, and apportion signifieth a division of a rent, common, etc., or a making of it into parts." (5) The term is used in two senses: (i) to denote distribution of a common fund among the several claimants; and (ii) sometimes to denote the contribution made by several persons having distinct rights to discharge a common burden. (6) The words rents, annuities, etc., here used, are nowhere defined in this or in the General Clauses Acts. They are, however, defined in section 5 of the English Statute in the following terms: "5. In the construction of this Act, the word '*rents*' includes rent service, rent charge, and rent seek, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe. The word '*annuities*' includes salaries and pensions. The word '*dividends*' includes (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise; but this does not include payments in the nature of a return or reimbursement of capital." It includes, however, occasional bonuses or surplus profits of the shareholders. (7) In the "*absence of a contract*," implies that parties may stipulate otherwise. (8) "*As between the transferrer and the transferee*," implies that a stranger cannot apportion them, "*to accrue due from day to day*," i.e., only for the purpose of apportionment. Under the Bengal Tenancy Act, rent is not ordinarily regarded as accruing from day to day, but as falling due only at stated times according to the contract or tenancy of the general law. (9) "*Rents*" is used in its wider sense as including rent-service, rent-charge, etc. (10) "*Annuities*" are annual payments, usually, but not necessarily determining with the life of the grantee, or after a limited period. An annuity generally means the purchase of an income, and usually involves a change of capital into sums

(1) Story Eq. Jur. (2nd Eng. Ed.), 306.

(2) *Ib.*, p. 306.

(3) *Ex parte Smyth*, 1 Swanst., 338.

(4) *Chooramun v. Mt. Patoo*, 24 W. R., 68.

(5) Co. Litt., 147 b.

(6) Story, Eq. Jur., (2nd Eng. Ed.), 305.

(7) *Carr v. Griffith*, 12 Ch. D., 655.

(8) Dart. pp. 146, 147.

(9) *Per Banerjee, J.*, in *Satyendra Nath v. Nilkantha*, 1 L. R., 21 Cal., 383 (385).

(10) See S 105, Comm. post, as to the full significance of the word.

payable annually over a number of years. (1) It is frequently paid by the borrower instead of interest. It may be purchased from the Government of the various joint-stock companies. An annuity, as such, is an intangible moveable property, but it is in England often classed with incorporeal hereditaments issuing out of land. (2) "*Pensions*:" A pension is a similar payment usually made in consideration of past services. The term has assumed a variety of meanings, e.g., "*Pension of Churches*," which means payments made to clergymen in lieu of tithes. But the term is no doubt here used in its more restricted sense. "*And other periodical payments in the nature of income*:" The clause is borrowed from the English Statute and means payments claimable as of right at fixed and recurring periods. An occasional present from a relation or an allowance from a relation is thus excluded. "*Upon the transfer of the interest of the person entitled*:" The rule is only to be applied upon transfer of the beneficiary's interest, although the rule itself enunciates a sound equitable principle and is, as such, of wider application. (3) "*As between the transferor and the transferee*:" i.e., only the actual parties to the transfer are bound by the rule. It does not affect third parties. Thus if a tenant assigns his tenure, rent may be apportioned as between them but not so as to prejudice the landlord.

610. What Incomes are apportionable.—The provisions of this section must be regarded as only applicable to incomes or profits of an invariable character, such as rents, annuities, pensions, and dividends. It is apprehended that the term periodical payments must relate to payments *ejusdem generis*. The section would scarcely be applicable to profits of a private partnership, or a trading company where profits only accrue after the adjustment of the account which of course cannot be presumed to be made *die per diem*. (4)

But the shares of public companies which are in the nature of investments for the production of ordinary income are apportionable. The words "*other periodical payments in the nature of income*" occur in the English Statute and have been construed by Lord Selbourne, L.C., to mean such periodical payments other than dividends, which are made periodically recurring at fixed times, not at variable periods, nor in the exercise of the discretion of one or more individuals, but from some antecedent obligation; and, further, they must be in the nature of income; that is, coming in from some kind of investment, as in the other cases with which the section deals. (5) The profits of a mere private partnership, which though fixed to be taken at a period previously fixed do not share the characteristics of the "*periodical payments*" contemplated by the section, nor can such profits be classed as "*dividends*" which is a term applicable to income derived from stocks in the public funds, where a person under the obligation to make the periodical payments, hands to the persons through whose hands the payment is to be made, funds for the purpose of division among the persons entitled. In such cases the dividends are apportionable because it is known that the shares of such companies are in the nature of investments. A person cannot be said to take a "*dividend*" because he only gets an aliquot part of the whole. (6) The

(1) *Scoble v. Secretary of State* [1903], 1 K. B., 494 (504).

(2) Cf. 3 & 4 Will. IV c. 27, s. 21, in which an annuity is described as a "*rent charge*," from which it however differs materially.

(3) E.g. cf. *Re South Kensington Co-operative Stores*, 17 Ch. D., 161; *Swansea Bank v. Thomas*, 4 Ex. D., 94.

(4) *Jones v. Ogle*, L. R., 14 Eq., 419; O.A. L. R., 8 Ch., 192; *In re Cox's Trusts*, 9 Ch. D., 159. *In re Griffith; Carr v. Griffith*, L. R., 12 Ch. D., 656; *Govind Rao v. Bhagirathi*, 14 O.P.L.R., 84.

(5) *Jones v. Ogle*, L.R., 8 Ch. 192 (198).

(6) Per Lord Selbourne, L.C., in *Jones v. Ogle*, L.R., 8 Ch., 192 (197).

bequest of stock in a canal company to trustees to pay the dividends to the testator's wife has been accordingly held to be apportionable ⁽¹⁾ Dividends out of profits from time to time declared by a commercial company are apportionable, ⁽²⁾ but a single sum of money to be divided among the share-holders is not so apportionable. For the purpose of apportionment a dividend is to be taken as payable on the day on which it was actually payable, and not on the last day of the period during which it was earned. In cases of doubt the practice of the court, in declining to recognize the equity to an apportionment, is governed by considerations of convenience and saving of expense. ⁽³⁾ The profits of a newspaper owned by a single individual do not fall within the section and they do not partake of the nature of dividends merely because several persons are interested in them. ⁽⁴⁾ But a Life Assurance Company unincorporated, but established with a Board of Directors, a definite capital and list of share-holders, and possessing certain powers and concessions under a special Act of Parliament stands on a different footing. ⁽⁵⁾ There is no question of apportionment in a bequest by the testator of a certain sum to trustees, such sum to carry interest at $4\frac{1}{2}$ per cent. until the same should be paid or appropriated, upon trust, with the consent of his wife, to invest the same in certain specified securities and to pay the annual income of the legacy and the investments thereof, including in such income the interest payable in respect of such legacy, to his wife for life, with remainder over. Interest was paid to the widow up to the day when, pursuant to an order of the court, the bequeathed sum was invested in stocks on some of which five months' dividend had accrued. It was contended for the remainder-man that the dividends must be apportioned, but it was ruled that the widow was entitled to the whole of the dividends when received upon the purchased stocks. ⁽⁶⁾ But where a grand-father bequeathed his residuary personal estate to trustees for his two grand-daughters in equal shares at twenty-one or at marriage, and directed that in case they or either of them should marry under twenty-one, their shares should be settled upon them and their children in the usual form. The grand-daughters married under twenty-one, and it was held that in both cases the income of the trust-funds was apportionable down to the date of the respective marriages. ⁽⁷⁾

611. In determining the question whether a periodical payment is an income, regard must be had to the real nature of the transaction. Where the principal advanced is repaid in the form of an annuity, the payments cannot be regarded as "income." So on the re-purchase of a railway company where the shareholders were paid a terminable annuity from the time when the gross amount became payable, which represented both the principal as well as the interest, the payments could not be regarded as an "income." But such a payment must be distinguished from that in which it is apparent on the face of the transaction that each instalment covered payment of a principal sum as well as interest, in which case only the sum representing interest would be treated as income. ⁽⁸⁾

An apportionment of interest upon a bond as accruing *de die in diem* is not prevented by the condition reserving it by equal half-yearly payments. ⁽⁹⁾

(1) *Pollock v. Pollock*, L.R., 18 Eq., 329; explaining *Whitehead v. Whitehead*, L.R., 16 Eq., 528.

(2) *Hartley v. Allen*, 27 L.J., Ch., 621 (a case under 4 & 5 Will. IV. c. 22).

(3) *Scholfield v. Redfern*, 92 L.J., Ch., 627.

(4) *In re Cox's Trust*, 9 Ch. D., 159 (163).

(5) *In re Griffith : Carr v. Griffith*, 12 Ch.

D., 655.

(6) *In re Clarke: Barker v. Perowne*, 18 Ch. D., 160 (164).

(7) *Clive v. Clive*, L.R., 7 Ch., 433.

(8) *Scoble v. Secretary of State* [1903], I. K. B., 494 (504); following *Foley v. Fletcher*, 3 H. & N., 769.

(9) *Banner v. Lowe*, 13 Ves., 135.

612. Apportionment of Rent.—The apportionment that the section contemplates, is one following the transfer of the interest of the person entitled to receive the rent and not the transfer of the interest of the person bound to pay it. (1) The person liable to pay the rent cannot then claim to apportion it as between his landlord and the assignee. On the other hand, the assignee is entitled to recover from the lessee the entire arrear of rent falling due after the date of assignment. (2) But if the vendor has already taken the rent in advance, the assignee is bound by the agreement made by his vendor. (3)

On the division of a holding, apportionment of rent may be made by the court. (4) If a tenant with the consent of the landlord, where such consent is a pre-requisite to a valid transfer, sells a portion of his holding, the purchaser is entitled to regard the portion sold as his separate holding, and for which he is liable to pay no more than a proportionate rent. (5) Royalties payable periodically by a tenant are apportionable. (6) In England land-tax, quit-rents, etc., are not apportionable as between tenant for life and the remainder-man. (7) And it is apprehended that land-revenue which is a paramount charge on the land cannot be apportioned. But where the tenant loses a portion of his holding through no fault of his own, he is manifestly entitled to a proportionate abatement of rent. So if a portion of a *putni* is acquired by the Government under the provisions of the Land Acquisition Act, the *putnidar* is entitled to a proportionate abatement of rent at the hands of the zamindar and the ratio of which is determined according to the following rule: "As the gross rental of the whole *putni* is to the gross rent of the land proposed to be taken, so will the entire *putni* rent be to the particular portion of the rent to be remitted." (8)

613. The provisions of this section have been held to be inapplicable to a tenant governed by the Central Provinces Tenancy Act. (9) On the other hand, it has been held in Madras that embodying as it does an equitable principle, its provisions may be resorted to where as a matter of equity and good conscience a case for apportionment is made out. Thus, where a person was entitled to receive rents *pur autre vie*, who died four days before the half-yearly instalment fell due, and thereupon the question arose whether the rent which had accrued due four days after the determination of the life *pur autre vie* was recoverable, it was held that as a matter of equity and good conscience the plaintiff was entitled to an apportionment of the rent due up to the date of the former's death. (10) An apportionment of rent due in respect of several villages should not be on the basis of the assets of the different villages at the time of the creation of the original tenure, but on the basis of the present assets of the different portions of the tenure which by division have passed into different hands. (11)

In apportioning compensation-money, awarded under the Land Acquisition Act, between the landlord and the tenure-holder, the court ought to proceed on the principle of ascertaining what the value of the interest of the landlord is on

(1) *Satyendra Nath v. Nilkantha*, 1 L. R., 21 Cal., 383 (386); followed in *Matheuson v. Shyam Sunder*, 1 L. R., 33 Cal., 786.

(2) S. 109, *post*.

(3) *Chooramun v. Mt. Patoo*, 24 W. R., 68.

(4) *Obiter in Piare v. Gopal*, 15 C. P. L. R., following *Janki v. Balmukhurd*, 14 C. P. L. R., 107.

(5) *Piare v. Gopal*, 15 C. P. L. R., 37.

(6) *Llewellyn v. Rous*, L. R., 2 Eq., 27.

(7) *Sutton v. Chaplain*, 10 Ves., 66.

(8) *Burdwan Ryj Case* (1860), S. D. A., 336; followed in *Bhobani v. Land Acquisition D. C. of Bogra*, 7 C. W. N., 130.

(9) *Janki v. Bayabai*, 16 C. P. L. R., 55.

(10) *Lakshminaranappa v. Melothraman*, 1 L. R., 26 Mad., 540 (*Per* Subramania, J., Davies, J., *dissentiente*).

(11) *Hari Kishun v. Tilukdhari*, 7 C. W. N., 453.

the one hand, and that of the tenant on the other, and to divide the sum awarded between them in accordance with these values. Where the rent is fixed in perpetuity, the landlord is not entitled to more than the capitalized value of his rent. (1)

614. Contribution.—Contribution as a branch of the law of apportionment has been partially dealt with in the Act in section 95 and more particularly in the Contract Act. (2)

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in the manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one-quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C, and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C, and D severally required E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions, as B, C and D, may join in giving.

615. Analogous Law.—This section is similar to section 30 of the Indian Easement Act, (3) which provides as follows:—

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and, in case of prescriptive rights, with the user during the prescriptive period.

(1) *Dinendra Narain v. Tituram*, I. L. R., 30 Cal., 801.

(2) Ss. 43, 69, 254 (2).

(3) Act V of 1882.

Illustrations.

(a) A house to which a right of way by particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well, to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled in respect of his heritage, to draw from the well fifty buckets a day; but the amount by both must not exceed fifty buckets a day.

(c) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its window unobstructed.

The provisions of the section have been, however, adapted from the corresponding provisions of the English Conveyancing Act (1):—

“12. (1) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re entry and every other condition, contained in the lease, shall be apportioned and shall remain annexed to the several parts of the reversionary estate as severed, and shall be in force with respect to the term, whereon each several part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each several part, or the land as to which the term remains subsisting as the case may be, had alone originally been comprised in the lease.”

The exemption of agricultural leases, from the operation of this section, was made on the recommendation of the Select Committee who thought that this section might possibly cause hardship to agriculturists who were the least able to help themselves. (2) The section being inapplicable to agricultural tenancies, payment of the rent to one of the several co-sharers discharges the tenant, (3) unless the tenant had agreed to a different arrangement. (4) In the case of a grant made to several persons on a single rent as in *Agraharams Dharmasanam* villages, it would appear that this section has no application. (5)

This clause should be read in conjunction with sections 50 and 109 *post* where a similar provision is inserted in the interests of the tenants.

616. This section considerably modifies the pre-existing law on the sub-

Previous law. subject under which a tenant was liable to pay his rent only to all the owners jointly. (6) except where he had once agreed to the apportionment of rent, in which case he was then held bound by it. (7) Formerly apportionment could only be effected by mutual consent, or by a suit in which all the co-sharers had to join. (8) Under the present section, however, only a notice is sufficient.

(1) 44 & 45 Vict., c 41, s 12. As to the previous law see *Baynton v. Morgan*, 22 Q.B. D., 74.

(2) *Alimuddin v. Hira Lal*, 1 L. R., 23 Cal., 87 (101), F.B.

(3) *Pergash Lal v. Akhowri*, 1 L. R., 19 Cal., 735; *Premchand v. Mikhoda*, 1 L. R., 14 Cal., 201; *Pratap Singh v. Umrao*, 11 O. P. L. R., 1.

(4) *Jadoo v. Kadambinee*, 1 L. R. 7 Cal., 150; *Rutnesur v. Burrish Chunder*, 1 L. R. 11 Cal. 221; *Sri Raja Simbadri v. Prathipati*, 1 L. R. 29 Mad. 29 (35, 36).

(5) *Zamindar of Ramnad v. Ramamany*, 1 L. R., 2 Mad., 234 (339).

(6) *Ishwar Chunder v. Ram Krishna*, 1 L. R. 5 Cal., 902, F. B., following *Sreenath v. Mahesh Chunder*, 1 C. L. R., 453. *Goni Mohamad v. Noran*, 1 L. R., 4 Cal., 96, F.B.

(7) *Lootfulhuck v. Gopee Chunder*, 1 L. R., 5 Cal., 941.

(8) *Ishwar Chunder v. Ram Krishna*, 1 L. R., 5 Cal., 902 F. B., *Bhyrub Mundul v. Gogaram*, 12 B. L. R., 290; 17 W. R., 408; *Kally Churn v. Solano*, 24 W. R., 267; *Jadudas v. Sutherland*, 1 L. R., 4 Cal., 556.

617. Principle.—This section is enacted on the equitable principle, that the increment follows the principle, (1) and that therefore in the case of joint property each co-owner is entitled to the profits accruing from his respective share, provided that he gives notice of his share to the person held liable. But this, of course, does not mean that the completion of his title is in any way dependent upon notice, or that it is postponed till notice has been given either by the assignor or assignee. (2) The notice here mentioned may be given either by the assignor or assignee (3). A similar provision as to notice on transfer of debts is also made by section 130.

618. Meaning of Words.—“*The benefit of any obligation passes from one to several owners of the property.*” The section then has no application to where apportionment may be desired in the interest of the tenants.

619. Apportionment of Obligation.—Before the question of apportionment arises, the first thing to enquire is, whether the duty, if continued to be performed, for the benefit of each of the divided shares, would increase the burden of obligation. If the burden will not be thereby increased, then apart from the section the duty will become annexed to each of the shares and will have to be performed for their benefit irrespective of their number. (4) As an instance of such a duty may be mentioned the right of way to, or from a place, or a right to light and air, which all shares are, on partition, entitled to have and enjoy. (5) It cannot be said that such obligations do not increase the burden, but law takes heed of only a *substantial* increase. If a large property to which a right of way is appurtenant is divided between many persons, the right of way could not be extended to all the new comers without imposing a greatly increased burden on the servient tenement. And even where a right of way is claimed, it is a question which has to be decided, with reference to the facts of each case, whether the new burden imposed is of a nature which may conveniently be thrown on the property. (6) The right of common and turbary, whether appendant or appurtenant, usually passes with a parcel of the entire estate to the enjoyment of which the common was originally attached. (7) In such a case the right is however supported in spite of the increased burden in the interest of the commonwealth, otherwise common would have been extinguished all over the country by the alienation of land. But the right does not extend beyond the necessary and reasonable enjoyment of the parcel. But a right which is appurtenant to the entire property, cannot be re-apportioned to any particular parcel of land unless an intention to that effect can be inferred from the nature of the grant, or from the surrounding circumstances.

620. Right of Way.—A right annexed to a dwelling-house, or to a pew in a church, may be apportioned, each sharer having on a partition, a right to use it (8). “Where the grant,” said Jessel, M. R., “is in respect of the lands and not in respect of the person, it is severed when the lands are severed,

(1) *Soorjeemoney v. Denobundo, Mullick*, 6 M. I. A. at p. 554; General Clauses Act, (1897), 3 (25).

(2) *Peary Lal v. Madhoji*, 17 C.L.J., 372 (376).

(3) *Ib.* p. 377.

(4) S. 30, Indian Easements Act (V of 1882).

(5) *Ib.* See *ill.* (a) & (c).

(6) *Codring v. Johnson*, 8 L. J. K. B., 68; *Bower v. Hill*, 2 Bing., N.S., 339; *The United Land Co. v. The Great Eastern Railway Co.*, L. R. 17 Eq. 159, O. A. L. R., 10 Ch., 586; *Newcomen v. Coulson*, 5 Ch. D., 133.

(7) *Sacheverell v. Porter*, W. Jones, 896, *Wyat Wild's Case*, 8 Ref., 78 b; *Baring v. Abingdon* [1902], 2 Ch., 374 (295).

(8) *Harris v. Drewe*, 2 B. & Ad., 164.

that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments for ever deprived of access to the highway" (1) Thus where the plaintiff claimed a right of way across a water-course as being the occupier of a portion of the property in respect of which the right had been acquired, and it appeared that the right had been acquired by the owner of an adjoining inn and yard by user raising the presumption of a grant; but that there had been no user of this way for at least sixteen years, it was held that the user was no more than personal "referable to the King's Head Inn and yard, to those premises only" and that it could not be extended to any one not being the owner or occupier of the Inn. Any other view would be unreasonable to the grantor who may have granted the right to the occupier of the Inn, from his knowledge of the degree of user which would follow from the grant when so limited. (2) "Where a right of way is claimed by user," observed Mellish, L. J., "then no doubt, according to the authorities the purpose for which the way may be used, is limited by the user; for we must judge from the way in which it has been used what the purposes were for which the party claiming has gained the right. But when a right of way is created by grant, or by an Act of Parliament, then it must depend on the proper construction of the grant, or Act of Parliament, whether the right of way is to be used for all purposes or for only limited purposes." (3)

621. Formerly, a sale of a share in a tenure let out to a tenant in its entirety, did not of itself necessarily effect a severance of the tenure or an apportionment of the rent, but the purchaser was, of course, entitled to partition. If he took no steps for the purpose, then the tenant was justified in paying the entire rent to all the parties jointly entitled to it. But if a purchaser desired to effect a severance of the tenure and an apportionment of the rent, he was required to give the tenant due notice to that effect, and then if the parties could not agree to an apportionment the purchaser could enforce it by suit, impleading all the other co-sharers as parties to the suit. (4) Now, under the section, a mere notice of the severance is enough to place the tenant under an obligation to pay an apportioned rent, and it would seem that it is no longer necessary for the transferee to make arrangements with the tenant, or to sue for his share of the rent. But if he is driven to a suit, it is still necessary to implead the other co-sharers as parties to the suit (5) making recalcitrant co-sharers defendants, if they refuse to join as plaintiffs. (6) A co-sharer may, how-

(1) *Newcomen v. Coulson*, 5 Ch. D., 133 (141).

(2) *Bower v. Hill*, 2 Bing. (N.S.), 339 (342).

(3) *United Land Co., v. Great Eastern Railway*, L. R., 10 Ch., 586 (590).

(4) *Ishwar Chunder v. Ram Krishna*, I. L. R., 5 Cal., 902, F. B.; following *Sreenath v. Mohesh Chunder*, 1 C. L. R., 453; *Gungarnarain v. Sreenath*, I. L. R., 5 Cal., 915; followed in *Lootfulhuck v. Gopal Chunder*, ib., 941 (945); *Param v. Achal*, I. L. R., 4 All., 289; *Butabee v. Khooshal*, 3 N. W. P., H. C. R., 221; *Mookta v. Oomabuttu*, 14 W. R., 81; *Sudaburt v. Loot Ali*, 14 W. R., 339;

Alum v. Ashad Ali, 16 W. R., 138; *Kuttusheri v. Vallotit*, I. L. R., 3 Mad., 234; *Gobind v. Ram Coomar*, 24 W. R., 393.

(5) *Prem Chand v. Mokshoda*, I. L. R., 14 Cal., 201; *Indromonee v. Suroop*, 15 W. R., 395; *Ilurishore v. Joagul Kishore*, 16 W. R., 281; *Nanoo v. Jhoomuck*, 18 W. R., 376; *Balkrishna v. Moro Krishna*, I. L. R., 21 Bom., 154; *Vilttilinga v. Vilttilinga*, I. L. R., 15 Mad., 111.

(6) *Kuttusheri v. Vallotit*, I. L. R., 3 Mad., 234; *issesswar v. Brojo Kant*, 1 O. W. N., 221; *Dwarkanath v. Tara*, I. L. R., 17 Cal., 160; *Jibanti v. Gokool* I. L. R., 19 Cal., 760.

ever, alone sue if the other co-sharers are unwilling to join as plaintiffs.⁽¹⁾ But the case is of course different when a tenant has taken a lease from one of several joint landlords in respect of his own share of the holding.⁽²⁾ But apart from an agreement express or necessarily implied to pay rent separately, there was formerly no such obligation on the part of the tenant.⁽³⁾

622. Exceptions.—The section has of course no application to cases where the obligations and covenants do not pass with the property on division, nor does it apply to involuntary transfers, or to cases where third parties become owners of different portions of the property by purchase, as where a zemindar grants a portion, or *maganam* of his estate to another, which in turn passes to third parties who acquire different portions of it by purchase.⁽⁴⁾ On a similar principle, the indivisible character of a mortgage is not lost by the disruption of the mortgagee's interest into several shares.⁽⁵⁾ So on the death of the creditor his numerous heirs are only jointly entitled to enforce the right which the deceased creditor, if alive, could have singly enforced.⁽⁶⁾ In this respect both the English and Indian law depart from the rule of the Civil law under which the death of any party to the contract, whether creditor or debtor, split the right and the correlative obligation into several so that each one of the heirs of the creditor or the debtor was as of right entitled to apportionment.⁽⁷⁾ In this view of the law as many actions would become necessary as there are claimants, for, persons having distinct causes of action cannot sue jointly.⁽⁸⁾

623. The English law on the subject has been thus stated by Tindal, C.J.: "The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together, by unity of interest and unity of title; and one of them cannot distrain without joining the others in the avowry. If they cannot distrain separately, how can they separately claim a portion of the rent from a person who has received it, in the character of a trustee? It would be a great hardship on him to be exposed to three actions instead of one. But it might happen that it might have received authority from the other parceners. Inasmuch, therefore, as there has been no division of these rents, nor any agreement by the defendant to hold one-third of them separately for the plaintiff, he has no right separately to sue the defendant." ⁽⁹⁾

(1) *Pyari v. Kedarnath*, 1 L. R., 26 Cal., 409; *Pyari Mohun v. Nobin Chunder*, 3 C. W. N., 271; *Soshee v. Giris Chandra*, 1 C. W. N., 659.

(2) *Behary v. Bhut Nath*, 3 C. W. N., 214; *Unrit v. Hyder Ali* (1864), W. R., 63; *Mohammad v. Mughy*, 1 W. R., 253; *Hidayatollah v. Inderjeet*, 2 N. W. P. H. C. R., 282; distinguished in *Jankee v. Mahomed*, 1 N. W. P. H. C. R., 16.

(3) *Ganga v. Saroda*, 12 W. R., 30; *Rakhal Chunder v. Mahtab Khan*, 25 W. R., 231; *Brijokishore v. Oomasunduree*, 23 W. R., 37; *Bhykunt v. Shushkes Mohun*, 22 W. R., 526; *Haradhan v. Ram Newaz*, 17 W. R., 414; *Sree Misser v. Crowdy*, 15 W. R., 243; *Nussurut v. Abdool*, 11 W. R., 373; *Ramjoy v. Nagur Gaze*, 5 W. R., 68.

(4) *Zaminder of Ramnad v. Ramamany*, 1 L. R., 2 Mad., 234.

(5) See §§. 60 & 67 and Comm.

(6) *Kandhiya Lal v. Chander*, 1 L. R., 7 All., 313 (324), P. B.; followed in *Ahinsa Bibi v. Abdul Khader*, 1 L. R., 25 Mad., 26 (33).

(7) Pothier on "Obligations," Vol. I, Pt. II, Ch. IV, Sec. 2, Art. 2.

(8) *Smurthwaite v. Hannay* [1854], A. C., 494; distinguishing *Booth v. Briscoe*, 2 Q. B. D., 496; *Gort v. Rowney*, 17 Q. B. D., 625; *Ahinsa Bibi v. Abdul Kader*, 1 L. R., 25 Mad., 26 (33).

(9) *Decharms v. Horwood*, 10 Bing., 526 (529). The same rule prevails in America "If a covenant of general warranty be broken by the eviction of heirs of the covenantee they must jointly sue the covenantor. He is not liable to as many suits as there are heirs of his grantee." *Freeman on "Co-tenancy and Partition"* (2nd Ed.), §§ 336, 427. #

B.—Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferrer and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purpose neither religious nor charitable, to sell a field, part of such property to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

624. Analogous Law.—This section is substantially a statement of the principle deducible from the cases decided with reference to Hindu law, (1) but the section pre-supposes an actual transfer and has no application where the transaction is still inchoate. (2) Similarly a *bona fide* transferee for valuable consideration of trust-property is under the same circumstances protected by the Indian Trusts Acts. (3) Another phase of the same question is presented by section 41, *post*.

The second chapter of this Act has been divided into two sections, *viz.*, (A) and (B). Section (A) contains 33 sections (from 5 to 37) and section (B) 16 sections (from 38 to 53). Part (A) applies to both kinds of property, moveable and immoveable, but this part is exclusively confined to immoveable property. Although Chapter II has not been made applicable to Hindus, the section would naturally apply to them inasmuch as it enunciates a rule founded on Hindu law. Both the law and the language of the section is in harmony with the English cases, which throw round innocent purchasers a similar protection. (4) The mistake or ignorance of any of the parties to a conveyance of their rights in the estate will not turn to the prejudice of a *bona fide* purchaser for a valuable consideration. (5) And where a man, being already married, performed the marriage-ceremony with another, and then joined with her as his wife in assigning her property to a purchaser—although she was deceived—the assignment to the

(1) *Hunooman Persaud v. Mt. Babooes*, 6 M.L.A., 393; *Jugmohandas v. Pallonjee*, 1. L.R., 22 Bom. 1 (10); *Jamsetji N. Tata v. Kashinath*, 1 L.R., 26 Bom., 326 (336).

(2) *Jamsetji N. Tata v. Kashinath*, 1. L. R., 26 Bom., 326 (336). The rule is subject to the same restriction in England: *Societe Generale de Paris v. Walker*, 11 App. Cas., 20 (28); explained *per* Stirling J., in *Roots v. Williamson*, 38 Ch. D., 485 (493); *Powell v. London and Provincial Bank* [1893], 2 Ch. 555.

(3) S. 64, Act II of 1882.

(4) *Burgh v. Wolf*, Tot., 226; *Smith v. Rosewell*, ib., 224; *Abdy v. Loveday*, Finch. 250; *Stanhope v. Earl Varney*, 2 Eden., 81; *Pilcher v. Rawlins*, L.R., 11 Eq., 53 O.A., 7 Ch., 259; *Mumford v. Stohwasser*, L.R., 18 Eq., 556; *Sharpe v. Foy*, L.R., 4 Ch., 35; Butler's note to Co. Litt. 2906, note 1, S. 13 Story's Eq. Jur. (2nd Ed.), p. 102, S. 1502, Sud. V. & P. (14th Ed.), p. 741.

(5) *Malden v. Menill*, 2 Atk., 8.

purchaser was supported. (1) The rule enacted in the section has long been recognized in India, (2) and is now authoritatively enunciated in view of the frequent agitation of this question in connection with the right of a Hindu widow to maintenance. The section is clearly applicable and has been applied to Hindus (3) and Mahomedans in cases arising both before and since the passing of the Act.

625. Principle.—It is a recognized maxim of equity, that where the rights are equal, the condition of the party in actual possession shall prevail. (4) If, for example, the defendant has a claim to the passive protection of a court, and his claim is equal to that which the plaintiff sets up, the court will refuse to assist the plaintiff against the defendant. Thus where the trustee of a sum of stock for *T*, in pursuance of an order of the court made in a suit instituted by his *cestui que trust*, *T*, transferred what purported to be *T*'s trust funds into court, and the funds were thereafter treated as belong to *T*'s estate, and the legal estate therefore vested in the Accountant-General for the purpose of *T*'s trust, and it afterwards appeared that the trustee had provided himself with the means of paying *T*'s fund into court by fraudulently misappropriating funds which he held in trust for another *cestui que trust*, *B*. The question arose whether *B* had a right to follow the money into court as against *T*'s estate, but the court laid down that *B* had no such right, since *B*'s right or equity to follow the money was no greater than *T*'s right to retain it, and the circumstance of the legal estate being held for *T* was sufficient to create a preference in favour of *T* as against *B*. (5) But in order to confer protection in such a case, the legal title must be absolutely complete and not merely inchoate. (6) "It would be plainly inequitable," says Story, "that a party who has, *bona fide*, paid his money upon the faith of a good title, should be defeated by any creditor of the original grantor, who has no superior equity, since it would be impossible for him to guard himself against such latent frauds. The policy of the law, therefore, which favours the security of titles, as conducive to the public good, would be subverted, if a creditor, having no lien upon the property, should yet be permitted to avail himself of the priority of his debt, or defeat such a *bona fide* purchaser." (7) The same principle will be found running through several subsequent sections making provision for the protection of *bona fide* transferees for valuable consideration without notice. The section is intended to protect such a purchaser. If he acts in good faith, and after making reasonable inquiry, acquires property from a person having only limited interest therein, he cannot be subsequently ousted at the instance of the rightful owner.

If, therefore, the alienee from a Hindu widow makes *bona fide* inquiries of the existence of legal necessity, although he may be in fact mistaken,

(1) *Sturge v. Starr*, 2 My. & K., 195.

(2) *Lakshman v. Satyabalamabai*, I. L. R. 2 Bom., 494; *Mangala Devi v. Dhanath*, 4 B. L. R. (O.C.), 72; following *Prankoonwar v. Devkoonwar*, 1 Bom., 404; *Srimati Bhagabati v. Kanai Lal*, 8 B. L. R., 225; *Gauri v. Chandramani*, I. L. R., 1 All., 262; *Soudamini v. Jogeshchandra*, I. L. R., 2 Cal., 262; *Baijan v. Brij Bhookun*, I. L. R., 21 Cal., 133 P. C. A fraudulent alienation for the purpose of defeating her claims will not be supported. *Per* Sir J. Turner, V.C., in *Tidd v. Lister*, 10 Hare, 140; followed *Per* West, J., in *Lakshman v. Satyabhamabi*, I. L. R., 2 Bom., 494 (511).

(3) *Shri Beharilalji v. Bai Rajbai*, I. L. R.

23 Bom., 342; *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326; *Soorja Koer v. Nath Buksh*, I. L. R., 11 Cal., 102; *Ramanadhan v. Rangammal*, I. L. R., 12 Mad., 260, F. B.

(4) "In oequali fiere melior est conditio possidentis."

(5) *Thorndike v. Hunt*, 3 De G. & J., 563; *Newman v. Newman*, 28 Ch. D., 674; *Taylor v. Blakelock*, 32 Ch. D., 560; *London and County Bank v. Goddard* [1897], 1 Ch., 642.

(6) *Societe Generale de Paris v. Walker*, 11 App. Cas., 20 (28); explained *per* Stirling, J., in *Roots v. Williamson*, 38 Ch. D., 485 (493); *Powell v. London and Provincial Bank* [1893], 2 Ch., 555.

(7) *Eq. Jur.* (2nd Ed.), p. 246 § 381. *

he will be protected by this section. He has not to see to the application of the money.⁽¹⁾

626. The rule enacted in the section does not depend upon any peculiarity of Hindu or other laws, but is in substance the reproduction of the equitable rule which has long since been settled in England, and according to which in the absence of collusion, or fraud, or any action for administration pending, (2) the purchaser is not bound to see to the application of the purchase-money. (3) So where real estate is devised to trustees upon trust to sell for payment of debts, generally, the purchaser is not bound to see that the money is rightly applied. The same rule applies where real estate is not devised to be sold for the payment of debts, but is only charged with such payment.⁽⁴⁾ But as Lord St. Leonards observed—"people who deal with trustees raising money at a considerable distance of time, and without an apparent reason for so doing, must be considered as under some obligation to inquire and to look fairly at what they are about."⁽⁵⁾ But the mere absence of statement of the purpose for which the money obtained by the transfer was required will not make the transferee liable on the ground of the presumed knowledge that the loan was not required for a necessary purpose.⁽⁶⁾ In England a presumption is made after lapse of twenty years that the debt has been paid off, (7) and it is therefore the duty of the transferee to enquire not only about the existence and necessity of the debt but also of the time of its creation.⁽⁸⁾

627. Meaning of Words.—"Authorized only under circumstances variable" includes such circumstances as constitute legal necessity, and which vary according to the status of the person and the other surrounding circumstances. The *karta* of a Mitakshara family, a trustee, executor, a mortgagee or other person having a limited power of sale might fill the character of a person "authorized to dispose of property under circumstances in their nature variable."⁽⁹⁾ "*Alleging the existence of such circumstances.*" The transferrer must have alleged the justifying circumstances into which the transferee must have made inquiry. "*After using reasonable care . . . has acted in good faith:*" "A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not"⁽¹⁰⁾. The question, what is a "reasonable care" which the transferee is enjoined to use in prosecuting his inquiry is a question of fact dependent upon many circumstances. But it is certain that in a given situation the transferee must at least have used such precaution and diligence, as may be expected from a prudent man of the average intelligence. *

628. What Transfers protected.—The subject of persons who are authorized to transfer property only under limited circumstances has been so

(1) *Hunooman Persaud v. Mt. Babooee*, 6 M.I.A., 393; *Udai Chunder v. Ashutosh*, I. L. R. 21 Cal., 190. For English law which is similar see *Elliott v. Merryman*, Barn. Ch., 78.

(2) *Lewin on Trusts*, 506.

(3) *Elliott v. Merryman*, Barn., Ch., 78.

(4) *Ibid*; cf. now Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., C. 41), S. 36; Settled Land Act, 1882 (45 & 46 Vict., C. 38), S. 40; *Cookes v. Cookes*, 34 Ch. D., 498; *Pyne v. Phillips* [1895], W. N. 8. S. 36 of the Conv. Act, 1881, has been repealed by the Trustee Act, 1893 (56 & 57 Vict., C. 53), but it has virtually re-enacted

the same law.

(5) *Stronghill v. Austey*, 13 Ch. D., 141.

(6) *Corser v. Cartwright*, L.R., 7 H.L., 731; *West of England District Bank v. Murch*, 23 Ch. D., 138.

(7) *Per Jessel, M.R.*, in *In re Tanqueray v. Willaume*, 20 Ch. D., 480; *Sutton v. Sutton*, 22 Ch. D., 511; *Fearnside v. Flint*, *ib.*, 579.

(8) *Per Jessel, M.R.*, in *In re Tanqueray v. Willaume*, 20 Ch. D., 480.

(9) *Steph. Comm.*, p. 55.

(10) S. 3 (20), General Clauses Act (X of 1897).

fully discussed before, that it is only necessary here to invite reference to that discussion (§§ 303—329). A Hindu widow, a Hindu son or a manager, a trustee, executor or any limited owner, all are equally subject to the rule stated in the section. Transfers of all kinds whether by way of sale, mortgage or lease fall equally within its scope.⁽¹⁾ But the section being applicable to completed transfers does not extend to inchoate transactions, and which would, therefore, have to be distinguished from them. It has been held that a title by transfer is to be deemed inchoate only until all necessary conditions have been fulfilled to give the transferee, as between himself and the transferrer, a present, absolute, and unconditional right to have the transfer registered.⁽²⁾ But a still narrower view has been taken in a case in which it has been held that a transfer is not complete until everything has been done which is necessary to put the transferee into the position of the transferrer.⁽³⁾ For example, where the registration of the conveyance, or its delivery is requisite to complete the title, the transfer is not complete without registration or delivery.⁽⁴⁾ A transfer, unless it has complied with all the solemnities of law, would be incomplete for the purposes of the section although it may have so far advanced as to entitle the parties to obtain specific performance. For example, if *A*, a person authorized only under variable circumstances to sell property, agrees to sell it to *B* who enters into the contract *bona fide* and for valuable consideration which he pays to *A*, and the latter executes a conveyance, but which, however, remains to be registered. In the meantime, *B* ascertained that *A* has no power to sell, what is he then to do? It would appear that under such circumstances although he may compel *A* to register his conveyance, he has to thank his own folly if he is worsted in the competition for priority, for the section will not help him.⁽⁵⁾

629. Again, the section will not apply, if the transferrer does not allege the existence of justifying circumstances, but the parties act in ignorance. The transferee is only protected when he has been imposed upon by misleading averments, the falsity of which could not be ascertained from reasonable enquiries, nay, which his inquiry tended to establish. Once, however, he has inquired and has ascertained that the allegations of the transferrer as to the necessity of the proposed transfer are substantially true, he obtains the protection of the section, and any defect in the transferrer's powers or title does not vitiate the transfer, and neither the transferrer, nor his representatives or assigns can thereafter question it on those grounds,—not that they cannot question it on any other grounds.

Again, the rule pre-supposes at least some right to transfer in the transferrer. It has then no application to a mere *benamidar*, whose case is, however, provided for by a similar rule enacted in section 41.

630. Burden of Proof.—No transferee of immoveable property can safely take a transfer of such property without enquiring into the title of the person who is his proposed transferrer. If the latter's title is absolute, then the question of enquiry becomes immaterial. But if it was dependent upon variable circumstances, then the transferee must justify his transfer, and since

(1) *Jugmohandas v. Pallonjee*, 1 L. R., 22 Bom., 1 (10).

(2) *Roots v. Williamson*, 38 Ch. D., 485 (493); explaining *Societe, General de Paris v. Walker*, 11 App. Cas., 20 (28).

(3) *Nanney v. Morgan*, 37 Ch. D., 346 (353).

(4) *Biblewhite v. McMorine*, 6 M. &

W., 200; *Taylor v. G. I. P. Ry. Co.*, 28 L. J., Ch. 285; *Swan v. North British Australasian Co.*, 7 H. & N., 603; *Societe General de Paris v. Walker*, 11 App. Cas., 20 (28).

(5) *Societe General de Paris v. Walker*, 11 App. Cas., 20 (28); following *Shropshire Union Co. v. Reg.*, L. R., 7 H. L. 509.

the duty of making an inquiry is primarily cast by the law upon the transferee, it is for the latter to allege and prove the circumstances justifying his alienation.⁽¹⁾ But while this is ordinarily so, the question is not one capable of a general and inflexible answer, since the presumption proper to be made will vary with circumstances and must be regulated by and be dependent on them.⁽²⁾ "Thus, where the mortgagee himself, with whom the transaction took place, is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate and the motives influencing his immediate loan."⁽³⁾ On the other hand, the case may be different where the transaction has become old or the property has passed out of the hands of the transferee. The courts moreover recognize the distinction between alienations by conveyance, and those made under process of execution: "The court set aside the sales by conveyance because no justifying necessity for them had been established, and it did this, although the considerations for the sales were in some instances money raised in order to satisfy either judgment or bond debts. On the other hand, it dismissed the suit so far as it sought to recover property which had been sold under decrees of court on the ground that the son was under an obligation to pay the debts of the father, if not contracted for immoral purposes and that he had failed in this case to prove as against the purchasers under the decrees that they were so contracted."⁽⁴⁾

631. So the nature of the debt and the extent of the power possessed by

the transferor would in a great measure determine the *onus*.
What facts determine onus. Where, for example, joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. And purchasers at an execution-sale, being strangers to the suit, if they have not notice that the debts were so contracted are not bound to make inquiry beyond what appears on the face of the proceedings.⁽⁵⁾ So in a later case the same tribunal laid down: "It appears therefore from the decisions that in a case like the present, where sons claim against a purchaser of an ancestral estate, under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity."⁽⁶⁾ Even in the mortgagee's suit for foreclosure against the father, it lies upon the sons to prove their non-liability to the debt, and which may be shown

(1) *Jannuk v. Habu Raghnandan* (1861), 1 S. D. A., 213; *Raman Chetti v. Po son* (1909) 5 L.B.R. 125. *Maharaj Singh v. Balwant Singh*, I. L. R. 28 All., 508 (529)., *Bhagwat Dayal v. Debi Dayal*, I.L.R. 35 Cal. 420 (428) P.C.

(2) *Hanooman Persaud v. Mt Babooee*, 6 M. I. A., 393; *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (528).

(3) *Hunooman Persaud v. Mt Babooee* 6 M. I. A., 393.

(4) *Suraj Bunsî Koer v. Sheo Prasad*, I. L. R., 5 Cal., 148 (169, 170), P. C.

(5) *Suraj Bunsî Koer v. Sheo Pershad*, I. L. R., 5 Cal. 148 (171), P.C.: distinguishing *Muddun Thakoor v. Kuntoo Lal*, 14 B.L., R., 187. P. C.

(6) *Bhagbut Pershad v. Girja Koer*, I. L. R., 15 Cal., 717, P. C.; *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (538, 539), where the authorities are all reviewed.

by proof that the debt had been incurred for illegal and immoral purpose—the mere proof that the father had been a man of immoral and extravagant habits being insufficient⁽¹⁾. But these cases were distinguished in Allahabad on the ground that they professedly followed the Privy Council cases⁽²⁾ in which the joint ancestral property had already passed out of the joint family under sale held in execution of decrees against the father⁽³⁾. According to the view taken in Allahabad a mortgagee suing the Hindu sons on a mortgage executed by the father must at least show that he had made such reasonable inquiries as would satisfy a prudent lender that the money was required to pay off an antecedent debt or for the legal necessities of the family. ⁽⁴⁾ And the mere fact that the debt was antecedent is no answer to the plea of immorality, for if the original debt was immoral, the fact that it had been paid off by borrowing from another would not relieve the latter from making some inquiry as to the purpose of the loan. ⁽⁵⁾ And where the sons have to establish the immorality of the debt, it is not necessary that they must further show that the creditor knew of it. ⁽⁶⁾

632. Extent and Limits of Inquiry.—Before any presumption could arise under this section, it is initially incumbent upon the transferee seeking to enforce his transfer to shew that after using reasonable care to ascertain the existence of the circumstances alleged as motive for the transfer he has acted in good faith. Now such an inquiry to be of any value must naturally be made from persons who are cognizant of the circumstances of the transferor's family, and who, on the one hand, are free from prejudice or bias, and are, on the other hand, not interested in upholding the proposed transfer. Persons who expect pecuniary or other gain by the transfer or who from motives of malice or enmity are incompetent to give an unbiased version of the circumstances are not such as the transferee may resort to for information. And for obvious reasons it would be futile to rely upon the transferor's uncorroborated assurances however strongly made and howsoever strenuously supported by circumstantial details. But while the transferee is presumed to bestow reasonable care in making his inquiries he is not expected to pry into inquisitorial details unconnected with his transfer, for his inquiry must be confined to the ascertainment of only the circumstances attendant upon the transfer, and he is therefore not bound to see to the destination of the money nor can he take upon himself the officious duty of paying off an anterior debt for which the transferor is in no way responsible. In the words of the Privy Council, the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the estate. "But they (their Lordships) think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money"⁽⁷⁾. Nor, indeed, is

(1) *Chintamanrav v. Kashi Nath*, I. L. R., 14 Bom., 32; following *Jagabhai v. Vybhukhandas*, I. L. R., 11 Bom., 41; dissenting from *Jamna v. Nainsukh*, I. L. R., 9 All., 493.

(2) *Suraj Bansi v. Sheo Prasad*, I. L. R., 5 Cal., 148 P.C.; *Nanomi v. Madan Mohan*, I. L. R., 18 Cal., 21, P.C.; *Bhagwat Pershad v. Girja Koer*, I. L. R., 15 Cal., 717, P.C.

(3) *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (539 540).

(4) *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (541).

(5) *Saravana v. Muthiyammal*, 6 M. H. C. R., 371; *Maharaj Singh v. Balwant Singh* I. L. R., 28 All., 508 (542, 543).

(6) *Maharaj Singh v. Balwant Singh*, I. L. R., 28 All., 508 (544, 545).

(7) *Hunooman Persaud v. Mt. Babooee*, 6 M. L. A. 393 (424); followed on this point in *Maharaj Singh v. Balwant Singh* I. L. R., 28 All. 508 (528, 529).

it necessary that the lender should ascertain that, every pice of the money advanced by him is required for a legal necessity ⁽¹⁾. And it has been laid down in the same case that "where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause." ⁽²⁾ It may be added that in determining the question regard must be had to the fact that reasonable care must be with reference to average circumstances under normal conditions. ⁽³⁾

633. The statements of trustee made *at the time* of the transfer are statements which presumably influence the transferee's action, and but for which he may not have acted. Thus in the leading case on the subject ⁽⁴⁾, where an alienation made by the manager was questioned on the ground of impropriety, Knight Bruce, L. J., in delivering the judgment of the Privy Council, said: "It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ* and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *prima facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir; where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as in the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable" ⁽⁵⁾. And in another case in which a minor's property had been mortgaged the rule was thus re-stated by the Madras High Court ⁽⁶⁾. "That where antecedent debts are shown to have existed, it is not incumbent on a mortgagee to prove by positive evidence that they were undischarged at the date of the mortgage securing the advances, unless circumstances should appear, which raise the probability of their having been satisfied. He is not debarred the benefit of the ordinary rule throwing the *onus* of proof on the person affirming that fact of payment. Following these rules, I think that between a *bona fide* sale or mortgage for an advance made to pay off a pre-existing mortgage-claim or an unsecured debt of an ancestor, and one not made for that purpose, there is this distinction to be observed, that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so, it is

(1) *Ghansham v. Badiya Lal*, I. L. R., 24 All., 547.

(2) *Hunooman Persaud v. Mt. Babooee*, 6 M.I.A., pp. 423, 424.

(3) *Smith v. London & S. W. Ry. Co.*, L. R., 5 C.P., 98 (103).

(4) *Hunooman Persaud v. Mt. Babooee*, 6 M.I.A. 393.

(5) *Hunooman Persaud v. Mt. Babooee*, 6 M.

I. A., 393 (419, 420). "A case in the time of Sir Edward Hyde East, reported in his decisions in the second volume of *Morley's Digest* seems the foundation of this practice. (See also the case of *Brown v. Ram Kunace Dutt*, 11 S. D. A. 791.)" — *Ib.*, p. 420.

(6) *Saravana v. Muttayi*, 6 M. H. C. R., 371 (381).

incumbent on him to prove more than the court below decided to be necessary. He must give proof not only of the consideration for the sale or mortgage having been *bona fide* advanced in discharge of an antecedent debt, but also of an inquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale, or mortgage, a prudent arrangement for its discharge." (1) In another case their Lordships of the Privy Council treated a transaction "which could only be valid in the event of appropriating the payments so as to make this balance a charge upon the estate" as evidence that such an appropriation was made (2). Where the sale made by order of the Civil Court was sought to be impeached on the ground of fraud, illegality and want of consideration, it was held that *onus* of establishing the ground-impeaching the sale was clearly upon the party who sought to set it aside. (3)

634. In an Allahabad case decided since the passing of the Act, (2) Mahmud, J., declined to treat the recital in the deed of the objects of sale by itself as evidence of the necessity of the alienation. For holding this view reliance was placed on a Privy Council decision, (4) but their Lordships did not lay down any such rule, although it is true that they did not consider the evidence afforded by the recital as conclusive or even sufficient to shift the burden of proof on the other party (5). The case too was decided without reference to the section which, whatever may have been the antecedent law, clearly recognizes the evidentiary value of such recitals.

But while under the law as now constituted, the allegation made at the time of the transfer and as a motive therefor is evidence against the persons affected by the transfer, but it is in itself and apart from other evidence insufficient to create any presumption in favour of its truth. (6) Such other evidence must relate to the existence of legal necessity or at least of an inquiry into it by the transferee. Inquiry would be supererogatory where the transfer is supported by necessity. It becomes necessary only when necessity is neither apparent nor proved, in which case law protects a transferee who has taken after reasonable inquiry and in good faith. The *quantum* of evidence necessary to establish these elements must differ according to the circumstances of each case. But it may be safely asserted that the degree of precision in evidence would vary with time. For while on the one hand, greater particulars would have to be proved in support of a transfer comparatively recent, the same details cannot be expected after a lapse of time, and the court may even presume in favour of the validity of a transfer if it has not been challenged but acquiesced in by those whose interest it was to attack it.

635. Inquiry would be quite unnecessary where the sole person having title or interest to challenge the validity of the transfer has made representations, or induced a belief by his conduct in the purchaser that the transaction was unobjectionable. (7)

Inquiry when dispensed with.

(1) *Cavalry Venkatanarrianapah v. The Collector*, 11 M.I.A. 619 (636); see also *Syud Tasonwar v. Koonj Beharee*, 3 N.W.P.H.C. R., 8.

(2) *Sikher Chund v. Dul Putty*, I.L.R., 5 Cal., 363 (389).

(3) In *Subbammal v. Avudaiyammal*, I.L.R. 30 Mad. 3 (4, 5) the recitals were held to prove the necessity, there being no grounds for treating them as otherwise than *bona fide*.

(4) *Makundi v. Sarabushk* (1884), I.L.R., 6 All. 417 (421).

(5) *Rajlakhi v. Gokul Chandra*, 3 B.L.R.

57 P.C.

(6) *Lala Brij Lal v. Mt. Inda Kunwar*, I.L.R., 36 All. 187 (193) P.C.; *Rajlakhi v. Gokul Chandra*, 3 B. L. R., 57 (60), P.C. In *Subbammal v. Avudaiyammal*, I.L.R., 30 Mad. 3 (4, 5) the mere recitals were held to prove the necessity there being no ground for treating them as otherwise than *bona fide*. But in face of the judgments of the Privy Council this view is untenable.

(7) *Sarat Chunder v. Gopal Chunder* I.L.R., 20 Cal., 296 (308) P.C.

When a married woman executes a mortgage, there is no obligation on the mortgagee to inquire whether a settlement was made on her marriage⁽¹⁾.

636. Assuming then that the transferee succeeds in shewing that he had made reasonable inquiries, the next thing he has to shew is that he acted in good faith. Now a man who takes reasonable

Good faith. care to ascertain the existence of necessity generally acts in good faith, but it is not always necessarily so, for a man may ascertain the true facts and may still act *mala fide* from some ulterior motive for his own advantage. It is therefore, enacted, that the transaction should have been accomplished in good faith, that is honestly, although *per se* it may have been done negligently.⁽²⁾ But a transaction which is entered into in "good faith," may be impeached on the ground before discussed. It is therefore provided that reasonable care and good faith should both be proved, and a loan dictated by good faith but made without reasonable care would not be supported by the section. But where the creditor has acted honestly and with due caution it is immaterial that he was himself deceived.⁽³⁾

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law *B*, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property and agrees with her that, if she is dispossessed of Sultanpur *A* will transfer to her an equal area out of such several other specified villages in his possession as she may elect. *A* sells the specified villages to *C*, who buys in good faith, without notice of the agreement. *B* is dispossessed of Sultanpur. She has no claim on the villages transferred to *C*.

637. Analogous Law.—This section and sections 40, 41, and 43 are based upon the law of estoppel by which the transferees with notice are prevented from throwing off the burden on the property, of which they were presumed to be cognizant when they obtained it. In the case of gratuitous transfers the fraudulent intention of the transferrer is presumed to be conveyed to the transferee. And it is inequitable that the gratuitous transferee should consummate the fraud intended on the person entitled to maintenance. The language of this section has been animadverted upon in a Bombay case⁽⁴⁾ in which it is stated that the two parts of the section are not in harmony and that "it is quite impossible to say whether the legislature really meant a purchaser for value's right to be postponed to a maintenance-holder's right, if at the time of the purchase he had notice of her claim to maintenance, or if in addition to that the dominant intention of the transferrer, had been to defeat the

(1) *Lloyd's Banking Co. v. Jones*, 29 Ch. D., 221.

(2) So "good faith" is defined—S. 3 (20), General Clauses Act (X of 1897).

(3) *Hunooman Persaud v. Mt. Babooee*, 6 M. I. A., 393.

(4) *Per Beaman J. in Yamna Bai v. Nanabhai*, 12 Bom. L. R. 1076 (1077, 1078).

maintenance-holder's right and the vendee had been aware of that intention also." But it is obvious that the latter case is all that the rule was intended to meet; and as to this it was said: "Now, the latter case could hardly occur in practice, unless indeed the vendors had announced their intention, and it could be proved that the vendees had heard them doing so, else the Court would be left to infer from the surrounding circumstances only, and inferences of that kind would always fall far short of being irresistible, although possibly in exceptional cases Courts might deem them cogent enough to warrant discovering the intention as the true underlying fact," (1) As to this it is sufficient to state that in view of the definition of "notice" given elsewhere (2) there are other possibilities than a direct communication of one's fraudulent intention, and that as to the difficulties of proof they must attend all cases in which constructive notice plays a part.

638. Principle.—The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. The words "*with the intention of defeating such right*" in the section naturally govern all that follow those words. Given a right to receive maintenance from the profits of immoveable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of Court, is only enforceable like any other liability in respect of which no charge exists. (3)

639. Meaning of Words.—"Provision for advancement, etc." Provision for advancement is here used in the English sense. An *advancement* is a provision made by a parent for a child during the parent's life, by gift of property, to which the child would be entitled as heir after his parent's death. Provision for marriage apparently refers to the expense of unmarried Hindu female members of the family which is a charge on the inheritance. (4) "*From the profits of immoveable property*" does not merely mean that the person so entitled has only a personal right against the person in possession of such property. It means that his right is a charge upon such property. "*With the intention of defeating such right.*" Compare section 53 in which a similar language is used; it means that the primary object of the transfer was to deprive the maintenance-holder of her right. In other words the transfer was fraudulently made to defeat it (5). "*If he has notice*:" means whether actual or constructive notice, as laid down in the last paragraph of section 3, *ante* (q. v.) "*Purchaser*" means purchaser of an absolute title and nothing less. It

(1) *Per Beaman J. in Yammabai v. Nana-bai*, 12 Bom., L.R., 1078.

(2) S. 3, *ante*.

(3) *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326; following *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom. 494; *Snamalal v. Ban-na*, I. L. R., 4 All. 296 (299), F.R.

(4) Vyav. May., Ch. IV, s. iv, 38-40; Mit. Ch. I, s. vii, 3.6; Str. H. L. 166, 170, cited in *Lakshman v. Sarasvatibai*, 12 H. B. C. R. 69 (77); *Rustom Singh v. Moti Singh*, I.L.R. 18 All., 474.

(5) *Digambari v. Dhankumari*, 4 C. L. J. 476 (479, 482).

cannot mean "a person who purchases a mortgage as a mortgage, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It therefore must mean some person who purchases that which, *de facto*, is a mortgage, upon a representation made to him, and in the full belief that it is not a mortgage but an absolute sale."⁽¹⁾ And a purchaser is not a *bona fide* purchaser, if his attention being called to the infirmity of his title he makes the purchase. It is not necessary to impute any dishonesty whatever in the transaction, or any moral obliquity in his dealings in the matter. It is sufficient if, from the circumstances of the case, the intending purchaser should have been put upon an inquiry, which he may or may not make.⁽²⁾ Property in *his* hands implies that if the property passes to a *bona fide* purchaser, it would no longer be liable.⁽³⁾

"*With the intention*" implies that if, in fact, the transfer defeats such right, but nevertheless it was not made with that intention, this section would be inoperative. The word "intentionally" is an exact equivalent of the word "wilfully" of the English law.⁽⁴⁾ "*The right may be enforced against the transferee*": i.e., only against the property in the hands of the transferee, but not against him personally.

640. What Rights protected.—The rule protects three definite rights, namely: (a) a right of maintenance; (b) a provision for marriage; and (c) a provision for advancement. The nature of these rights differs according to the personal law of the persons claiming them. Thus, while the Hindu widow has a peculiar place in Hindu jurisprudence, her position bears no analogy to English or Mahomedan law.

641. As regards the nature and extent of the right of a Hindu widow to
(1) **Hindu widow's main-tenance.** maintenance, both the Mitakshara and the Dayabhaga Schools agree that a moral obligation exists on the part of a father-in-law to maintain his dependent daughter-in-law, and that the obligation ripens into a legal one as against the heir who has inherited his ancestral property.⁽⁵⁾ The ripening of the moral obligation into a legal obligation on devolution by inheritance is due to the operation of principles peculiar to the doctrines of Hindu law which regards a member into whose hands property comes by virtue of his status as a member of the family, as *quasi-trustee* for the family, and for the spiritual benefit of the deceased owner. But property acquired by a valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power of making such disposition is unrestricted, it is difficult to conceive any consistent grounds on which the devisee could be held bound by an obligation from which the testator had power to relieve him, and by bequest had actually relieved him⁽⁶⁾. And it is settled that where there is a widow having a right to be maintained out of ancestral property, a holder of such property cannot alienate it, so as to defeat her right.⁽⁷⁾ And while a Hindu is at liberty to dispose of by will his self-

(1) *Radhanath v. Gisborne & Co.*, 15 W. R. 24 (27), P. C.

(2) *Ib.*

(3) *Dharam Chand v. Janki*, I. L. R., 5 All 398.

(4) *Sarat Chunder v. Gopal Chunder*, I. L. R. 20 Cal., 296. (341) P. C.; following *Free-man v. Cooks*, I. L. R. 2 Exch. 654.

(5) *Siddessury v. Janardhan*, I. L. R., 29

Cal., 557.

(6) *Per Betty J.*, in *Bai Parvati v. Tarwadi*, I. L. R., 25 Bom., 263 (267, 268).

(7) *Mt. Lalli v. Ganga* (1875), N. W. P. H. C. R., 261; *Jamna v. Macbul*, I. L. R., 2 All., 315; *Devi v. Gunwabat*, I. L. R., 22 Cal., 410; *Becha v. Mothina* (1900), A. W. N., 210.

acquired property he cannot alien it so as to override his widow's claim to maintenance. (1)

642. But where the property alienated is ancestral the case is quite different, for in such a case the widow has a right which she may, subject to the rules to be presently discussed, enforce against the property in the hands of transferees. (2) The right to maintenance does not rest upon contract. It is a liability created by the Hindu law and arises out of the jural relation of the Hindu family. (3) But of course, the right may also emanate from a contract where the holder of an impartible Raj declared, "I have agreed to give you through the Collector every month Rs. 300 on account of the maintenance of yourself, your younger brothers, three in all, and the rest of your family"—in which case the covenant will be enforced and held to embrace not only the three brothers but also their issue. (4) A right of maintenance once created cannot be withdrawn except for misconduct or any other sufficient reason. A gift of *stridhan* is not equivalent to a provision for maintenance. (5) And so the fact that the wife had shared her husband's estate and supported herself by trading is insufficient to negative her right if she be destitute. (6) Hence if she has sufficient property of her own to enable her to maintain herself, she has then no right to claim maintenance. (7) Her right to maintenance out of her husband's estate is not absolute, or in the nature of an inheritance, but it is one which accrues from time to time according to the wants and exigencies of the widow. (8) But her right to maintenance is contingent upon her relatives, having succeeded to her husband's property. If her husband had a vested interest in the ancestral property, his widow is entitled to be maintained by the surviving co-parceners, (9) whether she is separated from them or not. (10) No limitation precludes her from asserting her right. A statute of limitation might do much harm if it should force widows to claim their strict rights and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable. (11) But such a right may be waived. (12) A Hindu widow leaving her house against the direction of her husband, (13) or for the purpose of unchastity or for any other improper purpose forfeits her right. (14) If she leaves her husband's house not for immoral purposes, her right remains in abeyance, but it is not extinguished.

(1) *Krishna Rao v. Bhaqwant Rao*, 2 Bom. L. R., 1082.

(2) *Mt. Lalti Kuar v. Ganga* (1875), N. W. P. H. C. R., 261 F.B., *Jamna v. Macbul*, I. L. R., 2 All., 315; *Becha v. Mothina*, I. L. R., 23 All., 86; *Devi Pershad v. Ganwanti*, I. L. R., 22 Cal., 410.

(3) *Sidlingapa v. Sidava*, I. L. R., 2 Bom. 624, F. B.

(4) *Lakshmi Narayana v. Durga Madhawa* I. L. R., 16 Mad., 268.

(5) *Joytara v. Ramhari*, I. L. R., 10 Cal., 638.

(6) *Bai Lakshmi v. Lakshmidas*, 1 B.H.C. R., 13.

(7) *Ramawati v. Manjhari*, 4 C. L. J., 74.

(8) *Narayanrao v. Ramabai*, I. L. R., 3 Bom., 415; *Gokibai v. Lakshmidas*, I. L. R., 14 Bom., 490; *Ramawati v. Manjhari*, 4 C. L. J. 74 (78).

(9) *Devi Persaud v. Gunwanti*, I. L. R., 22 Cal., 410 (*Mitakshara Case*).

(10) *Timmappa v. Parmeshriamma*, 5 B.H. C. R., 135; *Sreeram v. Puddomookhee*, 9 W. R., 152; *Ahollya v. Lukhmee*, 6 W. R.

37; *Surnomoyee v. Gopaul*, Marsh., 497, *Chandrabhagabhai v. Kashinath*, 2 B. H. C. R., 341; *Umrit v. Kidernath*, 3 Agra, 1827; *Rango v. Yamunabai*, I. L. R., 3 Bom., 44 (but the withdrawal must be reasonable; *Narayanrao v. Ramabai*, I. L. R., 3 Bom., 415, P. C.; *Ramchandra v. Sagunabai*, I. L. R., 4 Bom., 261; *Pinthee Singh v. Ram Raj Koer*, 12 B. L. R., 238, P. C.; *Siddesswree v. Janardhan*; 6 C. W. N., 530 (542); *Ramawati v. Manjhari*, 4 C. L. J., 74.

(11) *Narayanrao v. Ramabai*, I. L. R., 3 Bom., 415, P. C.

(12) *Ram Lal v. Tara Soondary* (1864), W. R., 3.

(13) *Girianna v. Bonama*, I. L. R., 15 Bom., 236 (but she may even then leave for just cause); *Mulji v. Bai Ujam*, I. L. R., 13 Bom., 218; *Ramchanara v. Sagunabai*, I. L. R., 4 Bom., 261; *Gokibai v. Lakshmidas*, I. L. R., 14 Bom., 490.

(14) *Pirthee Singh v. Raj Koer*, 12 B. L. R., 238 P. C.; *Seddesswary v. Janardan*, I. L. R., 29 Cal., 557.

The right of a Hindu widow to maintenance includes her right to residence in the ancestral house, and to which she would be entitled as against a transferee for valuable consideration, with notice of her right, and which should put him upon enquiry, as to whether and how her right has been satisfied, and if not, whether the transfer to him has not been negotiated with the intention of defeating her claim. This would become all the more imperative if in assertion of her right the widow is actually in residence therein.⁽¹⁾

643. The right of a Hindu wife to maintenance is much more circumscribed by restrictions than the right of a Hindu widow.

(2) **Hindu wife.** A Hindu wife has no right to live apart from her husband, unless she is driven to it by his misconduct, cruelty, ⁽²⁾ as distinguished from a mere neglect or even unkindness, ⁽³⁾ or other justifying cause. ⁽⁴⁾ His marrying a second wife is, however, not such a cause. ⁽⁵⁾ But if he keeps a Mahomedan mistress she has then good cause for leaving him. ⁽⁶⁾ A Hindu abandoning his wife on conversion to the Mahomedan faith and marrying a Mahomedan wife is not on that account exempt from his liability to maintain his Hindu wife. ⁽⁷⁾ Chastity is, of course, the necessary condition of the continuance of the right both in the wife ⁽⁸⁾ and in concubine ⁽⁹⁾ or in the widow, ⁽¹⁰⁾ unless the unchastity is condoned. ⁽¹¹⁾ But where the funds are too small to permit of a separate allowance, the courts have decreed possession of a portion of the family lands, not exceeding one-third, ⁽¹²⁾ that being usually the maximum extent of her right, in her husband's estate. ⁽¹³⁾

644. The case of a daughter presents some analogy to the right of a wife.

(3) **Daughter.** Living apart from her father for no sufficient cause disentitles a daughter to claim maintenance. ⁽¹⁴⁾ But under Hindu law only unmarried daughters have a right of maintenance against their father. The married daughters must seek their maintenance from their husbands' family. If this provision fails, and the widow daughter returns to live with her father or brother, there springs up a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs. ⁽¹⁵⁾

There is no distinction between the rights of maintenance of a Hindu widow under the Bengal and under the Mitakshara law. ⁽¹⁶⁾

(1) *Yannabai v. Nanabhai*, 12 Bom.L.R. 1075 (1079).

(2) *Matangini v. Jogendra*, 1 L. R., 19 Cal. 84.

(3) *Sitanath v. Hainabutty*, 24 W.R., 377.
(4) *Kulyanessuree v. Dwarkanath*, 6 W. R., 116; *Nitje Laha v. Soondaree*, 9 W. R., 475; *Sudlingapa v. Sidava*, I.L.R., 2 Bom., 634.

(5) *Virasvami v. Appasvami*, 1 M.H.C.R., 375.

(6) *Lala Gobind v. Doulat*, 6 B. L. R. (A. C.), 85.

(7) *Mansha v. Jwan*, I.L.R., 6 All., 617; *Surampalli v. Surampalli*, I.L.R., 31 Mad., 338.

(8) *Muttammal v. Kamakshy*, 2 M.H.C.R. 337; *Sikki v. Vencatasamy*, 8 M. H. C. R., 144; *Kandasami v. Murugammal*, I. L. R.,

19 Mad., 6.

(9) *Yashwantrav v. Kashi Bai*, I.L.R., 12 Bom., 26.

(10) *Kasturbai v. Shivajiram*, I. L. R., 3 Bom., 372; *Pirthee Singh v. Raja Koor*, 12 B.L.R., 238 P.C.

(11) *Illata v. Illata*, 1 M.H.C.R., 372.

(12) *Godavaribai v. Sagunabai*, I.L.R., 22 Bom. 52.

(13) *Ramabai v. Trimbak*, 9 B. H. C. R., 283; *Adhibai v. Cursundas*, I. L. R., 11 Bom., 199.

(14) *Illata v. Illata*, 1 M.H.C.R., 372.

(15) *Bai Mangal v. Bai Rukhmini*, I. L. R., 23 Bom., 291; *Mokhoda v. Nand Lall*, I. L. R., 27 Cal., 555.

(16) *Siddessury v. Janardhan*, I. L. R., 29 Cal., 557.

645. Under Hindu law a concubine gets no right of maintenance against her paramour, unless, having been kept continuously till his death, it can be said that the connection had become permanent. (1) It is only on his death that his estate in the hands of those who take it becomes liable for maintenance. (2) During his life-time he is under no legal or moral obligation to provide for her maintenance, as indeed, it is open to her to terminate the connection at any time. (3) A discarded concubine has no right to maintenance. (4) The right is subject to continued continence. (5) The son is not bound by the gift made to her by his father in consideration of past cohabitation. (6)

646. Under the Mitakshara law the right of a son's widow to maintenance against her husband's father depends upon whether (5) **Son's widow.** the father and son were joint in estate, and whether any joint estate was left by the son burdened with the payment of such maintenance. (7) But while a son's widow has no legal claim for maintenance against self-acquired property in the hands of her father-in-law, still when such property devolves upon his heirs, the daughter-in-law has a claim against it in their hands for maintenance if her husband had lived in union with his father (8).

647. A son is bound to maintain his aged mother, whether or not he has inherited property from his father. (9) The right (6) **Mother.** of the grandmother would appear to stand on a similar footing. (10) But a step-son is under no obligation to maintain his step-mother. (11)

648. There is no obligation on the part of a Hindu or Jain father to maintain a grown-up son, out of his self-acquired property. (12) (7) **Son.** But having a right to a share in the ancestral property, his right to maintenance there-out is a matter of course, a son whether adopted or begotten being treated alike in this respect. (13) But the grandson of the holder of an impartible Raj is not entitled to maintenance. (14)

(1) *Sikki v. Venkatasamy*, 8 M. H. C. R., 144; *Khemkor v. Uma*, 10 B. H. C. R., 391.

(2) *Ningareddi v. Lakshmawa*, I. L. R., 26 Bom., 163; *Vrandavandas v. Yamunabai*, 12 B. H. C. R., 229.

(3) *Ibid.*

(4) *Ramanarasu v. Buchamma*, I. L. R., 23 Mad., 282.

(5) *Yashwantrao v. Kashibai*, I. L. R., 12 Bom., 26.

(6) *Ningareddi v. Lakshmawa*, I. L. R., 26 Bom., 163 (169).

(7) *Ruijamoney v. Sibchunder*, 2 Hyde., 103; *Khetramani v. Kashinath*, 2 B. L. R. (A. C.), 15; *Umacharan v. Nitambini*, *ib* (S.N.), 11; *Hema v. Ajoodhya*, 24 W.R., 474; *Kalu v. Kashibai*, I. L. R., 7 Bom., 127; *Ammakannu v. Appu*, I. L. R., 11 Mad., 1 considered in *Rangammal v. Echammal*, I. L. R., 22 Mad., 305; *Janki v. Nand Ram*, I. L.

R., 11 All., 194.

(8) *Yamunabai v. Manubai*, I. L. R., 2 Bom., 608.

(9) *Subharayana v. Suphakka*, I. L. R., 8 Mad., 236; *Kedar Nath v. Hemangini*, I. L. R., 13 Cal., 336; *Amrita Lal v. Manick Lal*, I. L. R., 27 Cal., 551.

(10) *Pudummookce v. Rayeemonee*, 12 W. R., 409; *Venkatammal v. Audyappai*, I. L. R., 6 Mad., 130.

(11) *Bai Dayd v. Natha*, I. L. R. 9 Bom., 279; Cf. *Sivananjanja v. Meenakshi*, 5 M.H. C. R. 377.

(12) *Premchend v. Hulas Chand*, 4 B.L.R., (A. C.) 23 *Ammakannu v. Appu*, I. L. R., 11 Mad., 91.

(13) *Ayavu v. Niladatchi*, 1 M.H.C.R., 45; *Dawani v. Ambabay*, *ib.*, 393.

(14) *Nilmoney v. Hingu Lal*, I. L. R., 5 Cal., 256.

649. As regards illegitimate children the Mitakshara law recognizes their right, (1) but while in the regenerate classes they have no part in the family inheritance, illegitimate children of the sudra caste can both inherit and claim maintenance. (2)

(8) **Illegitimate children.**

650. Mohamedan Law.—Under Mahomedan law a wife is entitled to maintenance during the continuance of the marriage, (3) but until there has been an ascertainment of the rate at which maintenance is payable, no right to maintenance accrues to a wife on which she can found a suit. (4) A widow's claim for dower is not a charge on her husband's property, but ranks on a par with ordinary debts. (5) A Muhammadan widow obtained against the other heir of her deceased husband, a decree for her dower payable out of the estate of the deceased and in execution thereof attached certain property of the deceased in the hands of the heir. A creditor of the heir having obtained a money decree against the heir for his personal debt, subsequently attached the same property in execution of that decree. It was held that, although the widow could not in virtue of her decree for dower claim a charge on any specific property of her late husband, her decree, for dower was entitled to priority over the decree against the heir for the heir's personal debt, nor was the creditor of the heir entitled to the benefit of the provisions of section 295 of the Code of Civil Procedure. (6)

The father is bound to maintain his children. who on their part are bound to maintain their parents, if old and infirm, and unable to support themselves. (7)

The Code of Criminal Procedure also provides for the maintenance of wives and children, but an order passed thereunder, can create no charge. (8)

651. Provisions for Advancement.—The clause relating to provisions for advancement is clearly intended to apply to persons subject to English law. Such provisions are unknown amongst the people of India. But it is quite customary to make a provision for the marriage of unmarried maidens, in which case the rule enunciated in the section would apply. **Provision for marriage.** A provision for marriage is hardly distinguishable from a right of maintenance in its legal incident.

652. Maintenance whether a Charge.—It is clear that this section protects persons who have a right to receive maintenance, etc., from the profits of immoveable property. But it does not protect a transferee for consideration, when the immoveable property transferred has already been charged by a decree

(1) *Parichat v. Zalim Singh*, 4 I.A., 165; *Anantihaya v. Vishnu*, I.L.R., 17 Mad., 160; *Chuturaya v. Saheb*, 7 M.I.A. 18; *Balwant Singh v. Roshen Singh*, I.L.R., 18 All., 253 O.A.; *Roshan Singh v. Balwant Singh*, I.L.R., 22 All., 191 P.C.; *Sakharam v. Ram*, 1 B.H.C.R., 191; *Omrao v. Man Koonwer*, 2 Agra, 136; *Ghana Kanta v. Gereli*, I.L.R., 32 Cal., 479.

(2) *Inderan v. Ramasawmy*, 13 M.I.A., 141; *Kuppa v. Singaravelu*, I.L.R., 8 Mad., 325 (only maintenance claimed); but in *Ranoji v. Kandoji*, I.L.R., 8 Mad., 537 (563), a right to a share was denied against the co-parceners.

(3) *Kolashun v. Didar*, 24 W.R. (Cr.), 44; *Abdool v. Zabunnessa*, I.L.R., 6 Cal., 631; *In re Muddun*, I.L.R., 8 Cal. 736.

(4) *Mahamed v. Museehooddeen*, 2 N.W.P., H.C.R., 173.

(5) *Ameer Ammal v. Sankaranarayanan*, I.L.R., 25 Mad., 658.

(6) *Bhola Nath v. Magbul-un-nissa*, I.L.R., 26 All., 28; distinguishing *Yasin Khan v. Muhammad Yar Khan*, I.L.R., 19 All., 505; following *Bazagat Hossein v. Dool Chand*, I.L.R., 4 Cal., 402 P.C.; *Kindersley v. Jervis*, 22 Beav., 1.

(7) 1 Hedaya, p. 408.

(8) S. 488, Act V of 1898.

of court in favour of a Hindu widow for her maintenance. The fact that the maintenance claimed accrued subsequent to the transfer does not affect the liability of the property to be sold in execution of a decree for the maintenance so claimed. (1) But a mere claim for maintenance is not a charge upon immoveable property, (2) and it is only when it is not specifically charged on some property that the rule here enacted comes into play.

653. The earlier authorities on the point were, however, by no means consistent. For in some cases it was held that the right was a charge on the property notwithstanding its alienation by the heir to a stranger. (3) But this view was subsequently abandoned, it being held that the charge does not avail against all the world irrespective of notice, and that while it may be enforced against the heir or a volunteer, (4) it cannot be enforced against a *bona fide* purchaser without notice. Any other position would be clearly untenable. According to the Mitakshara law (5) while sons must, from the moment of their father's death, be regarded as owners of the property, the widow has no proprietorship in the estate before its partition, but she has an equity to a provision which the court will enforce to guard her against attempted fraud. The debts of the deceased owner take precedence of the maintenance of the widow. The estate is properly applied, in the first instance, by the sons as managers in payment of such debts. By a sale of the property the sons cannot evade a personal liability to provide for the widow. A fraudulent alienation for the purpose of defeating her claims will not be supported, but the particular assignee for value acquires a complete title. In the case of a widow of an ordinary co-parcener as against the surviving members of the joint family; it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion and in good faith. If there is an ample estate left, out of which to provide for the widow, or, if knowing of a proposed sale, she does not take any step to secure her own interest, no imputation of bad faith, or of abetment can be made against the purchaser of a portion of the joint property. If the widow, on the other hand, is not accepting support from the co-parceners, she if lives apart, and if the estate is small and insufficient, it is the vendee's duty, before purchasing to inquire into the reason for the sale, and not by a clandestine transaction to prevent the widow from asserting her right against the intending vendor. It is in this connection that the doctrine of notice becomes of importance. The knowledge of collateral rights created by agreement, in equity frequently qualifies those acquired by a purchaser. (6)

(1) *Kuloda v. Jogeshwar*, 1 I. L. R., 9 Cal., 194.

(2) *Beer Chunder v. Raj Coomar*, 1 I. L. R., 9 Cal., 537; *Bhagirathi v. Anantha*, 1 I. L. R., 17 Mad., 268.

(3) *Heera Lall v. Konsillah*, 2 Agra, 42; *Ramchurn v. Jussoda*, ib., 134; *Ramchandra v. Savitribai*, 4 B. H. C. R. (A. C.), 73; *Anund Moyee v. Gopal Chunder* (1864), W. R., 310; *Khukroo v. Jhoomuck Lall*, 15 W. R., 263; *Tarunginee v. Chowdry*, 20 W. R., 196; *Gunga v. The Administrator-General*, 2 I. J. (N. S.), 124; cited per Jackson, J., in *Adhiranee v. Shona*, 1 I. L. R., 1 Cal., 365 (474); *Mangala v. Dinanath*, 4 B. L. R. (O. C.), 72; following *Prankoonwar v. Devkoonwar*, 1 Bom., 404; followed in *Srimatti v. Kanailal*, 8 B. L. R., 225; *Gauri v. Chandramani*, 1 I. L. R., 1 All. 262.

(4) *Subhramania v. Katiani*, 7 M. H. C. R., 226.

(5) *Lakshman v. Sarasvatibai*, 12 B. H. C. R., 69; *Bhagabati v. Kanai Lall*, 8 B. L. R., 225; *Nistarini v. Mahkun Lall*, 9 B. L. R., 11; *Juggernath v. Odhiranee*, 20 W. R., 126; *Adhiranee v. Shona Malee*, 1 I. L. R., 1 Cal., 365; *Lakshman v. Sattiyabhamabai*, 1 I. L. R., 2 Bom., 494; *Dalsukhrum v. Lallubhai*, 1 I. L. R., 7 Bom., 282.

(6) *Leech v. Schweder*, L. R., 9 Ch., 463 (475), in which Mellish, L. J., says: "Where the right comes into existence by covenant, the burden does not, at law, run with the servient tenement; but equity says that a person who takes it with notice that a covenant has been made shall be compelled to observe it;" *Goluck Chunder v. Vohilla*, 25 W. R., 100.

654. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists, though equity as between the vendee and the vendor will make the property retained by the latter primarily answerable. Whether such a claim by a widow against the estate of her deceased husband in the hands of a purchaser is enforceable or not, does not depend upon whether the remainder of the estate in the hands of the heir has been exhausted. What was honestly purchased is free from her claim for ever. What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first. The relations of the parties are determined once for all at the moment of the sale. There is no authority for the doctrine which makes the claim of widows not entitled to a share of property, in case of partition, a real charge on the inheritance, and ranks the claim of widows who are so entitled as a mere moral obligation. In all cases it is a claim to maintenance merely, not interfering, so long as it has not been reduced to certainty by a legal transaction, with the right of the actually participant member to deal with the property at their discretion, provided this dealing is honest and for the common benefit. The reduction of the number of surviving co-parceners to a single person makes no difference in the widow's legal positions. The rights and obligations of the original co-parceners fall at last to the sole survivor. The widows must be maintained by him out of the property, but he may still deal with the estate at his discretion in the absence of actual fraud or of a decree which has converted the claim into an actual right *in rem*. The purchaser from him takes a perfectly good title, and one which, if good at the time, cannot be impaired by subsequent changes in the circumstances of the family.⁽¹⁾

655. Claim is not a Charge.—The law in this respect is the same in England, according to which, a liability for debts does not constitute a charge on lands before a judgment is obtained against the heir of a deceased, and ranks subsequent to any alienation, even equitable, to a *bona fide* purchaser or mortgagee, because this liability being a creation of the law can extend no further than its clearly defined scope; and a debt is not there regarded as binding the debtor's conscience so as to make it inequitable to deal with his property as he can ⁽²⁾ (§ 579). It is now settled that a person entitled to maintenance out of the family property, does not on that account acquire any lien over it, so as to be binding upon a *bona fide* purchaser with or without notice. For, if otherwise, such a doctrine would equally invalidate a sale made by the husband himself, as a wife's maintenance is even a stronger obligation than that of maintaining a widow. In fact, the Madras Sudder Court did carry out the principle to that full extent, by holding that a sale of property made by a husband was invalid, where nothing was left for the maintenance of his wife. ⁽³⁾ If

(1) *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom., 494 (*Per West J.*, at p. 500); followed in *Shri Beharilalji v. Bai Rajabai*, I.L.R., 23 Bom., 342; *Bai Mangal v. Bai. Rukhmini*, *ib.*, 291 (1934); *Ashutosh v. Lukhmoni*, I.L.R., 19 Cal., 139 F.B. (as to future maintenance being recoverable by the same decree); *Digambari v. Dhan Kumari*, 4 C.L.J., 476; *Ram Kunwar v. Ram Dai*, I.L.R., 22 All., 326; *Shamlal v. Banna*, I.L.R., 4

All., 296 F.B.; *Kalpagaathachi v. Ganapathi*, I.L.R., 3 Mad., 184 (190, 191); *Ramanada v. Rangammal*, I.L.R., 12 Mad., 260 (269) F.B.

(2) *British Mutual Investment Co. v. Smart*, L.R., 13 Ch., 567; *Benham v. Keane*, 13 L.J. Ch., 129.

(3) *Lachchanna v. Bapanamma*, Unrep. Mad. No. 230 of 1860.

this had been held it would follow that the purchaser must have notice, not merely of the existence of a charge actually created and binding on the estate, but also of a bare right to maintenance, that is, of the existence of persons who did or might require to be maintained, and from which it is evident that an estate could never be purchased as long as there was any person living, whose maintenance was, or might become, a charge upon the property. But, of course law could not countenance such an absurdity.

656. The rule then must be limited to a decree,⁽¹⁾ or a specific agreement creating a charge,⁽²⁾ or notice of the existence of a claim likely to be unjustly impaired by the proposed transaction.⁽³⁾ It is not essential that the claim should have been reduced to a money value, though if it is, it would be a point in its favour.⁽⁴⁾ In cases of this kind it would appear that the question will always be: (i) Was the vendor acting in fraud of a person's claim to maintenance? (ii) Was the purchaser acting with notice, not merely of her claim, but of the fraud which was being practised upon her claim? As was observed by West, J., in a case already before noticed: "If the heir sought to defraud her, he could not, by any device in the way of parting with the estate, or changing its form, get rid of the liability which had come to him along with the advantage derived from his survivorship; and the purchaser—taking from him with reason to suppose that the transaction was one originating not in an honest desire to pay off debts, or satisfy claims for which the estate was justly liable, and which it could not otherwise well meet, but in a desire to shuffle off a moral and legal liability—would, as sharing in the proposed fraud, be prevented from gaining by it, but if, though he knew of the widow's existence and her claim, he bought upon a rational and honest opinion that the sale was one that could be effected without any furtherance of wrong, he has, as against the plaintiff, acquired a title free from the claim, which still subsists in full force as against the recipient of the purchase-money."⁽⁵⁾ The effect of the rulings then appears to be that in order that the claim for maintenance may avail against the purchaser, it is necessary, not only to prove that he had notice of such claim, but only the absence of *bona fide* on his part in purchasing the property.⁽⁶⁾ But this, however, is by no means clear from the illustration appended to the section.

657. Evidence of Intention to defeat Maintenance.—In the case of a volunteer the question of intention is immaterial, for a gratuitous transferee is independently of notice of fraud liable to a claim that may be made against the estate which he has taken. The right is accordingly a charge on the heir's estate.⁽⁷⁾ And as regards a transferee for valuable consideration the right cannot be enforced against him, if he had no notice of the right, although the transfer was made with the intention of defeating the right. It would appear from the language of the section that a condition precedent to the enforcement of the right against the transferee in all cases is that the

(1) *Mayne's Hindu Law*, §. 420.

(2) *Hiralal v. Mt. Kousillah*, 2 Agra, 42; *Abadi v. Asa*, ib., 162; *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326.

(3) *Lakshman v. Satyabhamabai*, I. L. R., 2 Bom., 494 (524); *Kalpagathachi v. Ganapathi*, I. L. R., 9 Mad., 184; *Mahalakshamma v. Venkatramamma*, I. L. R., 6 Mad., 83; *Arundava v. Gopalakrishna* (1909), 5 M.L.T. 142.

(4) *C. F. Mana v. Karnavan* I. L. R. 30

Mad. 203 (206).

(5) *Lakshman v. Satyabhamabai*, I. L. R., 2 Bom., 494 (524); *Shambal v. Banna*, I. L. R., 4 All., (296, 299), F. B.; *Soorja Koer v. Nath Buksh*, I. L. R., 11 Cal., 105; *Digambari Devi v. Dhan Kumari*, 10 C. W. N., 1074.

(6) *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326; *Shri Beharilalji v. Bai Rajbai*, I. L. R., 23 Bom., 342.

(7) *Subbramaniam v. Kaliani*, 7 M. H.C. R., 226.

transferrer has acted in fraud of the person entitled to the right. In this view the words "and such property is transferred with the intention of defeating such right" govern all that follows these words. Given a right to receive maintenance from the profits of immoveable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right.

658. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. Something more than mere notice of the right must then be proved against the transferee. Mere notice is insufficient. It must, moreover, be established that the transfer was made in bad faith, that is, with the intention of defeating the right. The reason for such a rule is stated to be the nature of the widow's right to receive maintenance, which being a right of an indefinite character, unless made a charge upon property, is only enforceable like any other liability in respect of which no charge exists. A right of such a nature should not equitably be enforced against a transferee for value unless the transfer was made in fraud of the right of maintenance. (1) Where the purchaser takes with notice of the fraud, he is, of course, in a worse position. (2) The fact that there is other property from which the claim may be satisfied does not afford the transferee otherwise liable any protection, for, as West, J., observed in a case before noticed: "What was honestly purchased is free from her claim for ever: What was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced is liable to her claim from the first." (3) A purchaser of a house in which the widow had a right of residence and of which she was consequently in possession, cannot dispossess her if he had purchased with notice of her right, although *mala fides* had not entered into the transaction. (4) Such a right is distinguishable from a right of maintenance in that it is not indefinite as to the specific property to which it is referable, and as the residence of Hindu females in family houses is a fact well-known in this country, a purchaser is held not entitled to eject her, unless he showed that the sale bound that interest. (5) So if *A* obtain a personal decree against *B* for maintenance, in execution of which a portion of the family property is sold and purchased by *C* with notice that the widow claimed a right to recover maintenance from the family property, *A* cannot follow the property in the hands of *C*, who being a purchaser in a sale held for the satisfaction of a family debt, would not be affected by any notice on the part of the widow. (6)

659. Decree or Charge for Maintenance.—As soon as the right is fixed and charged upon the estate by a decree or by agreement, it becomes

(1) *Per Banerji & Aikman, JJ.*, in *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326 (328, 329); *The Bhartpur State v. Gopal Dai*, I. L. R., 24 All., 160; *Soorja Koer v. Nath Baksh*, I. L. R., 11 Cal., 102; *Digambari Debi v. Dhan Kumari*, 10 C. W. N., 1074.

(2) *Shri Beharilalji v. Bai Rajbai*, I. L. R., 23 Bom., 342; *Ram Kunwar v. Ram Dai*, I. L. R., 22 All., 326 (328).

(3) *Lakshman v. Satyabhamabai*, I. L. R., Bom., 494 (530); followed in *Shri Beharilalji v. Bai Rajbai*, I. L. R., 23 Bom., 342 (347).

(4) *Dalsukhram v. Lallubhai*, I. L. R., 7 Mad., 82; following *Goluk Chunder v. Ohilla*, 25 W. R., 100; *Mangala v. Dinanath*, 4 B. L. R. (O. C.), 72; *Bhagabati v. Kanailal*, 8 B. L. R., 225; *Manilal v. Bai Tara*, I. L. R., 17 Bom., 398; *Nana v. Ram* (1886), B. P. J., 252.

(5) *Ramanadan v. Rangammal*, I. L. R., 12 Mad., 260 (272), F. B.; cf. *Jogendra v. Fulkumari*, I. L. R., 27 Cal., 77 (91).

(6) *Soorja Koer v. Nath Buksh*, I. L. R., 11 Cal., 102 (105).

enforceable against whosoever's hand it may be—even against a purchaser with or without notice of the charge. (1)

660. A decree for maintenance once passed is declaratory of a right and may be executed for the payment of future maintenance. No fresh suit is necessary. (2) A decree creating a charge for maintenance should specify the property on which the charge has been created. But the fact that the decree is in this respect defective, and does not specify the property by metes and bounds, does not render the decree too vague for execution, if the intention to create the charge is clear and the property can be otherwise identified. (3) A decree for maintenance creating a charge is not a mere personal decree, but binds the representatives of the family as well, unless they can avoid it by shewing that the consideration thereof was illegal or immoral. A decree made against the father may then be executed against the sons, though the latter were not actually parties to it. (4) Apart from a decree a charge for maintenance may be created in any of the other ways known to the Law. (5) So where an allowance had been enjoyed for more than three-quarters of a century, and had been received during all that time out of certain land with the acquiescence of successive holders, the court would justifiably presume that the allowance was charged on the land. (6)

661. Creditor and Debtor.—There is some analogy between the right which has been before discussed and the right of the creditor to follow the property of his deceased debtor. The unsecured creditors of a deceased person have no charge on the inheritance (§574). If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors. (7) Indeed, in this respect the right of a person to maintenance may be regarded as a debt falling into the general category of a right of a creditor against his debtor's property as to which it is agreed that the creditor cannot follow the property in the hands of a stranger, unless the latter is shown to have had notice of the anterior debts and that the purchase-money was not intended to be applied to their liquidation. (8) A settlement of his property made by the settler cannot therefore be questioned by his creditors except on the ground of fraud. (9) If the creditor has in any way lent himself to collusion or fraud he cannot afterwards recover. (10) But a purchaser from a Hindu widow must see that she is exercising her power of sale strictly, or at least satisfy himself that a sufficient cause for alienation exists. "If the defendants told the widow that the claims, in consideration of which she made the conveyance to them, were barred by limitation, then clearly she has joined

(1) *Sham Lal v. Bama*, I. L. R., 4 All., 296, F. B.; *Ramkumar v. Rani Dai*, I. L. R., 22 All., 326; *Maina v. Bachi*, I. L. R., 23 All., 655; *Kuloda Prosad v. Jageshwar*, I. L. R., 26. Cal., 194 (196).

(2) *Ashutosh v. Lukhimoni*, I. L. R., 19 Cal., 139, F. B.

(3) *Minakshi v. Chinnappa*, I. L. R., 24 Mad., 689 (692).

(4) *Id.*, 694.

(5) S. 100, post.

(6) *Mana v. Karnavan*, I. L. R., 30 Mad., 203 (206).

(7) *Veerasokha v. Papiiah*, I. L. R., 26 Mad., 792; *Haji Saboo v. Ally Mahomed*, 6 Bom. L. R., 1195.

(8) *Laksman v. Sarasvatibai*, 12 B. H. O. R., 69 (78); *Haji Saboo v. Ally Mahomed*, 6 Bom. L. R., 1195 (1138); *Greender v. Mackintosh*, I. L. R., 4 Cal., 897; *Kasmunissa v. Nilratna*, I. L. R., 8 Cal., 86; *Oriental Bank Corporation v. Gobindlall*, I. L. R., 10 Cal., 73, (789); *Arunachala v. Ramasamy*, I. L. R., 6 Mad., 403; *Veerasokha v. Papiiah*, I. L. R., 26 Mad., 792; *Bazayet v. Doolichand*, I. L. R., 4 Cal., 402; *Corser v. Cartwright*, L. R., 7 H. L., 731; *British Mutual Investment Co. v. Smart*, L. R., 10 Ch. 567 (577); cf. *per Hall V. C.* *ib.*, p. 569 note.

(9) *Burjorji v. Dhunbai*, I. L. R., 16 Bom. L.

(10) *Kanagappa v. Sokkalinga*, I. L. R., 15 Mad., 362.

with them in a scheme for depriving the judgment-creditors of their due. If they did not tell her, they deprived her by their silence when as near relatives getting an advantage, they were bound, in dealing with an ignorant woman, to put her in possession of all the material facts." (1) A sale executed on the eve of the failure of a firm is not on that account void. (2) The subject will have to be more fully discussed later on. (3)

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

Burden of obligation, imposing restriction on use of land,
or of obligation annexed to ownership, but not amounting to interest or easement.

such rights or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C who has notice of the contract. B may enforce the contract against C to the same extent as against A.

662. Analogous Law.—With this section may be compared section 108, exception 2, of the Indian Contract Act, by which one of several joint-owners of property in sole possession of it by permission of the co-owners may convey the whole property to a *bona fide* purchaser "under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them." And under section 27 (b) of the Specific Relief Act, specific performance of a contract may be enforced against "any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith, and without notice of the original contract." Compare also sections 24 (d) and 25 (e) of the latter Act. (4) This and the last preceding section originally formed one section on which the Select Committee observed: "The remainder of section 40, though suggested by English cases, (5) is, in our opinion, founded on general principles of equity applicable to India, and may therefore fitly be left unaltered in the Bill."

(1) *Rangilbhai v. Vinayak*, I. L. R., 14 Bom., 666.

(2) *Motilal v. Utam*, I. L. R., 13 Bom., 434, see S. 58 & comm. post.

(3) S. 53 post.

(4) Act I of 1877.

(5) Marginal reference in the Bill as settled by the Law Commissioner shew that these cases are *Wilson v. Hart*, L.R., 1 Ch., 463; *Richards v. Revitt*, 7 Ch. D., 224; *McLean v. McKay*, L.R., 5 P.C., 327.

As regards contract for the sale of land a similar rule is enacted in section 91 of the Indian Trusts Act.⁽¹⁾ "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

663. Principle.—The principle and scope of this section is the same as of section 11, *ante*, paragraph 2 (*q. v.*). This section deals with, what are known in the English law as "restrictive covenants" and which are equitably enforced against all transferees under circumstances mentioned in the section. They are not covenants running with the land and hence not binding upon all purchasers with or without notice.⁽²⁾ Nor are they covenants of the nature of easements which avail against all the world. The object of this section is to protect covenants which are universally regarded as necessary for the improvement or beneficial enjoyment of one's property. And since these restrictions are not of the same importance as easements, or covenants running with the land, it is considered equitable that they should be enforced only as against transferees with notice, or gratuitous transferees. But the section has no application to merely personal covenants, which were not intended to bind all transferees as such, and so it has been held by Hall, V. C., who, on a review of the cases on the subject, said: "It may be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building lots, when the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenant entered into by each of the purchasers, is entitled to the benefit of the covenant and that this right, that is, the benefit of the covenant enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but where a mutual contract can be sufficiently established."⁽³⁾ And as to the necessity, and effect of notice, it has been held "that notice of a covenant puts the defendant in the same position, and that the Court will proceed exactly as if he were a party to the covenant."⁽⁴⁾ And in another case Knight Bruce, L. J., said: "It may be stated at least as a general rule that where a man by gift of purchase acquires property from another, with knowledge of a previous contract lawfully, and for valuable consideration made by him, with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."⁽⁵⁾

664. Meaning of Words.—Immoveable property and an "interest" therein are two distinguishable terms. Rights of common, right of way, and other profits *in alieno solo*, rents, pensions and annuities secured upon land—all these clearly constitute an "interest" in immoveable property. On the other hand, pensions and annuities not secured upon land, houses or the like, as clearly do not constitute such an interest.⁽⁶⁾ The meaning of immoveable property has already

(1) Act II of 1882.

(2) *Tulk v. Moxay*, 2 Phil., 774; *Spencer's case*, S.L.C. (9th Ed.), 66; *Austerbury v. Corporation of Oldham*, 29 Ch. D., 750.

(3) *Renals v. Cowlishaw*, 9 Ch. D., 130, O. A. 11 Ch. D., 866.

(4) *Per Fry, J.*, in *Richards v. Revitt*, 7 Ch. D., 224 (227); following *Wilson v. Hart*, L.R. 1 Ch., 463.

(5) *De Mottos v. Gibson*, 4 D. & J., 276 (282); cf. *Barfield v. Nicholson*, 2 L.J. Oh., 90; *Hoare v. Dresser*, L.R., 7 H.L., 317.

(6) *Fadu v. Gour Mohan*, I.L.R., 19 Cal., 544 (562), F. B. The point is elaborately discussed in *Collector v. Krishnanath*, I.L.R., 5 Bom., 322 (335); *Govind Sahaye v. Munohur*, 1 W.R., 65 (66).

been discussed before. (1) "*Benefit of an obligation*" is the right which one of the contractual parties acquires over the other in virtue of his contract. The section only treats of a benefit of an obligation (a) arising out of contract, and (b) annexed to the ownership of immoveable property. "*Transferee for consideration*" must mean for valuable consideration, i.e., money, marriage, or money's worth, i.e., some equivalent for money in the eye of the law. (2) "*Without notice*"—as to what constitutes notice has been defined in the last paragraph of section 3 of the Act (§§ 103-170).

665. Covenants running with the Land.—On a transfer of property, covenants are made or implied which may either run with the land on which may merely relate to the land but do not run with it. The Act itself affords instances of the former in section 55 which enumerates such covenants implied on a sale of land, and which in the language of that section "shall be annexed to, and shall go with the interest of the transferee as such, and may be enforced by every person to whom that interest is for the whole or any part thereof from time to time vested." (3) Similarly, covenants running with the mortgage are enumerated in section 65, and those with the lease in section 108. Such covenants must then be distinguished from those here mentioned, for while the former pass with the land and are enforceable against the transferee with or without notice, those which merely relate to the land are only enforceable against transferees in the circumstances here mentioned. A covenant is said to run with the land, when either the liability to perform it, or the right to take advantage of it passes to the assignee of that land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it passes to the assignee of that reversion. (4) At common law covenants did not run with the reversion (5) but they ran with the land. (6) As regards covenants running with the land it should be noted that the Act does not generally deal with them, but such covenants play an important part in the English Law, where they would appear to be subject to the three following conditions: (i) that they must relate directly to the land, or to "a thing in existence, or parcel of the demise" (ii) where they relate to a thing not in existence at the time, but which comes into existence, they will be annexed to the land, but they will not bind the assigns unless so named; and (iii) when they relate to a thing not annexed nor to be annexed to the land, but are collateral in their nature or are merely personal, they will not run, that is, they will not bind the assignee nor pass to him even though he is named. (7) And their principle has been thus stated:—(i) Where, either by tradition or good sense, the burden of the obligation would be said, elliptically, to fall on the land of the covenantor, the creation of such a burden is, in theory, a grant or transfer of a partial interest in that land to the covenantee; as the right of property, so created, can be asserted against every possessor of the land, it would not be extravagant or absurd to allow it to be asserted by the action of covenant; (ii) Where such a right is granted to the owner of a neighbouring piece of land for the benefit of that land, the right will be attached to the land, and go with it into all hands; the action of covenant would be allowed to assignees, not named, and it would not be absurd to

(1) §§ 59, 65.

(2) S. 55 (2).

(3) Snell's Equity (9th Ed.), 83; Story, Eq. Jur., § 354; *Thomas v. Thomas*, 2 Q.B. D., 851; Indian Contract Act, 8, 2 (a).

(4) Cf. Conveyancing Act, 1881 (44 & 45 Vict. C., 41) §§ 10, 11.

(5) *Thursby v. Plant*, 1, Lev., 259.

(6) *Butler v. Archer*, 12 L. R., Ir. Ch. 104 (127); For instances of such covenants see 1 S. L. C., 65.

(7) Real Property Commissioners' 3rd Report.

give it to disseisors. ⁽¹⁾ In order to make a covenant run with the land of the covenantor and bind his heirs and assigns, the covenantee must have such an interest in that land as to amount to a privity of estate between the parties to the covenant. It is not necessary that their relation should be that of landlord and tenant; but an interest in the nature of an easement in the land which the covenant purports to bind, whether already existing or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon the land, for the support and protection of that interest, and the beneficial use and enjoyment of the land granted, run with the land charged. An obligation, duly expressed, that the structures upon one parcel of land shall, for ever, be of a certain character for the benefit of an adjoining parcel, is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts, necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other."⁽²⁾ Such covenants must be clearly distinguished from those treated of in the section, as well as from easements, such as a right to light or a water-course, or a right of way, which may independently of notice be enforced against the occupier of the servient tenement if the right is interfered with. ⁽³⁾ Or in other words while a mere covenant avails against only those who take with notice, an easement avails against all the world irrespective of notice. But a covenant running with the land though wider in its application is not necessarily exempt from the equitable rule as to notice. ⁽⁴⁾ For while it is clear from the Act that certain covenants ⁽⁵⁾ are enforceable against all transferees with or without notice, there are others, which though falling into the same class are still not enforceable against all transferees independently of notice. The former may be designated the usual covenants, while the latter are those unusual covenants which are not presumed by implication of law but which though running with the land are nevertheless not enforceable against transferees without notice. Such covenants would then be scarcely distinguishable from those comprised in the section.

666. Negative Covenants.—A restrictive covenant is one which would entitle a third person to interfere with the free use which the transferee may choose to make of the property which is the subject matter of the contract. ⁽⁶⁾ A restrictive covenant runs with the land if created for the benefit of the land conveyed or of that of which the grantor remains the owner, and is intended to be annexed to such land; in other words, when by the construction of a grant it appears that it was not the intention of the parties to create or reserve a right in the nature of a servitude in the land granted, for the benefit of other land owned by the grantor,—no matter in what form the intention may be expressed, such right, if not against public policy, will be held to be appurtenant to the land of the grantor, and binding on that conveyed to the grantee, and the right and burden, thus created and imposed, will pass with the land to all subsequent grantees. The converse proposition also holds, because a grantor may impose restrictions for the benefit of the land already sold as of that remaining in his hands which he proposes to sell. ⁽⁷⁾

(1) *Norcross v. James*, 140 Mass., 188, cited in *Dayal Chandra v. Chunilal*, 12 C. L. J., 259 (263.)

(2) *Bronson v. Coffin*, 108 Mass., 175 cited in *Dayal Chandra v. Chunilal*, 12 C. L. J., 259 (264.)

(3) Cf. *Per Mellish*, L. J., in *Leech v. Schweder*, L. R. 9 Ch., 463 (475, 475).

(4) *Renals v. Cowlshaw*, 11 Ch. D., 866 O. A., from 9 Ch. D., 125.

(5) *N.g.* those mentioned in Ss. 55, 65 and 180.

(6) *Pemsel and Wilson v. Tucker*, [1907] 2 Ch., 191.

(7) *Dayal Chandra v. Chunilal*, 12 C. L. J. 259 (265).

Negative covenants entered in sale deeds restricting the right of the purchaser to use the land purchased ordinarily fall under the three following classes: (i) where the covenant is entered into simply for the vendor's own benefit; (ii) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; and (iii) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers as part of what is called a building scheme.⁽¹⁾ In all such cases, the court has, speaking generally, no discretion to consider the balance of convenience on matters of that nature, but is bound to give effect to the contract between the parties, unless the plaintiff seeming to enforce the covenant has by his own conduct, or by that of the persons through whom he claims, become disentitled to sue.⁽²⁾ Such covenants may assume a variety of forms. For instance, they may require the purchaser to conform to a settled building scheme as that the land should be used only for the erection of houses adapted for and used as private residences in which case the erection of residential flats would be a breach.⁽³⁾ So would be the erection of an embankment and the running of a railway line, the breach of a covenant that the land shall be used only for building private dwelling houses and against the carrying on upon them any noisy trade; ⁽⁴⁾ so where the vendees covenanted not to erect "any hut, house or shop or any hotel of less annual value than £50," and the administratrix of the vendor sued the vendee's assignee upon the covenant for injunction, but it appeared that the plaintiff had no interest in any adjoining land which would be damaged by breach of the covenant. It was held that in these circumstances the covenant which was a personal one could not be enforced.⁽⁵⁾ Covenants which are unusually restrictive are not included in nor presumed from the usual covenants: as for instance, a covenant to build houses on land the rent of which should be double the value of the rent reserved by the deed, without limiting any time within which such building was to be required. ⁽⁶⁾ Delusive or deceptive statements as to covenants by the transferor not only disentitle him to enforce them, but if they materially affect the enjoyment of the property, the purchaser may repudiate his bargain. ⁽⁷⁾ It would appear that a transferee, availing himself of this section, must explicitly plead want of notice and then prove it. "And it would seem still that, if a defendant put in a statement, but did not set up the defence that he is a purchaser, for value without notice, he cannot afterwards insist on that defence." ⁽⁸⁾ In England it has been held that when the benefit of a restrictive covenant has been once clearly annexed to one piece of land there is a presumption that it passes by an assignment of that land, and it may be said to run with the land in equity as well as at law, without proof of special bargain or representation of the assignment of the land. The covenant in such a case runs with the land because the assignee has purchased something which inhered in or was annexed to the land which he bought. The purchaser's ignorance of the existence of the covenant does not defeat the presumption, though it may be rebutted by

(1) *Per* Farwell J., in *Osborne v. Bradley*, [1903] 2 Ch. 446 (450).

(2) *Per* Lords Cairns in *Doberty v. Allinan*, 3 App. Cas., 709 (719) followed in *Osborne v. Bradley*, [1903] 2 Ch., 446 (451).

(3) *Rogers v. Hosegood* [1900] 2 Ch., 388.

(4) *Long Eaton Recreation Grounds Co., v. Midland Railway*, 71 L.J. K.B., 74, O.A., [1902] 2 K.B., 574.

(5) *Formby v. Barker*, [1903] 2 Ch., 539.

(6) *Andrew v. Aitken*, 22 Ch. D., 218.

(7) *Spunner v. Walsh*, 11 W. Eq., 597; *Flin v. Woodin*, 9 Ha., 618; *Phillips v. Cladcleugh*, L.R., 4 Q.B., 159; *Cato v. Thompson*, 9 Q. B. D., 611; *Ellis v. Rogers* 2 Ch. D., 661.

(8) 2 W. & T. L. C., p. 30, note; *Hira Singh v. Narain*, 10 C. P. L. R., 100 (112); followed in *Gopal v. Ganput*, 13 C. P. L. R., 172; *Mulji v. Macleod*, 5 Bom. L. R., 991 (995).

proof of facts inconsistent with it. (1) The question of notice would hardly arise where a valid charge has been created on land, and which being an interest carved out of the land would subsist and may be enforced against a purchaser independently of notice." (2)

667. Nature of Relief granted.—A restrictive covenant may be enforced by a perpetual injunction, or a mandatory injunction: while in certain cases the Court may substitute damages for an injunction.

668. Perpetual injunction will only be decreed if the right and the breach are clearly established, and the covenant is of such a nature

(1) **Injunction.** as can be specifically enforced. In such a case injunction will be granted, and the court will not, except under very exceptional circumstances, take into consideration the comparative injury to the parties from granting or withholding it. (3) And in all cases injunction is the rule, and damages the exception. A covenantee has a right to the enjoyment of his property *modo et forma* as stipulated for by him. (4) And it is no defence to say that the right complained of has occasioned no damages, or has on the contrary benefited the owner. The question has nothing to do with damages, and it is not necessary that the plaintiff should prove any damages. (5) So Kekewich, J., in one case said: "When a man is suing on a covenant, leaving out of the question of course those *minima* about which the law is said not to care, it is immaterial whether there is damage or not. A man is entitled to enforce that covenant, which is a species of property." (6) Lord Cranworth arrived at the same conclusion, though his reasoning was different: "It was said," he remarked, "that this case comes within the principle of those cases in which the court has refused to interfere because no damage has been actually sustained; but a person who stipulates that her neighbour shall not keep a school, stipulates that she shall be relieved from all anxiety from a school being kept, and the feeling of anxiety is damages." (7) The court is bound to protect the plaintiff against violation of the contract entered into by him. Where a restrictive covenant is entered into for the benefit of the covenantee personally, and not to secure the amenities of his property or as part of a building scheme, the plaintiff will not lose his right to enforce the covenant by injunction, on the ground that there has been a change in the character of the neighbourhood, unless he himself has been guilty of some act or omission raising a personal equity against him. (8)

But in these matters the court is given a wide latitude. And, though ordinarily, the inconvenience to the defendant is not to be taken into account, it is loth to issue an injunction if it is made clear that the mischief it is intended to remedy is inappreciable and out of all proportion to the inconvenience it would cause to the defendant. (9)

(1) *Rogers v. Hosegood*, [1900] 2 Ch., 838.

(2) *Abadi v. Asaram*, I.L.R., 2 All., 162; but in a later case the question was left open, *Churaman v. Balli*, I. L. R., 9 All. 591. "Charges" are dealt with in S. 100, *post*.

(3) *Leader v. Mody*, L. R., 10 Eq., 153; *Tipping v. Eckersley*, 2 K. & J., 264; *Johnstone v. Hall*, *ib*, 420; *Dickenson v. Grand Junction Canal Co.*, 15 Beav., 270.

(4) *Per Wood*, V.C. in *Tipping v. Eckersley*, 2 K. & J., 264 (770); *Western v. MacDermott*, L. R. 1 Eq. 499; *Leech v. Schweder*,

L. R., 9 Ch., 465 n.; reviewed by Hall, V.C. in *Manners v. Johnson*, 1 Ch. D., 673 (680).

(5) *Manners v. Johnson*, 1 Ch. D., (673, 690); *Richards v. Revt.*, 7 Ch. D., 224 (226); following *Wilson v. Art.* H.L.R., 1 Ch., 463; *Collins v. Castle*, 36 Ch., D. 243.

(6) *Collins v. Castle*, 36 Ch., D. 243 (254, 256).

(7) *Kemp v. Sober*, 1 Sim. (N.S.), 517 (520); followed in *Manners v. Johnson*, 1 Ch. D., 673 (679, 680).

(8) *Osborne v. Bradley* [1903] 2 ch. 446.

(9) *Bowes v. Law*, L. R. 9 Eq., 636.

669. It has been before remarked that the covenants do not extend to compelling a party to the doing of a positive act, but while this is generally true, the same result may often be attained by framing the order in an indirect form, to compel a defendant to restore things to their former condition. The order when so framed is called a mandatory injunction.⁽¹⁾ It is however only resorted to in cases where relief by way of damages would be inadequate, and restoration of the things to their former condition is the only relief which will meet the ends of justice. A breach of an express covenant is usually relieved against in this way, notwithstanding the inconvenience it may cause to the defendant. A person who enters into an express agreement is bound to perform its conditions literally and he cannot be relieved of his obligation by pleading inconvenience either to himself⁽²⁾ or the public.⁽³⁾ In other respects a mandatory injunction follows in principle a perpetual injunction and would be granted where it is found to be more appropriate. Thus where a person was bound by a covenant to supply water to work his lessee's mills, the court restrained the lessor from binding the enjoyment of the plaintiff by keeping the works out of repair, by the use of lock, or by continuing the removal of the stop-gates.⁽⁴⁾ Similarly a Railway Company was restrained from infringing its covenant to use a portion of the lessor's land for a first-class station, by being required to stop its trains.⁽⁵⁾ So again, where a building has been erected in violation of a covenant, the defendant may be restrained from using it, or he may be compelled to alter the elevation and form of the building to the requisite symmetry.⁽⁶⁾

A person applying for mandatory injunction must be diligent in enforcing his rights. A building allowed to be erected without demur,⁽⁷⁾ or allowed to stand for five years⁽⁸⁾ will not be ordered to be pulled down, but the question whether the plaintiff has used due diligence is one of fact and must be judged having regard to the facts and circumstances of each case.⁽⁹⁾

670. Relief in damages is substituted for an injunction, where the breach has been partially acquiesced in or where the circumstances dictate such a course to be reasonable.⁽¹⁰⁾ But if acquiescence amounts to a waiver even damages cannot be given.⁽¹¹⁾

671. What Restrictions bind Assignees with Notice.—Besides the covenants running with the land, and those expressed to bind assignees, law protects another class of servitudes controlling the enjoyment of land, which though not running with the land, nor even purporting to bind assigns, are still enforced by law, provided that the person against whom they are enforced had notice of them. Thus in a leading case on the subject the owner in fee of a square garden and some houses in the square, in London, conveyed the garden to A in fee, the latter covenanting for himself and assigns not to use the open space for any other purpose than as a square garden, it was held that a purchaser from A with notice of the covenant was bound by it in equity, whether or not he was bound at law, and an

(1) *Smith v. Smith*, L.R. 20 Eq., 504; *Herman Loog v. Blan*, 26 Ch. D., 314.

(2) *Bowes v. Law*, L.R., 9 Eq., 636; *Kilbey v. Haviland*, 19 W.R., 698.

(3) *Lloyd v. London, Chatham and Dover Ry.*, 2 D.J. & S., 579.

(4) *Lane v. Newdigate*, 10 Ves., 192.

(5) *Hood v. N.E. Ry. Co.*, L.R., 8 Eq., 665, modified O.A., in L.R., 5 Ch. 725.

(6) *Manners v. Johnson*, 1 Ch. D., 860; *Macmanus v. Cooke*, 56 L.J., Ch., 66; *De*

Nicols v. Abel (1969), W.N., 14.

(7) *Gaskin v. Balls*, 13 Ch. D., 328.

(8) *Id.*

(9) *Gate v. Abbott*, 8 Jur. (N.S.), 987;

Senior v. Pawson, L.R., 3 Eq., 335; *Smith v. Smith*, L.R., 20 Eq., 500; *Gaunt v. Nyuncy*, L.R., 8 Ch., 14.

(10) *Leader v. Moody*, L.R., 20 Eq., 154; *Formley v. Barket* [1903] 2 Cal. 539 (555).

(11) *Kelsey v. Dodd*, 52 L.J., Ch., 34.

injunction was accordingly granted to restrain him from building on the square garden.⁽¹⁾ In another case on the sale of a building estate, there was a general deed of covenant prohibiting the various purchasers from using or allowing their lots to be used for certain purposes, and persons claiming, through purchasers who had been parties to the deed, having notice of the covenant, were accordingly restrained from using their lots for any of the prohibited purposes.⁽²⁾ So where there was a covenant by purchasers of adjoining lots not to throw out a building at the rear, it was held that subsequent purchasers of part of such adjoining lands, with notice of the covenants, were held to be bound by them, although it appeared that the vendor had reserved no interest for himself in the houses, and that no substantial injury had been done to any one of the owners of the houses, beyond affecting their enjoyment and somewhat diminishing their value.⁽³⁾ Similarly, a covenant for the use and occupation of land will be enforced against the successor or assignee of the covenant without or with notice.⁽⁴⁾ Thus where the owner of some land sold a part of it and entered into an agreement with the purchaser that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties and their successors," it was held by the Privy Council that this being an agreement that the plot of land should be left open, in the state in which it then was, for the common advantage of both parties, the obligation could be enforced against any person who might hold the vendor's land.⁽⁵⁾ So where *S* purchased several houses from *C*, agreeing with the latter to use the houses for dwelling purposes only, and not to use them for carrying on any trade or business, or cause annoyance to the neighbouring property of *C* let out to other tenants, and *S* afterwards leased out these houses to persons who during negotiations became aware of the restrictive covenants, it was held that the lessees could not use the houses for the purpose of trade.⁽⁶⁾ In another case the owner of a freehold house had entered into a covenant with the plaintiff, who was a previous owner, that the building should not be used as a beer-shop. The house was afterwards left to the defendant as tenant from year to year, without express notice of the covenant, but it was held that he was bound by it.⁽⁷⁾ A covenant not to build houses of less value than £1,200 has been similarly upheld.⁽⁸⁾ And while a covenant in favour of conforming to a particular design of architecture will be enforced, slight deviations as to the colour of the buildings or as to the slate roofing may be overlooked.⁽⁹⁾

672. A vendor cannot create rights not connected with the enjoyment of

Leading principle stated.

the land and annex them to it, nor can the owner of land render it subject to a new species of burden so as to bind it in the lands of an assignee.⁽¹⁰⁾ The general principle

upon which the court deals with cases relating to the burden and incidents of covenants and stipulations restrictive of the free use of land were

(1) *Tulk v. Moxay*, 2 Ph., 774 (777).

(2) *Whatman v. Gibson*, 9 Sim., 206.

(3) *Western v. MacDermott*, L.R., 1 Eq., 499, O.A., L.R., 2 Ch., 72; *Whatman v. Gibson*, 9 Sim., 196, in which the V.C. said: "I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row." To the same effect in *Coles v. Sims*, Kay 56 (69); *Keates v. Lyon*, L.R., 4 Ch., 218 (223). (In the lower Court

an attempt was made to arrive at the same result by objecting to the erections on the ground of obscuring ancient lights, but Lord Romilly, M.R., had no hesitation in overruling the contention—*ib.*, 505).

(4) *Mann v. Stephens*, 15 Sim., 379.

(5) *McLean v. McKay*, L.R. 5 P.C., 327.

(6) *Spicer v. Martin*, 14 App. Cas., 12.

(7) *Wilson v. Hart*, 2 H. & M., 551 O.A., L.R., 1 Ch., 463.

(8) *Collins v. Castle*, 36 Ch. D., 243.

(9) *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Ch. D., 260, 270.

(10) *Ackroyd v. Smith*, 10 C.B., 164.

enunciated by Lord Cottenham in a leading case in which he observed: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it—that the latter shall either use or abstain from using the land purchased in a particular way—is what I never knew disputed. It is said that the covenant being one which does not run with the land this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use a land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased. Of course, the price will be affected by the covenant." And further on he continued: "That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." (1) The covenant is not open to the objection of creating a perpetuity. (2) Where S by an instrument for valuable consideration agreed to pay a sum of money to his wife A out of the income of certain land, and not to alienate such land without stipulating for the payment of such allowance out of its income, he having subsequently given a usufructuary mortgage to L subject to the payment of the allowance, and L gave R a sale-mortgage, the latter being informed of the charge, it was held that R was liable to continue the allowance to A. (3) *Malikana* reserved to be paid annually by the vendee to the vendor has been on a similar principle decreed against the vendee's mortgagee. (4) Where property is sold in lots to several purchasers, any purchaser can enforce the covenant as if he were an equitable assignee of it. "Each has an equitable right to enforce against the other, the obligation stipulated for in his interest and serving as a part of his inducement (as the other knew) to the contract." (5) But the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact to be determined by the intention of the vendors and the purchasers, in accordance with the ordinary rules of evidence, (6) and if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a court of equity will, in favour of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter. (7) Where the vendor disposes of his entire interest though in separate lots and not at the same time, it has been held that the fact of the vendor having reserved nothing for himself in conclusion or almost so, shows that the restrictive covenants are intended for the mutual benefit of the purchasers, who will be therefore bound by them *inter se*. (8)

(1) *Tulk v. Moxay*, 2 Phil., 774 (777); *Keates v. Lyon*, L. R., 4 Ch., 218 (222, 223).

(2) *Whitman v. Gibson*, 9 Sim., 196; *Mann v. Stephens*, 15 Sim., 379; *Tulk v. Moxay*, 2 Phil., 774; *Keppell v. Bailey*, 2 My. & K., 517; *Moxhay v. Inderwick*, 2 DeG. & S., 703; *Patchink v. Dubbins*, 1 Kay, 8 affirmed 23 L. J. Ch., 45; *Coles v. Sims*, 1 Kay, 56, affirmed 5 De G. & M. G., 1; *Child v. Douglas*, 1 Kay, 560; Injunction dissolved. L. J., 1 Aug., 1854; *Taylor v. Gilbertson*, 2 Drew., 391, not a case of covenant; *Lukey v. Higgs*, 1 Jur. N. S. 200; *Hodgson v. Copparad*, 29 Beav., cited in Sugd.

(14th Ed.), 596.

(3) *Abadi v. Asaram*, 1 L. R., 2 All. 162.

(4) *Churaman v. Bali* I. L. R., 9 All., 591; see S 100 Comm., post.

(5) *Per West, J.* in *Cooverji v. Bhimji*, 1 L. R., 6 Bom., 528 (533).

(6) *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Q. B. D., 778; *Knight v. Simmonds* [1896] 2 Ch., 294; *Rogers v. Hosegood*, [1900] 2 Ch., 388.

(7) *Nottingham Patent Brick & Tile Co. v. Butler*, 16 Q. B. D., 778 (784).

(8) *Nottingham Patent Brick & Tile Co., v. Butler*, 16 Q. B. D., 778 (784).

673. But in order to make them mutually binding, the covenants must conform to the following four conditions ; (i) both the plaintiff

Their pre-requisites.

and defendant must derive their title from a common vendor ; (ii) there must be evidence that previously to selling the lands to which both the plaintiff and defendant are respectively entitled the vendor had laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiff and defendant respectively) for sale in lots subject to restrictions intended to be imposed on all the lots, and which though varying in detail as to particular lots, are consistent and only consistent with some general scheme of development ; (iii) the restrictions were intended by the common vendor to be, and were for the mutual benefit of all the lots intended to be sold, it being then immaterial whether they were intended to and were equally for the benefit of the other land retained by the vendor ; and (iv) both the plaintiff and the defendant or their predecessors in title purchased their lots from the common vendor upon the footing that the restrictions subject to which the purchases were made were to enure for the benefit of other lots included in the general scheme. whether or not they were also to enure for the benefit of other lands retained by the vendor.⁽¹⁾ The object of restrictive covenants is to preserve the amenities of a neighbourhood, not necessarily to preserve or increase the value of property.

674. But if a person, on granting or demising land, takes a restrictive cove-

When benefit of covenant lost.

nant from the purchaser for his own benefit and then grants or demises other lands to other persons without any notice of the covenant, the benefit of the covenant does not enure to the subsequent grantee or lessee. Thus where the owner of an estate granted a lease of a plot of land to *A*, who covenanted that he, his executors, administrators, or assigns, would not during the term do on the premises anything which should be an annoyance to the neighbourhood or to the lessor or his tenants, or diminish the value of the adjoining property, neither build nor allow to be built on the ground any building or erection without first submitting the plans to the lessor and obtaining his approval. The landlord some years afterwards granted a lease of an adjoining plot to *B*, who entered into a similar restrictive covenant. Within twenty years *A* commenced, with the approval of the lessor, to build upon his ground so as to darken windows of *B*'s house. *B* sued to restrain *A* from erecting, and the lessor from approving the building objected to, but it was held that *B* was not entitled to relief either on the principle that the lessor could not derogate from his grant, or on the ground that the restrictive covenants in *A*'s lease enured for *B*'s benefit.⁽²⁾ "It would be," observed James, L. J., "too great an extension of the doctrine of implied obligation to raise by implication a right in the nature of an equitable assignment of the benefit of the covenant. There was no bargain as to enforcing the covenant for the benefit of the plaintiff and we cannot imply one."⁽³⁾ In another case *A* sold part of an estate to *B*, who entered into restrictive covenants, for himself, his heirs and assigns, with *A*, his heirs executors, and administrators. as to buildings on the purchased property ; but *A* did not enter into any covenants as to the land retained. Afterwards *A* sold various lots of the part retained to other persons, but nothing appeared as to the contents of their conveyances, nor was there any evidence that they were informed of the covenants entered into by *B*. *A* then re-purchased from *B* what he had sold to him. It was held that the benefit of *B*'s covenants did

(1) *Elliston v. Reacher* [1908] 2 Ch. 374.

(2) *Master v. Hansard*. 4 Ch. D., 718.

(3) *Master v. Hansard*, 4 Ch. D., 718 (722).

not in equity pass to the subsequent purchasers of other parts of the estate from A, and that A, after the re-purchase, could make a title to the repurchased land discharged from the covenants. (1)

675. The question in such cases is whether the restrictions are merely

True test.

matters of agreement between the vendor and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common benefit of the purchasers. (2) This is a question regarding which no general rule can be laid down, for its determination depends upon the intention of the parties, and of the surrounding circumstances of each case. (3) But the principle which may be deduced from the cases is that where the same vendor selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them *inter se* for their own benefit. Where for instance, the purchasers from the common vendor have not known of the existence of the covenants, that is a strong, if not a conclusive, circumstance to shew that there was no intention that they should enure to their benefit. (4) One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots. (5) Again, where the vendor disposes of the whole of his property parcelled out in lots and the purchasers take with notice of the restrictive covenants, the inference is strong that the covenants are for the common benefit of the purchasers, who have presumably paid a higher price for the plots than they would have fetched if the neighbours had been free to make unfettered use of the property purchased by them.

676. A purchaser may also be entitled to the benefit of a restrictive

Implied assignment of covenant.

covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assignee of it, that is, have the benefit of the covenant, and such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this the expressed or otherwise apparent purpose or object of the covenant in reference to its being intended to be annexed to other property or to its being only obtained to enable the covenantee more advantageously to deal with his property must be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor

(1) *Keates v. Lyon*, L. R., 4 Ch., 218.

(2) *Nottingham Brick & Tile Co. v. Butler*, 15 Q. B. D. 261 (268), O. A., 16 Q. B. D. 778.

(3) *Renals v. Cowlshaw*, 9 Ch. D., 125 (129); O. A., 11 Ch. D., 866.

(4) *Keates v. Lyon*, L. R., 4 Ch., 218; *Master v. Hansard*, 4 Ch. D., 718; *Renals v. Cow-*

shaw, 9 Ch. D., 125, O. A., 11 Ch. D., 866; explained per Wills, J., in *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q. B. D., 261 (269).

(5) *Mann v. Stephens*, 15 Sim., 377; *Western v. Macdermott*, L. R., 2 Ch., 72; *Coles v. Sims*, Kay 56.

when the covenant was entered into is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained and, if he has done so, whether or not he has sold subject to similar covenant; whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.⁽¹⁾

677. Covenants when Unenforceable.—A covenant which is too indefinite would be enforced only to the extent it is definite, and it may be even varied by omitting from it the words that are found to be too indefinite for construction.⁽²⁾ But if the covenant is altogether indefinite, or creates indefinite rights of property, the Court will not at all enforce it.⁽³⁾ Again, if compliance with the covenant has the effect of rendering a portion of the property inalienable except under very onerous and depreciating conditions, the Court will be reluctant to move.⁽⁴⁾ Nor is the rule intended to authorize dealing with the property in a manner unauthorized by the rules and principles which govern rights in real property. If the covenant has the effect of creating a servitude or an easement, the Court will not enforce it.⁽⁵⁾ A covenant may be rendered unenforceable by acquiescing in its breaches provided that the breaches were not unimportant,⁽⁶⁾ or such as caused no particular injury or were such as did not affect the enjoyment of the property. A passive acquiescence of one breach of covenant cannot be considered to be a waiver for all future time of the right to complain of any other breach.⁽⁷⁾ But the case assumes a different aspect when the party to be aggrieved actively connives at the breaches or does some act inconsistent with his right against the covenantor.

In doubtful cases restrictive covenants, being against common right, are construed favourably to the covenantor.⁽⁸⁾ And so it has been held that a covenant not to use the building as a public house for the sale of beer, was not infringed by sale of beer by retail under a license not to be drunk on the premises.⁽⁹⁾ So a prohibition against engaging in a specified trade "or in any matter relating thereto" within a given area does not prevent the covenantor from lending money to persons engaged in that trade, even though the debtor's only means of repayment are out of the profits of the trade.⁽¹⁰⁾

678. Limits of the Rule.—Again, the rule is limited only to restrictive covenants, and has no application to affirmative covenants, involving an expenditure of money, as to build or repair buildings.⁽¹¹⁾ So except in the case of landlord and tenant, the English authorities are in favour of holding the rule as only applicable to restrictive or negative covenants, as distinguished from covenants, "which can only be enforced by making the owner put his hand into his pocket."⁽¹²⁾ If the transferee has acquiesced in his non-enforcement

(1) *Per Hall, V.C.*, in *Renals v. Cowlishaw*, 6 Ch. D., 130, O.A., 11 Ch. D., 866.

(2) *Mann v. Stephens*, 15 Sim., 377; explained in *Keates v. Lyon*, L. R., 4 Ch., 218. (225).

(3) *McLean v. McKay*, L. R., 5 P.C., 327 (336).

(4) *Cl. Keates v. Lyon*, L. R., 4 Ch., 219 (228).

(5) *McLean v. McKay*, L. R., 5 P.C., 327 (334, 336, 337).

(6) *Richards v. Revitt*, 7 Ch. D., 224 (226).

(7) *Western v. MacDermott*, L. R., 2 Ch., 72 (74).

(8) *Plase v. Coats*, L. R., 2 Eq., 688.

(9) *Plase v. Coats*, L. R., 2 Eq., 688; cf.

Feilden v. Slater, L. R., 7 Eq., 523; *Jones v. Bone*, L. R., 9 Eq., 674.

(10) *Bird v. Lake*, 1 H. & M., 338.

(11) *Haywood v. The Brunswick Permanent, &c., Society*, 8 Q.B. D., 403.

(12) *Haywood v. Brunswick Building Society*, 8 Q. B. D., 403 (409); animadverting on *Cooke v. Chilcott*, 3 Ch. D., 694; in *Morland v. Cooke*, L.R., 6 Eq., 252, there was a deed of partition. The correct rule in accordance with the text has been enunciated in *Wilson v. Hart*, L. R., 1 Ch., 464; *London & S. W. Ry. Co v. Gomm*, 20 Ch. D., 582; *Austerberry v. Corporation of Oldham*, 29 Ch. D., 750; *Hall v. Ewin*, 37 Ch. D., 74; *Clogg v. Honds*, 44 Ch. D., 503.

or where its enforcement will be manifestly unjust, causing more harm than good, it will be refused.⁽¹⁾

679. A covenant, in a deed of mortgage or sale, of pre-emption in favour of the transferrer is not a covenant which in the phraseology of the English law runs with the land. Such a covenant is subject to the rule here enunciated, and is only available against transferees who have taken without consideration or with notice.⁽²⁾ The covenant must, however, give pre-emption of the land mortgaged or leased and not of other lands, in which case the covenant would not be enforced.⁽³⁾ An option for re-purchase is sometimes inserted in a sale deed, which may or may not be limited as to time and in which a fixed price may or may not be stipulated for. Such option is to be distinguished from a covenant for repurchase which converts a sale into a mortgage and which will have to be considered later on.⁽⁴⁾ It will suffice here to state that where the vendor sells his property outright to B, but stipulates for its repurchase at a fixed price, the covenant cannot be treated as otherwise than a purely personal one⁽⁵⁾ and which could only be enforced in the terms of this section, and for which the limitation would presumably be six years calculated from the date of the sale. It is however apprehended that such a covenant unlimited as to time would be obnoxious to the rule against perpetuities.⁽⁶⁾

680. Obligations merely Contractual.—The second paragraph deals with a contractual obligation relating to land but falling short of an interest therein, or easement thereon. A similar provision is made in the Indian Trusts Act.⁽⁷⁾ As an example of such an obligation may be mentioned the obligation created on contract for the sale of land and which is defined to create no more than a personal right to specifically enforce the contract.⁽⁸⁾ Such a contract may not only be enforced against the actual party to it and his representative, but also against other persons who claim by a title subsequently created, for, as their Lordships of the Privy Council in one case observed, "there is nothing more familiar than the doctrine of equity that a man, who has *bona fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with good faith of the dealing with himself."⁽⁹⁾ But it is equally clear that a subsequent transferee who has in good faith paid money without notice of any other title has the greater right to protection than one whose contract is still inchoate, although he may be equally innocent.⁽¹⁰⁾ So where there is a term in gross the expressed object of which has been satisfied, the term is, according to the doctrine of equity, held upon trust for

(1) *Bedford v. Trustees of the British Museum*, 2 M. & K., 552. For a full commentary on this subject see under S. 11 *ante*.

(2) *Ramaswami v. Chinnan*, 11 M. L. J. R., 132 (135); *contra* in *Karim Baksh v. Phula Bibi*, I. L. R., 8 All., 102; *Bahadur Singh v. Ram Singh*, I. L. R., 27 All., 12.

(3) *Collison v. Lettson*, 6 Taunt., 224; *Keppel v. Bailey*, 2 My. & K., 517 (544).

(4) S. 58 Comm. post.

(5) *Stricker v. Dean*, 16 Beav. 161; *Srimulky Tipoo v. Juggur Nath*, 2 W.R. 321; *Gurunath v. Yamanava*, I. L. R., 35 Bom.,

258; *contra* *Bansidhar v. Ganesha*, I. L. R., 22 All., 338 (339).

(6) *London and S. W. Ry. v. Gomen*, 20 Ch. D., 562 overruling *contra* held in *Birmingham Canal Co v. Cartwright*, 11 Ch. D., 421.

(7) S. 91, Act II of 1882.

(8) S. 54, para. 5.

(9) *Per* Lord Selbourne, L.C., in *Blackwood v. London Chartered Bank of Australia*, L.R., 5 P.C., 92 (111).

(10) Sugd., 177.

the successive equitable interests according to their priorities. It follows that if a subsequent equitable owner gets in the term with notice of the prior equity he gets it subject to the equity of the prior equitable owner, and, consequently, is restrained from setting it up against such owner by reason of an equity vested not in a third person, but in that prior equitable owner himself.⁽¹⁾ And so it has been elsewhere observed that "where two persons have, in conscience, an equal claim to the same property, equity will not interfere against the one who acquires a legal right to hold it, even although his equitable title be of later date than that of his opponent. The rule is subject to no exception not even in favour of charities."⁽²⁾ No person can have an equity of a higher kind in respect to property, than that which arises from his having fairly bought and paid for it. The execution of a conveyance to a *bona fide* purchaser for valuable consideration, or to his trustee, will, therefore under the above rule, render his title indefeasible as against all equitable claimants, even for valuable consideration, of whose claims he had no notice prior to the execution of the conveyance, and actual payment of the purchase-money. Of course, if the purchaser knows of an incumbrance, either before or after the execution of his conveyance, but before the payment of the whole of his purchase-money, he will be liable to the extent of any purchase-money, which he subsequently, without the consent of such incumbrancer, pays to the vendor."⁽³⁾

681. Where there is only an agreement to renew a *kanom* or mortgage for twelve years and the owner sells the property to a third person who purchases with notice of the prior agreement, such third person can sue to eject the person who is in possession, and who is entitled to get the *kanom* renewed under the agreement, notwithstanding the fact that the person in possession would be, at the institution of the suit, in time to enforce specific performance.⁽⁴⁾ So where a mortgagee had, at the time of his mortgage, notice of an agreement by the mortgagor to mortgage his property to another, the latter though holding a subsequent mortgage would have priority over the prior mortgagee, because the latter had taken his mortgage with notice of the prior agreements.⁽⁵⁾ In other words, so long as the remedy of the person having the benefit of an obligation is subsisting and not barred by time, he may not only enforce his right, but he may also restrain others who may be acting in derogation of it. But as soon as the enforcement of his right becomes barred by time, he has then no equity left that he could use for offensive or defensive purposes. So where the owner contracted to sell his property to *A* and he then sold it to *B*, who took it with notice of the prior contract in favour of *A*, who sued the owner without impleading *B*, and obtained a decree for specific performance, that decree would not be sufficient to oust *B* and if he is sued for possession *B* may set up limitation in bar of *A*'s right to enforce his contract against him.⁽⁶⁾

682. It would appear that the rule still holds good although a purchaser may have procured a good legal title by fraud of a third party, provided that he

(1) *Per* Lord Eldon, L. C., in *Maundrell v. Maundrell*, 10 Ves., 246 (259, 260); *Taylor v. Russell*, [1901], 1 Ch., 8 (29).

(2) *Dart's V. & P.* (6th Ed.), 927; citing *Oxwick v. Plumer*, Bac. Abr., Mortgage E.S. 3; *Attorney-General v. Wilkins*, 17 B., 285.

(3) *Ib.*, p. 927, 928.

(4) *Achuban v. Koman*, 13 M. L. J. R.,

217.

(5) *Kameswaramma v. Sitaramanuja*, I.L.R., 29 Mad., 177.

(6) *Manogi v. Sarat Lal*, 4 C. L. J., 334; *Jugaldas v. Ambashankar*, I.L.R., 12 Bom., 501; *Yashwant v. Vihoba*, I.L.R., 12 Bom., 231; *Surnomoyi v. Ashutosh Goswami*, I. L. R., 27 Cal., 714.

is innocent and has had no notice of it. (1) The two cardinal rules on the subject were stated by James, L. J., to be (i) that from a purchaser for value without notice this court takes away nothing which that purchaser has honestly acquired; and (ii) that if a purchaser, however honest, on the completion of his purchase, acquires a defective title, that defective title this court will not allow to be strengthened either by his own fraud or by the fraud of any other person. (2) The purchaser is not deprived of his protection if the legal estate is acquired by him by a different title from that which is deduced. (3) And it has been even held that the defence of purchase for value without notice may be sustained, although the defendant, in order to make out his title to the legal estate, must rely on an instrument which discloses the title of the plaintiff, the defendant not having had notice of such instrument at the time of his purchase. So where the trustees of a settlement advanced the trust-money on the security of real property which was conveyed to them by the mortgagor, the trust being noticed in the mortgage-deed, the surviving trustee of the settlement afterwards re-conveyed a part of the property to the mortgagor on payment of part of the mortgage-money, which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing with the connivance of the trustee, both the prior mortgage and the re-conveyance. When the fraud was discovered, the *cestui que trust* under the settlement filed a bill against the mortgagees claiming priority. But it was held that the court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance. (4) Similarly, the result would be the same if in the above case the surviving trustee after the mortgage induced the mortgagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed and the trustee then, concealing the prior mortgage and shewing title under the pretended purchase-deed, conveyed the property to a mortgagee with notice. (5) The right of the person entitled to priority is not lost by the fact that the subsequent transferee had obtained a conveyance and was put in possession of the property. But in such a case the court may vary its decree for possession by declaring that the defendant's possession was that of the trustee for the plaintiff, to whom he should convey the property. (6)

683. But a purchaser with a mere equitable title, is postponed to prior equitable claimants, for where the equities are equal the prior title prevails. (7) Now it is provided in the Specific Relief Act (8) that specific performance of a contract cannot be enforced in favour of a person who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force, and it has been accordingly held that a person entitled to priority may sue for specific performance notwithstanding that, his document being unregistered, he has to compete with the registered deed of his adversary. (9)

(1) *Pilcher v. Rawlins* L. R., 7 Ch., 259 (270); *Heath v. Crealock*, L. R., 10 Ch., 22.

(2) *Heath v. Crealock*, L. R., 10 Ch., 22 (38).

(3) *Pilcher v. Rawlins*, L. R., 7 Ch., 259.

(4) *Ibid.*

(5) *Per Lord Hatherley*, L. C. (James, L. J., concurring) in *Pilcher v. Rawlins*, L. R., 7 Ch., 259; overruling *O. A. Pilcher v. Rawlins*, L. R., 11 Eq., 58; disapproving of *Carter v. Carter*, 2 K. & J., 617.

(6) *Gafur v. Bhikaji*, 3 Bom., L. R., 659.

(7) *Thorpe v. Holdsworth*, L. R., 7 Eq. 139.

(8) S. 24 (d), Act I of 1877.

(9) *Chundernath v. Bhojrab*, I. L. R., 10 Cal., 250; *Chunder v. Krishna*, *ib.*, 710; *Kavar v. Ismail*, I. L. R., 9 Mad., 119; *Cooverji v. Bhimji*, I. L. R., 6 Bom., 528; *Abadi v. Asaram*, I. L. R., 2 All., 162; *Churaman v. Balli*, I. L. R., 9 All., 591; *Krishna v. Gangaram*, I. L. R., 13 All., 28, Specific Relief Act (I of 1877) S. 27.

684. Points for Proof and Defence:—Some of the cases in which the rule has been shewn to be inapplicable have been already discussed (§ 674). The subject of notice, however, still remains. As the section is worded, it would seem that the person who sues upon his covenant or contract must allege and prove that his defendant is either a transferee with notice or a gratuitous transferee as a part of his cause of action. Having thus made out a *prima facie* case, it would be then on the defendant to aver and prove his exemption from liability on the ground that he is a transferee for consideration and without notice. For this purpose the "plea of purchaser for value without notice is a single plea, to be proved by the person pleading it; it is not to be regarded as a plea of purchaser for value, to be met by a reply of notice." (1) Where, however, the competition is not between a prior covenant or contract and subsequent completed transfer, but only between the former and an executory contract for transfer, then the rule here enunciated does not apply and in that case it *qui prior est in temporis* must be held to be *potior in juris*. On this ground some decisions, which are assumed to lay down the contrary might be distinguished, (2) while in others the question of the burden of proof was neither raised nor considered. (3) But there still remain a number of cases in which in a competition between a prior contract and a subsequent completed transfer the former was held to possess priority, independently of proof of notice against the transferee upon whom it was held to lie to prove his non-liability to the claim on the ground of absence of notice. (4) Some justification for this view is found in section 27 (b) of the Specific Relief Act (5) and section 91 of the Trusts Act. (6) But the latter gives no indication on the question of *onus*, while the former is merely declaratory of a right and the general rule governing priorities with no reference to the special priority created by this section, the language of which must be construed consistently with the maxim "*Ei incumbit probatio qui dicit non ei qui negat.*" (7) In this country, generally speaking there is no distinction between legal and equitable estates but it is in some measure recognised in this section. For while ordinarily the rule is that *prior in temporis potior in juris*, (8) this section enacts that in a competition between a prior contract and the subsequent transfer the former is only postponed in favour of the latter, if the latter alleges and proves that he is a *bonafide* purchaser for value without notice, and which he must plead specifically, otherwise he will not be permitted to prove it at the hearing. (9) The burden of proving these facts defeating the prior contract is therefore necessarily on the subsequent transferee. As regards notice it has been held that constructive notice is sufficient to preclude the setting up of the

(1) *Per* Farrwall J., in *Nisbet and Potts' Contract* [1905] 1 Oh., 403; *Mulji Jetha v. Macleod*, 5 Bom., L.R., 991 (1905).

(2) *Hurnundun v. Jawad Ali*, I.L.R., 27 Cal., 468 (1902); *Hira Singh v. Narain*, 10 C.P.L.R., 107 (111) rule extended to a subsequent transfer in *Gopal v. Ganpat*, 13 C.P.L.R., 172 (176) on the ground that English law recognizes such priority: followed in *Budhia v. Hari Ram*, 14 C.P.L.R., 117 (119).

(3) *Chunder Kant Roy v. Krishna*, I.L.R., 10 Cal., 710 (712).

(4) *Humiah Lal v. Vasudev*, I.L.R., 36 Bom., 445 (449) in which *Varden Sette v. Luckpathy*, 9 M.I.A., 307 (326, 327) was

relied on, but which was a case of a prior charge.

(5) Act I of 1877.

(6) Act II of 1882.

(7) "The burden of proof lies upon him who asserts not upon him who denies; *Lallubai v. Bai Anrit*, I.L.R., 2 Bom., 299 (303).

(8) "Prior in time, stronger in law".

(9) *Mulji Jetha & Co. v. N. C. Macleod*, 5 Bom., L.R., 991; *Hira Singh v. Narain Gond*, 10 C.P.L.R., 107; *Gopal v. Ganpat*, 13 C.P.L.R., 172; *Budhia v. Hari Ram*, 14 C.P.L.R., 117 (119).

defence of purchase for valuable consideration without notice.⁽¹⁾ A yearly tenant⁽²⁾ or an under-lessee⁽³⁾ is equally bound to inquire into his landlord's title, and would be bound by any restrictive covenants binding his landlord. Indeed, prudence dictates that an intending purchaser should always inquire whether there are any undisclosed covenants or considerations restrictive of the enjoyment of property.⁽⁴⁾ At the same time the vendor cannot require the property to be subjected to "covenants, conditions, and restrictions," which do not appear upon the abstract,⁽⁵⁾ nor to obligations which, though appearing on the abstract, were not noticed in the particulars and conditions.⁽⁶⁾ Sometimes notice of the covenants would be presumed from the nature of the property, or from the surrounding circumstances, or where their existence is of such notoriety in the neighbourhood as to affect a person with notice of the covenants.⁽⁷⁾ And it is not only the immediate parties to a transaction, but also persons who come into possession under a derivative title, that are subject to the rule.⁽⁸⁾ Besides the plea of transfer for consideration and without notice, there are other defences open to the subsequent transferee, which are recognized as destroying the priority which the rule under reference confers. It would, for instance be defeated by estoppel⁽⁹⁾ of which section 78 affords an example, while limitation is of course intended to quiet all claims not prosecuted within the period allowed by the law.

Similarly covenants may be discharged by the impossibility of performance, as where the subject-matter of the covenant perishes without default of the covenantor,⁽¹⁰⁾ or it may be discharged by an act of law, if its performance is made unlawful by a statute,⁽¹¹⁾ but apart from limitation the Court will not refuse to enforce a covenant on the mere ground of delay, though the Court is always reluctant to revive state demands, and from which it may infer release, waiver or acquiescence, which all afford other answers to the claim. The covenantor is exonerated from the performance of his covenant when performance is prevented by the wrongful act of the covenantee.⁽¹²⁾

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a

Transfer by ostensible owner.

person is the ostensible owner of such property and transfers the same for consideration, the

transfer shall not be voidable on the ground that the transferrer

(1) *London & S. W. Ry., Co. v. Gomm*, 20 Ch. D., 583; *Patman v. Harland*, 17 Ch. D., 353; *Nottingham Brick & Tile Co. v. Butler*, 16 Q. B. D., 78; *Fielden v. Slater*, L. R., 7 Eq., 523.

(2) *Wilson v. Hart*, L. R., 1 Ch., 463.

(3) *Parker v. Whyte*, 1 H. & M., 167; *Clements v. Wells*, L. R., 1 Eq., 200.

(4) *Clements v. Wells*, L. R., 1 Eq., 200; *Morland v. Cooke*, L. R., 6 Eq., 252; *Wilson v. Hart*, L. R., 1 Ch., 463.

(5) *Re Monckton and Gilzean*, 27 Ch. D., 555.

(6) *Hardman v. Child*, 28 Ch. D., 712.

(7) *Wilson v. Hart*, L. R., 1 Ch., 463 (466, 467).

(8) *Tulk v. Moxay*, 2 Phil., 774; *McLean v. McKay*, L. R., 5 P. C., 327 (336).

(9) *Hari Mohan v. Ram Narain*, 14 I. C., 28 (29).

(10) *Taylor v. Caldwell*, 3 B. & S., 826; *Appleby v. Myers*, L. R., 2 C. P., 651; *Boast v. Firth*, L. R., 4 C. P., 1; *Robinson v. Davison*, L. R., 6 Ex., 269; *Howell v. Coupland*, 1 Q. B. D., 258; *Nickoll & Knight v. Ashton Edrige & Co.*, [1901] 2 K. B., 126; *Krell v. Henry*, [1903] 2 K. B., 740.

(11) *In re Baher*, 20 Ch. D., 290; *In re Maderer* 27 Ch. D., 523 but see *Brewster v. Kitchel*, 12 Mad., 166; *Newington Local Board v. Cottingham Local Board*, 12 Ch., D. 725.

(12) *Roberts v. Bury Commissioners*, L. R., 5 C. P., 310; (329) *Raymond v. Minton*, L. R., 1 Ex., 244; *Learoyd v. Brook*, [1891] 1 Q. B., 431.

was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferrer had power to make the transfer, has acted in good faith.

685. Analogous Law.—This section harmonizes with the English Law which similarly lays down that if a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age.⁽¹⁾ And even at law as to chattels, if a party negligently or culpably stands by and allows another to contract on the understanding of a fact which he can contradict, he cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.⁽²⁾

The rule is a deduction from the law of estoppel which is enunciated in the Indian Evidence Act,⁽³⁾ and, as such, it forms an exception to the general rule that a person cannot convey a better title than he has himself in the property.⁽⁴⁾ The same rule applies to moveable property, the law regarding which is similarly enunciated in the Indian Contract Act.⁽⁵⁾ The rule was recognized in India long before the present enactments,⁽⁶⁾ and its principle has been since held to be applicable to localities where the Act itself is not yet in force, e.g., the Punjab.⁽⁷⁾

686. In this speech, when moving for leave to introduce the Bill to amend this Act, the Hon'ble Mr. (afterwards Sir Courtney) Ilbert observed on this section as follows: "The section is based on the principle that where one of two innocent persons must suffer from the fraud of a third party, the loss should fall on him who has created or could have prevented the opportunity for the fraud, and that in such cases hardship is caused by the strict enforcement of the general rule that no one can confer a higher right on property than he himself possesses. This principle is generally recognized in the jurisprudence of all civilized nations, and lies at the bottom of such legislation as the English Factors Act."⁽⁸⁾ This section was one of the sections from which section 1 of the Act, as originally passed, gave power to exempt the members of any race, sect, tribe or class, and it was at first proposed in the amending Bill to continue this power of exemption in a modified form,⁽⁹⁾ but the Select Committee decided that it was unnecessary to give a power to exempt from the section on the ground that it contained a rule of equity which the courts should follow, and which they probably would follow even if the section were excluded from the Act.⁽¹⁰⁾

(1) Sugd., 743. In re *Morgan*; *Pilgren v. Pilgren*, 18 Ch. D., 93; *Carrit v. Real and Personal Advance Co.*, 42 Ch. D., 263. As to estoppel against the minor, *Luchmen v. Kalli Churn*, 19 W.R., 292 (296, 297), P.C.; followed in *Chunder Coomar v. Hurbans*, 1. L.R., 16 Cal., 137. The view is not inconsistent with *Dhurno v. Brahmo*, 1. L.R., 25 Cal., 616 O. A.; *Brahmo v. Dharmo*, 1. L.R., 26 Cal., 381.

(2) *Ib.*

(3) S. 115, Act I of 1872; *Mutsaddil v. Daleep Singh*, 7 A.L.J., 967 (974); *Hoorbai v. Aishabai*, 12 Bom. L.R. 457 (458).

(4) S. 108, Indian Contract Act (IX of 1872).

(5) *Ib.*, except. (1) & (2); cf. also *Ib.*, 8s.

238, 245 & 246.

(6) *Mohesh Chunder v. Issur Chunder*, 1 I. J. (N. S.), 266; *Ram Coomar v. McQueen*, 11 B.L.R., 46, P.C.; *Uda Begum v. Inamuddin*, 1. L.R., 1 All., 82.

(7) *Mt. Basso v. Mir Mahomed*, (1913) P. L. R. 278.

(8) Proceedings of the Legislative Council, p. 182; Supplement to the *Gazette of India*, dated 9th August 1894.

(9) Statements of Objects and Reasons, paras. 11 and 12, *Gazette of India*, dated 23rd August, 1884.

(10) See Report of the Select Committee, para. 3, *Gazette of India*, dated 31st January 1885.

The rule here expounded has its apt analogue in the principles on which the English Courts of Chancery act in cases of resulting trusts.⁽¹⁾

687. Principle.—This section is founded on the equitable doctrine of estoppel, and has been enacted in accordance with the ruling of the Privy Council which says: "It is a principle of natural equity which must be universally applicable that, where one man allows another to hold himself out as the owner of an estate, and that a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it."⁽²⁾ So Lord Ellenborough in one case observed:—"Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."⁽³⁾ This ruling is the basis of this as well as section 115 of the Indian Evidence Act,⁽⁴⁾ and has been followed in numerous Indian cases.⁽⁵⁾

688. The same principle runs through the rule embodied in section 431; since both rules have their origin in estoppel, though they run somewhat differently in their courses, but the element common to them is the belief produced in the transferee of his transferor's good title, though in the one case it is produced by the conduct of the real owner, while in the other it is the result of erroneous representation of the transferor himself. It is possible to conceive a case falling under both the sections, but while under this section the transferee's belief in the transferor's title is produced by the *indicia* of ownership being with the latter, section 43 operates on the mind of the transferee not by what he sees but by what his transferor says. Under section 43, mere belief in and acting upon a representation may be sufficient to pass the subsequently acquired interest, while under this section mere belief is insufficient.⁽⁶⁾

689. Meaning of Words.—"Consent" may be express, or implied, *e.g.*, by acquiescence. The term is defined in section 13 of the Indian Contract Act. But as the "consent express or implied" mentioned in this section operates as an estoppel, it is clear that the term is not used in the limited sense in which it is defined in the Contract Act. For, to create an estoppel, agreement is by no means essential. On the other hand, estoppel may be created when the person suffering by it has been guilty only of omission or negligence. *Of the persons interested in immoveable property,* *i.e.*, of the owner or owners. The transfer here must be by the "*ostensible owner,*" *i.e.*, apparently the full and unqualified owner of the property who had in reality only a

(1) *Ram Coomar v. McQueen*, 11 B.L.R., 46 (53); *Khwaja Muhammad Khan v. Mhd. Ibrahim*, I.L.R., 26 All., 490, P.C.

(2) *Ram Coomar v. McQueen*, 11 B.L.R., 46 (53); *Khwaja Muhammad Khan v. Mhd. Ibrahim*, I.L.R., 26 All., 490, P.C.; *Mutsad-dial v. Daleep Singh*, 7 A.L.J. 967; *Hoorbai v. Aishabai*, 12 Bom. L.R., 457; *Vaithianath v. Kanaku*, 21 T.L.R., 235.

(3) *Pickering v. Busk*, 15 East, 38 (43).

(4) *Karamat v. Saminddin*, I.L.R., 8 All., 409 (414).

(5) All reviewed in *Sarat Chunder Dey v. Gopal Chunder*, I.L.R., 20 Cal., 296, O.P., which has considerably extended the rule. *Khwaja Muhammad v. Mhd. Ibrahim*, I.L.R., 26 All., 490 (499).

(6) *Pandiri v. Karumooory*, 8 I.C., 389

qualified possession, such as that of a hirer of goods. Where the possession is for a specific purpose, the section is inapplicable. (1) "*The transfer shall not be voidable:*" at the instance "of the persons interested in immoveable property." The transfer cannot be attacked merely on the ground that the transferrer had a defective title. It may be, however, impugned on other valid grounds. What amounts to a "*reasonable care*" is a question of fact dependent upon the circumstance of each case. "*Good faith*" is defined in the General Clauses Act. (2)

690. Transfer by Ostensible Owner.—Before the real owner can be affected by a transfer made by another, it is in the first place essential that the transferee must have known that he was dealing with the transferrer with full powers of disposition. A transferee who takes with notice of his limited powers has no equity against the real owner, for he has taken what he knew to be an infirm title. But a defective purchaser without notice, has an equity against the real owner who had allowed another to give himself out as the true owner, and he can then compel him to make good the representation which he has induced or suffered another to make. For "a person shall not be permitted to represent or permit to be represented a state of facts at one time, and afterwards, when such representation has induced another person to change his position, seek to shew that such representation was erroneous, is a doctrine too well established now to be shaken, and whether it is accurately called '*estoppel*' or not, the principle is perfectly intelligible." (3) On a similar principle in the case of negotiable instruments, a person taking them for value without notice of any infirmity in the title would have a right to hold them even as against a prior owner who had never intended to part with the property in them. Or, again, such an owner may have so acted as to be estopped from setting up a claim as against a person who has *bona fide* and for value taken the instruments by way of sale or pledge. (4)

691. The rule here enacted protects only transferees who take from an ostensible owner, and which excludes persons who hold possession of property professedly as agents, guardians or in any other fiduciary character. (5) A person does not become an ostensible owner if the true owner has entrusted him with temporary dominion over his property for a limited purpose. Thus, where the executor of the registered shareholder in a company indorsed his shares in blank and handed them over to his broker to obtain registration, to whom a power of attorney was also given, but the brokers deposited them in a Bank as security for advances obtained by them, it was held that the mere delivery of them with the indorsed blank transfer and power of attorney signed, irrespective of any act or intent on the part of the owner of the shares, was not of itself sufficient to pass the title to them. But if they had been delivered by or with the authority of the owner with intent to transfer them, such delivery would suffice for the purpose. But there having been no intent on the part of the owner to transfer them, a good title could only be obtained as against him, if he had so acted as to preclude himself from setting up a claim to them. If then, in the above case, instead of the executor, the transfer had been signed by the registered owner

(1) *Greenwood v. Holquette*, 12 V.L.R., 46; *Colonial Bank v. Cady*, 15 App. Cas., 267.

(2) S. 3 (30), Act X of 1897.

(3) *Per Lord Halsbury, L.C.*, in *Colonial*

Bank v. Cady, 15 App. Cas., 267 (273).

(4) *Per Lord Herschell*, in *ib.*, p. 288.

(5) *Danbar Singh v. Jawitra*, I.L.R., 39 All. 292; *Chandra Kanta v. Bhaghir*, I.L.R., 525 (528).

and delivered by him to the brokers, the Bank would have obtained a good title as against him.⁽¹⁾ On the other hand, if the brokers had signed and delivered the shares for the purpose of effecting a transfer the result then would have been the same,—the difference in the two cases being, that in the case of a registered owner, the signature must reasonably be presumed to have been made at some time or other for effecting a transfer. And if he entrusts it in that condition to a third party, those dealing with such third party have a right to assume that he has authority to complete a transfer. But no such presumption can be made when the indorsement is signed by executors, for they may well have signed merely to complete their title without the intention of ever parting with the shares. If the owner of a chose-in-action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value.⁽²⁾

692. The conduct of the true owner must then be unequivocal. On this

Benamidar excluded.

ground it has been held that the fact of a mere *benami* transfer in itself does not constitute such a misrepresentation as to bind all persons claiming under the person who creates the *benami*,⁽³⁾ but if the transfer is accompanied by a change of possession, and other acts which are the usual concomitants of a valid transfer, there would then be a case of estoppel on which the purchaser may rely.⁽⁴⁾ So if a person entitled to challenge a deed waives his right to do so, and consents to another's holding the property and to represent his interest, there can be no doubt, but that he cannot afterwards resile from his position, if the purchaser has on the faith of the ostensible title so created *bona fide* advanced money to the *benamidar*.⁽⁵⁾ In such cases it is immaterial that the beneficial owner may have so acted in ignorance of his own right, or without any intention to commit fraud, and has not in fact committed any fraud by his acts and representations. Neither mistake, error, or deficient information can be pleaded to the prejudice of an innocent transferee: "If the person who made the statement without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."⁽⁶⁾ The determining element in such cases is not the motive with which the representation has been made, nor the state of the knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.⁽⁷⁾ The contrary view was propounded at Allahabad and Madras, but these cases have since been overruled.⁽⁸⁾

(1) *Colonial Bank v. Cady*, 15 App. Cas. 267.

(2) *Per* Lord Herschell, in *Colonial Bank v. Cady*, 15 App. Cas., 267 (285), in which the learned judge intimated his opinion that in this respect the doctrine was the same in the State of New York.

(3) *Sarat Chunder v. Gopal Chunder*, I.L.R., 16 Cal., 148, O.A., overruled by P.C., on other points in I.L.R., 20 Cal., 296 (306), P.C.

(4) *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296 (306), P.C.

(5) *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal. 295 (308), P.C.; following *Pickard v. Sears*, 6 A. & E., 469; *Freeman v. Cooke*, 2 Ex. Ch., 654; *Cornish v. Abington*, 4 H. &

N., 549; *Carr v. London and N. W. Ry. Co.*, 19 Q.B.D., 68; *Labhu v. Mt. Nihali*, [1905], P.R., No. 7; *Maung Beya v. Maung San*, 10 I.C., 779 (780).

(6) *Ib.*, p. 311; following *Cairncross v. Lorimer*, 3 H.L.C., 829.

(7) *Seton Laing & Co. v. Lafone*, 19 Q.B.D., 69; followed in *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296 (312), P.C.

(8) *Ganga Sahai v. Hira Singh*, I.L.R., 2 All., 809; *Vishnu v. Krishnan*, I.L.R., 7 Mad., 3; overruled by *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296 (318), P.C., in which it has been laid down that the English Law on the subject in no wise differed from the Indian rule—*ib.*, pp. 310, 314.

And if an innocent mortgagee is protected under the rule, the subsequent assignee of his right is equally protected though he may have taken with full knowledge of its original invalidity.⁽¹⁾ Once a purchaser acquires a valid title, it cannot be subsequently shaken at the instance of the heir. As the Privy Council observed in one case: "It was said that the minor would not be bound by the acts of the father before his death. Suppose the father had actually sold his property to the mother, and had made a misrepresentation by a deed of sale, would not the minor son have been bound by that deed, although the father might have had some secret understanding with the mother that it was purchased in her name *benami* for the father? After that misrepresentation on the part of the father, his heirs were no more entitled to recover than the father would have been in his lifetime. The heirs were as much bound by the misrepresentations made by the father as the father would have been if the wife in his lifetime had actually sold the property to a *bona fide* purchaser."⁽²⁾

693. Consent Express and Implied.—Before a transferee can suc-

Can the minor
consent.

cessfully hold his own, he must shew that the transferer was holding himself out as the owner "with the consent express or implied" of the true owner, who must, of course, be *sui juris*,⁽³⁾ and must have himself consented to the transfer. A person cannot be estopped by a consent given vicariously, and of which no knowledge was brought home to him. A minor as such, cannot therefore be bound under this section, by a consent given by his guardian in possession even though the consent given be expressed to a third person holding himself out as the proprietor of the property (§. 284).⁽⁴⁾ But the question whether in such a case the minor would not be equally bound even if he had himself consented instead of his guardian is one which does not admit of easy solution. For while it is true that a person not *sui juris* can no more, expressly contract than he is bound by his conduct; but still the fact remains that such a person cannot use his privilege to compass fraud: consequently, if an infant is old and cunning enough to contrive and carry on a fraud, he could not be relieved of the consequence.⁽⁵⁾ But, on the other hand, as was observed in a case: "A minor cannot be estopped by a deed or by recitals in a deed, and if he cannot be so estopped, it seems incongruous to say that he can be estopped by a parol declaration, for this is the contention."⁽⁶⁾ But to Law the prevention of fraud is more essential than the privilege of infancy, and, moreover, there appears to be no analogy, between the two cases, and that fraud took away the privilege of infancy has been conceded by the Privy Council.⁽⁷⁾ It may then be assumed that if a minor having attained sufficient maturity of understanding and possessing sufficient intelligence places another in the position of an ostensible owner, the latter should be able to convey as good a title in favour of a transferee as if the real owner had suffered from no legal disability. But the fact remains,

(1) *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296 (310), P.O.

(2) *Per Sir Barnes Peacock in Luchmun v. Kali Churn*, 19 W.R., 292 (296), P.C.; followed in *Sarat Chunder v. Gopal Chunder*, I.L.R., 30 Cal., 296, P.O.

(3) *Dambar v. Jawitri*, I.L.R., 29 All., 292.

(4) *Danibar v. Jawitri*, I.L.R., 29 All., 292; *Abdullah v. Mt. Bundi*, I.L.R., 34; All., 22 (24); *Dalibai v. Gopi Bai*; I.L.R., 26 Bom., 433 (436).

(5) *Watts v. Creswell*, 2 Eq. Ca. Abr., 516; *Ex parte Unity Joint Stock M.B. Association*,

3 Deg. & J. 63; *Overton v. Banister*, 3 Hare, 503; *Cornwall v. Hawkins*, 4 I.L.J.Ch., 435; *Mohun Bibi v. Sarat Chand*, 2 C.W.N., 18; but see *Dharmadas v. Brahmo Dutt*, I.L.R. 25 Cal., 6.6. O.A.; *Brahmo Dutt v. Dharmodas*, I.L.R., 26 Cal., 381 (388).

(6) *Brahmo Dutt v. Dharmodas* I.L.R., 26 Cal., 381 (388).

(7) *Mohori Bibi v. Dharmodas*, I.L.R., 30 Cal., 539 (546) P.C.; following *Nelson v. Stocker*, 4 De. G.L.J., 458; *Sarab v. Rajani*, 12, C.W.N., 481; *Ramcharan v. Joy Ram*, 16 C.L.J., 185 (190, 191).

that apart from fraud the minor owner is not bound by the doctrine of ostensible ownership here set out.

694. Before consent could be used to the prejudice of the true owner, it must appear that it was an intelligent consent and not one brought about by misapprehension on the part of the person making it, as to his legal rights.⁽¹⁾ Of course, consent may be proved by direct evidence or by consensual facts, or other evidence which would be only consistent with it. Taken in this connection the term consent would not bear the strict construction placed upon that term by the Indian Contract Act, which enacts that two or more persons are said to consent when they agree upon the same thing in the same sense.⁽²⁾ The definition, as it is, is open to the objection of defining one term by another, and does not carry the matter much further.⁽³⁾ But there should be no difficulty in enunciating the general rules to which the rule under discussion must be deemed to be subject. As an abstract conception, consent is an intellectual act or condition of the mind. But in law, consent is judged not by what a man *thinks*, but by the phenomenon his actions present. "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."⁽⁴⁾ In other words, law is concerned only with a man's external acts, and if it takes note of his mental condition at all, it is only when it reflects on those acts. Hence where the actually existing intention, by mistake differs from the intention expressed by the external act which signifies it, the expressed intention must, in relation to the act of another, honestly induced by such expressed intention, be deemed to be the real intention. For instance, in a written contract if there be a material mistake as to the subject-matter of the contract, it is not as such rendered void, though, of course, in certain cases relief may be obtained in equity.⁽⁵⁾ And while consent extorted by violence or grasped by fraud is invalid and renders contracts voidable at the option of the injured party,⁽⁶⁾ still it does not affect a *bona fide* purchaser for valuable consideration and without notice. Such a purchaser from a fraudulent vendor acquires a title which may not be defeated by the owner's exercise of his right to rescind. As Mellor, J., said : . . . The fact that the contract was induced by fraud did not render the contract void or prevent the property from passing ; but merely gave the party defrauded right on discovering the fraud to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. We think that, so long as he has made no election, he retains the right to determine it either way subject to this, that, if in the interval, whilst he is deliberating, the innocent third party has acquired an interest in the property, or, if in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind."⁽⁷⁾

(1) *Dungaria v. Nand Lal*, 3 A.L.J.R., 534.

(2) S. 13, Act IX of 1872. The word "thing" must be deemed to refer primarily to the act in regard to which there is an agreement.

(3) In England the term has by no means yet emerged out of the clouds of controversy—cf. *Holland's jurisprudence* (8th Ed.), 131, *Anson's Contract* (9th Ed.), 9. "Consent" in criminal law should be clearly distinguished from its meaning in the civil law. *Reg.*

v. Dee, 15 Cox, C. C., 579.

(4) *Per* Blackburn, J., in *Smith v Hughes*, 6 Q.B., 607; *Reg v. Helir*, [1895], 2 Q.B., Ir., 754; *Sukhimani v. Mahendro*, 4 B.L.R., 16, P.C.; *Dungaria v. Nandlal*, 3 A.L.J.R., 534.

(5) S. 35, Specific Relief Act (I of 1877).

(6) *Davies v. Harness*, L.R., 10 C.P., 166; *Kerr's Fraud*, p. 5.

(7) *Clough v. London and N.W. Ry. Co.*, L.R., 7 Ex., 34.

695. Now, as the inward element of the direction of the will eludes examination, and legal result is annexed by law to its outward manifestation, it is always a question of fact as to whether the overt acts and manifestation of a man's feelings, amount to legal consent. But since there are always certain common elements present in the acts and declarations of all men, it has been laid down as a maxim that consent is to be inferred, where dissent would be in contradiction with the facts.⁽¹⁾ In such cases the evidence given is the evidence of conduct from which consent is inferred. Ordinarily, a person's consent to an act is deemed to be a consent to the accruing of all its natural and ordinary consequences as may have been within his knowledge and contemplation. On this principle the section itself is enacted, and its truth can be exemplified by cases culled from the ordinary commerce of life.⁽²⁾ The motive with which consent is given is immaterial, for otherwise a *benamidar* could not make a valid disposition of property. All that law regards is, that if a man has created an apparent state of things which a reasonable man after inquiry takes to be the real state of things, and acts upon that belief, he is entitled to retain his bargain, even though he may be subsequently disabused of his mistake.

696. The general rule as to the effect of attestation by a person is now settled to be that though the mere attestation of a deed does not necessarily import concurrence with its terms, yet, where it is shewn by other evidence that when becoming an attesting witness, he must have fully understood what the transaction was, his attestation may support the inference that he was a consenting party, and that the question whether attestation of a document should be held to imply assent to it is a question of fact which has to be determined with reference to the circumstances of each case.⁽³⁾ But attestation by a person who is interested in the property conveyed by the deed would probably imply his consent,⁽⁴⁾ as this is the usual mode adopted in this country for signifying it, though it is, of course of its own force, wholly insufficient to operate as transfer of property.⁽⁵⁾ So it was observed in a Madras case: "Having regard to the ordinary course of conduct of Indians in this Presidency, attestation by a person, who has, or claims any interest in the property covered by the document, must be treated *prima facie* as a representation by him that the title and other facts relating to title recited in the document are true and will not be disputed by him as against the obligee under the document."⁽⁶⁾ It is, indeed, difficult to imagine that the true owner should affix his signature to a deed without having any knowledge of its contents.

697. Implied consent is nothing more or less than acquiescence, which is acquiescence under such circumstances as may lead to a reasonable inference of assent. Implied consent is a passive act as where a person does not oppose irregular acts which he knows are being done.⁽⁷⁾

(1) *Qui tacet consentire videtur* (He who is silent appears to consent)—a Maxim of law which for its truth has passed into a household proverb—cf. Indian Contract Act S. 17, Exp., (Act IX of 1872).

(2) Cf. "Law of agency," and "Possession by Benamidar" §§ ante.

(3) *Chunder Dutt v. Bhagwat*, 3 C.W.N., 207 (208); *Maung Tha v. Maung Shew*, 12 I.C., 891; *Collier v. Baron*, 2 N.L.R., 34.

(4) *Lala Rup Narain v. Gopal Devi*, I.L.R., 36 Cal. 780 (796, 797), P.C.

(5) *Baldeo v. Sundar*, 7 A.L.J. 664 (666).

(6) *Per Sadashiva Aiyar J., in Kandasawmy v. Rangasawmy*, 23 M.L.J., 301; 16 I.C., 30 (33).

(7) *De Bussche v. Alt*, 8 Ch. D., 314; *Duke of Leeds v. Earl of Amherst*, 2 Phil., 117; *Evans v. Smallcombe*, L.R., 3 H.L., 249; *Cowell v. Watts*, 2 H. & Tw., 224.

It is thus not a mere quiescence but something more from which consent may be inferred. And so acquiescence is not a question of fact but of a legal inference from facts found.⁽¹⁾ Acquiescence and delay in ejecting a person in wrongful possession may amount to an implied consent, and may even bar the remedy against the wrong-doer. In one case, nine years' delay in ejecting a trespasser was construed to amount to an acquiescence of his title so as to preclude him from maintaining a suit for ejectment,⁽²⁾ and in another case a suit to avoid an improper alienation by the plaintiff's father, instituted after twelve years⁽³⁾ was thrown out on the ground that he must be deemed to have consented to the alienations, even though he had in the meantime filed a petition of protest in a court of justice, whereof the vendees were not made aware. In a third case where the defendant was suffered to erect a building unopposed, a presumption of consent was made from his delaying his suit for seven years.⁽⁴⁾ And it is probable that much shorter period would estop a plaintiff who allows another to build *pucca* or substantial buildings.⁽⁵⁾ But a purchaser from an ostensible owner with notice of the defect in his title stands on a different footing, for law does not regard him with especial favour, but while he is not allowed to profit by his bargain, he is permitted to remove his erections,—an equity which treats him here with greater indulgence than in England where he would have to surrender up the land together with the structures he had raised.⁽⁶⁾ A person who permits another to erect a thatched house and live therein for over forty years cannot but be held to have consented to his ownership of the land and that house which are both attachable and assignable.⁽⁷⁾ But in the case of a tenant, as such, possession for howsoever long a period would not, of course, confer immunity against eviction,⁽⁸⁾ unless the tenant can show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy.⁽⁹⁾ But in any other case the court looks askance at a suit for ejectment after allowing a person to complete his erections or improvements.⁽¹⁰⁾ And if in the meantime an innocent purchaser has intervened, the owner cannot eject him at all.⁽¹¹⁾ So a tenant, who has planted mango trees on an agricultural holding to the knowledge, but without the consent of his landlord, and has

(1) *Beni Ram v. Kundan Lal*, I.L.R., 21 All., 496, P.C.; *Ananda Chandra v. Parbati*, 4 C.L.R., 198. (204, 205), but in which Rampini, J., held *contra*.

(2) *Nalatachi v. Venkatachala*, 1 M.H.C.R., 131, but it does not shorten limitation in respect of a right absolutely vested in the plaintiff—*Pudamutturly v. Timina*, 2 M.H.C.R., 270; *Ram Rau v. Raja Rau*, 2 M.H.C.R., 114; *Huro Soonduree v. Ram Dhun*, 7 W.R., 276; *Taruck Chunder v. Huro Sunkur*, 22 W.R., 267; *contra* in *Uda Begam v. Imam-udin*, I.L.R., 1 All., 82.

(3) *Ram Kishore v. Anund Misser*, 21 W.R., 12; *Sunt Lal v. Bhurosee*, 18 W.R., 57.

(4) *Bromo Moyee v. Koomodinee*, 17 W.R., 467; *Beni Madhab v. Ramjoy*, 10 W.R., 316.

(5) *Hurroo Chunder v. Hullodhur* (1864), W.R., 166; *Gobind v. Gooroo*, 3 W.R., 71; *Nil Kant v. Gugoo*, 20 W.R., 328; *Gujadhur v. Nund Ram*, 1 Agra, 244.

(6) *Narayan v. Bholagir*, 6 B.H.C.R. (A.C.), 80.

(7) *Durgaprasad v. Brindaban*, 7 B.L.R.,

152.

(8) *Addoyto v. Peter Doss*, 17 W.R., 383; explaining *Banee Madhub v. Joy Kissen*, 12 W.R., 495; *Tarukpodo v. Shyama Churn*, 8 C.L.R., 50; *Nabu Mondol v. Cholim Mulik*, I.L.R., 25 Cal., 896 (908).

(9) *Beni Ram v. Kundan Lal*, I.L.R., 21 All., 496, P.C.; *Ismael Khan v. Jaigun Bibi*, I.L.R., 27 Cal., 570; 4 C.W.N. 210.

(10) *Hurro Chunder v. Hullodhur*, (1864), W.R., 166; *Radha Nath v. Joy Kissen*, 1 W.R., 288; *Huro Sundoree v. Ram Dhun*, 7 W.R., 276; *Bromo Moyee v. Koomodinee*, 17 W.R., 467; *Nil Kant v. Jugoo*, 20 W.R., 328; *Savak Lal v. Ora*, 8 B.H.C.R. (O.C.) 77, in which, however, ejectment was decreed subject to the payment of compensation within three months. *Beni Madhab v. Ramjoy*, 1 B.L.R., (A.C.), 213 (erection of a house on the path-way to which a person had a right); *Rama v. Jan Mahomed*, 11 W.R. 574; *Aruna Chellum v. Olagappa*, 4 M.H.C.R., 312.

(11) *Jala Gopee Chand v. Liakut Hessein*, 25 W.R., 211.

thereby changed the character of the land, cannot be ejected by his landlord who stood by for more than three years and allowed the tenant to spend his labour and capital upon the land.⁽¹⁾ And the same rule has been extended to the case of an under-tenant.⁽²⁾ But in all such cases the tenant must show that he had acted under a *bona fide* mistake as to his rights, and that the landlord knowing of it did nothing to disabuse him.⁽³⁾ A mere absence of protest does not amount to acquiescence, especially where the party dealing with the property knew or could have known that the property he was dealing with belonged to another.⁽⁴⁾ Where one of several joint tenants executed a *kabuliat* in favour of the landlord, and the other tenants acquiesced in the representation of the holding by the tenant who executed the *kabuliat*, and the landlord sued him only for the rent, and in execution of that rent decree attached the entire holding, and the other tenants made no attempt to get themselves recognized or pay the arrears; it was held that the attachment covered the entire holding unless there was fraud and collusion on the part of the landlord.⁽⁵⁾

698. Acquiescence or even consent may be inferred from latches or delay.

Latches or delay. As was pointed out by Lord Penzance, "in all the cases in which lapse of time is held to stand in the way of the assertion of rights attaching to the ownership of property, it is not the lapse of time itself which so operates but the inferences which are reasonably drawn from the continuous existence of a given state of things during that period of time. These inferences are inferences of acquiescence or consent."⁽⁶⁾ But it is not necessary that such an inference should be made in the process of reasoning before effect can be given to the effect of latches, for the Court will refuse to unsettle titles if in consequence of latches and delay a change has been effected in the thing transferred so that it would be inequitable to deprive the transferee of the fruit of his bargain.⁽⁷⁾ "Now, the doctrine of latches in Courts of Equity" observed Sir Barnes Peacock, "is not an arbitrary or a technical doctrine," where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the

(1) *Noyna v. Rupkun*, I.L.R., 9 Cal., 609, and if the transfer be by mortgage the mortgagee will be allowed compensation on redemption; *Kunhammed v. Narayanan*, I.L.R., 12 Mad., 320; *Ravi Varmah v. Mathussen*, *ib.*, 323 note (in which tenant was allowed to remove improvements not acquiesced in).

(2) *Sreemunt v. Kookoor*, 15 W.R., 481.

(3) *Ramsden v. Dyson*, L.R., 1 H.L., 129; *De Busche v. Alt*, 8 Ch.D., 286; *Beni Ram v. Kundan Lal*, I.L.R., 21 All., 496 P.C.; *Jug Mohan v. Pallonjee*, I.L.R., 22 Bom., 1; *Kunhammed v. Narayana*, I.L.R., 12 Mad., 320; *Ismail Khan v. Jaigun Bibi*, I.L.R.,

27 Cal., 570.

(4) *Fatehyab v. Muhammad*, I.L.R., 9 All., 434; *Uda Begum v. Imamuddin*, I.L.R., 1 All., 82; *Baswanta v. Ranu*, I.L.R., 9 Bom., 86; *Chintaman v. Dareppa*, I.L.R., 14 Bom., 506.

(5) *Rajani Kant v. Uzir Bibi*, 7 C.W.N., 170.

(6) *Dalton v. Angus*, 6 App. Cas., 740 (805).

(7) *Lindsay Petroleum Co. v. Hurd*, L.R., 5 P.C., 221 (239); *Erlanger v. New Sombrers Phosphate Co.*, 3 App. Cas., 1218 (1230, 1231); *Peer Mahomed v. Mahomed*, I.L.R., 29 Bom., 234 (245, 246).

nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." . . . "In order that the remedy should be lost by laches or delay, it is, if not universally, at all events ordinarily—and certainly when the delay has been only such as in the present case ⁽¹⁾—necessary that there should be sufficient knowledge of the facts constituting the title to relief."⁽²⁾ Such a case is not contemplated by the rule here enacted which, prevents only one phase of the operation of estoppel, and is by no means exhaustive of the law of estoppel as affecting the transfer of property. Such a case may arise where a person under a legal obligation to disclose his title fails to do so, and thereby another person is induced to purchase the property, in which case the former would be estopped from disputing the latter's title on the strength of the title which he had failed to notify. A creditor obtained two decrees against his debtor, one being a mortgage decree to enforce his lien on certain property, and the other a simple money decree. In execution of the second decree the property over which the judgment-creditor had a lien was at his instance proclaimed for sale, but the creditor then failed to notify his own lien, which he, however, before the sale brought to the notice of the court, but the auction-purchaser was not apprised of it, and the court thereupon held that the judgment-creditor was estopped from afterwards setting up his lien against the auction-purchaser who purchased the property free from it.⁽³⁾ On the same principle, where a person holding two mortgages sued on the first and brought the property to sale without reference to his second mortgage, he was held precluded from setting up the latter against the purchaser of property sold in execution of the decree passed on his first mortgage.⁽⁴⁾

699. Closely allied to the subject of acquiescence is the subject of ratification, which has the same effect, but since it has the effect of barring one who is *prima facie* the legal owner, the plea must be accurately set up and cogently proved.⁽⁵⁾ Where the adoptive mother of one Ramchand mortgaged certain property but *not* in his behalf, and where the said Ramchand promised to his mother to redeem the property, it was held that such a promise being made not to the mortgagee but to the mother was without consideration and since the promise could not have had the effect of ratification, for the ratification of the unauthorized conduct of an agent can only be effectual when the contract has been made by the agent avowedly for or on account of the principal, and not when it has been made on account of the agent himself—he could assert his title and that the mortgage was ineffectual against him.⁽⁶⁾

700. Mistake Immaterial:—Where a person of full age allows his mother to continue to manage the family property and the creditor deals with her under the mistaken impression as to his age and believing him to be still a minor, he cannot afterwards turn round and shew that he was in fact major and therefore the creditor could not deal with the guardian of his nonage. (§§ 284, 699). And indeed this would be so, even if at the time of the transaction, even he himself and his relatives were mistaken as to his age, for as

(1) About two years.

(2) *Lindsay Petroleum Co. v. Hurd*, L. R., 5 P. C. 221 (239, 240, 241) P. C.

(3) *Nursing Narain v. Raghoobur*, I. L. R., 10 Cal., 609; *Tukaram v. Ram Chandra*, I. L. R., 1 Bom. 314; *Agarchand v. Rahma*, I. L. R., 12 Bom., 678; *Muhammad v. Shile*

Sabai, I. L. R., 21 All., 809.

(4) *Nattu v. Annangara*, I. L. R., 30 Mad., 353.

(5) *Rajan v. Basuva*, 2 M. H. C. R., 428.

(6) *Shiddeshvar v. Ramchandray*, I. L. R., 6 Bom. 463.

remarked before, it is immaterial that the party estopped was himself mistaken.⁽¹⁾ In the case of property held in the nature of a trust, if the trustee holds himself out to his vendees as the absolute owner, and there is nothing even to put them on the inquiry as to whether the vendor held the property in trust or not, purchase by a person in good faith and for consideration cannot be impugned by the *cestui que trust*.⁽²⁾ A person who causes the mutation of names effected in favour of another person and allows him to pay the Government revenue cannot afterwards complain if an innocent purchaser mistakes the ostensible owner to be the real owner.⁽³⁾ So where an incumbrancer stood by at a treaty for the settlement of the incumbered estate on the marriage of the owner's son, without opposition and fraudulently concealed his charge and privately assured the father of the son that he would trust to his personal security, he was compelled to relinquish his charge as against the son and his wife, and the issue of the marriage.⁽⁴⁾ In another case a Hindu widow mortgaged certain land to her son-in-law, husband of her daughter Ran. On her death the plaintiff claiming to be her reversioner disputed the mortgage and thereupon in 1882 the mortgagee accepted another mortgage with possession from him. Ran was aware of this transaction and acquiesced in it. Later on she sold her interest to the defendant who redeemed her husband's mortgage. The plaintiff then in 1889 sued both the mortgagee and Ran's assignee to redeem his own mortgage, and he was held entitled to succeed on the ground that though initially he may have had no title to the property, his mortgage of 1882 converted the mortgagee's possession as possession under the plaintiff and so adverse to Ran, who being aware of what was being done must be deemed to have acquiesced.⁽⁵⁾

And while an incumbrancer of an estate is not bound to give notice of it to any person whom he knows to be in treaty for the purchase of the estate, he must not when appealed to for information give evasive or misleading replies, for if he misinform an intending purchaser he does so at his own peril⁽⁶⁾ although he pleads forgetfulness in excuse.⁽⁷⁾ A mortgagee who brings his mortgagor's property to sale, in execution of a money-decree and omits to notify to intending purchasers the existence of his mortgage, is thereafter precluded from enforcing it against a *bona fide* purchaser.⁽⁸⁾

701. What Inquiry the Transferee should make.—As this section enacts a rule for the protection of titles honestly acquired by transferees, it is incumbent upon them to show that they had been reasonably circum-spect in dealing with their transferrer.⁽⁹⁾ Where the latter is the true owner, there is of course no necessity for inquiry—since inquiry is only evidence of *bona fides* and it is necessary to prove it in this connexion only when the

(1) *Nathubhai v. Mulchand*, 3 Bom. L. R., 535 (637); following *Ramcoomar v. John*, 11 B.L.R., 46 (52), P.C.; *Krishnaji v. Moro*, I.L.R., 15 Bom., 32; *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296, P.C.

(2) *Haitram v. Durga Prasad*, I. L. R., 5 All., 603 (612); dissenting from *Durga Prasad v. Asaram*, I. L. R., 2 All., 361.

(3) Cf. *Devji v. Godabhai*, 2 B. L. R., 85, P. C.; *Pandurang v. Anant*, 5 Bom. L. R., 956 (973).

(4) *Berrisford v. Milward*, 2 Atk. 49.

(5) *Purshottam v. Sagaji*, I. L. R., 28 Bom., 87.

(6) *Boyd v. Belton*, 1 Jo. & Lat., 730.

(7) *Burrowes v. Lock*, 10 Ves., 470; *Slim v. Croucher*, 1 De G. F. & J., 518.

(8) *Muhammad v. Shib Sahai*, I. L. R., 2 All., 309; following *Agar Chand v. Rakhma*, I. L. R., 12 Bom., 678; *Dullab v. Krishna*, 3 B. L. R., 407. The contrary was held in *Dhondo v. Raoji*, I. L. R., 20 Bom., 290, where, however, registration was held to be notice to subsequent purchasers.

(9) *Hoorbai v. Aishabai*, 12 Bom. L. R. 457 (458); *Chandra Kant v. Bhagiar*, 1 I.C. 525 (528); *Raman Chetty v. Po Son*, (1909) 5 L. B. R. 125.

transferrer's title is found to be defective. Now, when an estoppel is pleaded against a party, the facts relied upon as leading up to it should be precise and unambiguous, for since the nature of an estoppel is to exclude evidence of an inquiry into the truth, it must be clearly pleaded and proved, it therefore follows that the transferee invoking the aid of this section must allege and prove the precise nature of the inquiries he relied on.⁽¹⁾ It is impossible to lay down any general rule as to the nature of the inquiry which an intending purchaser should 'make, for that must depend upon the circumstances of each case.⁽²⁾ "But without laying down any general rule it may be said that they must be of such a specific character that the court can place its finger upon them, and say that upon such facts some particular inquiry ought to have been made. It is not enough to assert generally that inquiries should be made or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry, which might be expected to lead to some result."⁽³⁾ Such circumstances may be infinitely varied, but facts such as possession of the title-deeds or possession of the property, entry of a name in the Collector's Register⁽⁴⁾ and the like are always material. And where such circumstances exist, the purchaser is always put upon inquiry, and when he is, a mere perfunctory or superficial inquiry is not enough. For instance, an inquiry into the fact that the name of the transferrer was for many years and at the time of the sale borne on the Government records as in possession of the property transferred is not sufficient, if the search could have afforded means to pursue the inquiry further as to the real ownership of the property.⁽⁵⁾ So where a Government servant owning zemindari property in the district in which he was employed, caused that property to be recorded in the revenue papers in the name of his young sons, who sold or mortgaged it to a person, who satisfied himself that the property had been recorded for some years in the names of the sons, but made no further inquiries which would have revealed to him the true owner of the properties, it was held that the transferee was not entitled to the protection afforded by the section.⁽⁶⁾ It must, however, be noted that the transferee in this case presumably knew that the father of his transferors was a Government official in the district in which the property was situate and from which he could have well inferred that being prevented by the rules of his service from holding such properties the mutation of names made in favour of the sons may well have been *benami*.⁽⁷⁾ And since generally a purchaser cannot take more than his vendor has to sell, the rule must be regarded as an exception, the facts of which must be pleaded by the transferee, who must strictly prove the facts upon which he relies. If he has diligently pursued his inquiries, he is then protected, although it may be shown that there were more avenues open to him for profitable search. But it must be remembered that the doctrine of estoppel is an equitable one, and if it can be shown that the transferee ought to have but did not make inquiries, he can gain no advantage over the transferrer. Thus where a person took a permanent lease of a cultivatory holding direct from the Zemindar without making any inquiries as to who were the cultivators and on the tenure they held;

(1) *Rani Mewa Kunwar v. Huldass*, L. R., 4 I. A., 157 (161).

(2) *Partap Chand v. Saiyida*, I. L. R., 23 All., 442 (447); *Zimjabai v. Bhawani*, 9 Bom. L. R., 398 (391); *Manji v. Hoorbai*, 12 Bom. L. R., 1044 (1051).

(3) *Ramcoomar v. McQueen*, 11 B. L. R., 46 (52), P. C.

(4) *Kaung Hwe v. Ma Lun*, 11 I. C. 855 (856); *Maung Po Than v. Ka on*, 12 I. C. 858.

(5) *Ib.*, 442 (447, 448); cf. *Pandurang v. Anant*, 5 Bom. L. R., 956 (973).

(6) *Ib.*, 442 (447).

(7) *Ramcoomar v. McQueen*, 11 B. L. R., 442 (447, 448).

and where, the permanent lessee having commenced to build one of the cultivators, being an occupancy-tenant, subsequently brought a suit in ejectment against him, it was held that the lessee should, by the knowledge that the land was a cultivatory holding, have been put on his guard and have made inquiries as to the exact condition of the title, and that as he had not done so, the doctrine of equitable acquiescence could not be applied in his favour.⁽¹⁾

702. But on the other hand, further inquiry becomes supererogatory if the transfer is proposed, encouraged, or acquiesced in by the very person whose title or interest it was to challenge it.⁽²⁾ As Campbell, L. C., said: "I am of opinion that, generally speaking, if a party having an interest to prevent an act being done had full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license."⁽³⁾ This statement of the law has been since accepted by the Privy Council who observe: "These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him seek to challenge after a considerable interval of time."⁽⁴⁾ And so, in a case where a widow had held *benami* for her husband's property as to which he had executed a *hibanama* in her favour, and after whose death she mortgaged the property and her son represented her in the transaction and executed the mortgage on her behalf; and after her death, in a suit between rival purchasers of part of the property comprised in the *hibanama*, and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a purchaser at a sale in execution of the mortgagee's decree, it was held that the son's participation in the mortgage estopped both him and his representatives.⁽⁵⁾ Again, there can be no inquiry when there is nothing to inquire about. As the Privy Council remarked: "It is not enough to assert generally that inquiries should be made, or that a prudent man would make inquiries; some specific circumstances should be pointed out as the starting point of an inquiry which might be expected to lead to some result."⁽⁶⁾ If therefore all the external indicia of ownership, such as possession of the property and of the title-deeds, registry in the Collector's books and the like are in a person's favour, inquiry into them would be as unnecessary as it would be misleading and would have in no way led to the discovery of truth. So where a mortgage was taken from a person who was in possession of the mortgaged property, and was recorded as owner and held the title-deeds of the property, it was held that there was nothing in the transaction to put the mortgagee on inquiry as to the real title to the property, and the beneficial owner could not afterwards restrain the mortgagee from selling the property in execution of a decree on his mortgage.⁽⁷⁾ So where a person found in possession of property is recorded as

(1) *Bisheshur v. Muirhead*, I. L. R., 14 All., 362.

(2) *Sarat Chunder v. Gopal Chunder*, I. L. R., 20 Cal., 296 (308), P. C.; *Tulshi Bat v. Mutsaddi Lal*, 2 A.L.J. 97 (99).

(3) *Cairncross v. Lorimer*, 3 H. L. C. 829.

(4) *Sarat Chunder v. Gopal Chunder*, I.L.

R., 20 Cal., 296 (311, (312), P.C.

(5) *Ib.*

(6) *Ramcoomar v. McQueen*, 11 B. L. R., 46 (52), P. C.

(7) *Khawaja Mahomed v. Md. Ibrahim*, I. L. R., 26 All., 470; *Chandra Kanta v. Bhagito*, 1 I.C. 525.

owner, and holds the title deeds of the property, the transferee has all the indicia of ownership and he is not then bound to push his enquiry any further to discover if some one else had the secret title to the property. (1) The title of the apparent owner would in its strength vary in inverse ratio to that of the true owner. If therefore the latter's title was neither close nor clear, the transferee is not bound to investigate it beyond satisfying himself as to the *prima facie* title of his transferor. (2) So again, no fresh enquiry is necessary if the transfer challenged was merely a renewal of an old transfer made after due enquiry. (3)

703. A mere quiescence on the part of the real owner does not debar him from asserting his title. (4) The rule—that one who, knowing his own title, stands by and encourages a purchase of property, as another's will not be allowed to dispute the validity

Mere quiescence is insufficient.

of the sale—implies a wilful misleading of the purchaser by some breach of duty on the owner's part. (5) But where relying upon the irresistible strength of his own title whenever it might suit him to assert it, the real owner stood by for a period of eleven years and took no steps towards asserting his right and even concealed the fact from his friend and neighbour, he was precluded from afterwards claiming the property as against the purchasers from the ostensible owner. (6) A *benimadar* realized upon a bond standing in his own name money to which other parties were beneficially entitled, and paid over the money so obtained in the course of a transaction apparently *bona fide* and not collusive to a third party who had no knowledge of the beneficiaries' interest therein. It was held, on a suit by one of the parties beneficially interested in the bond, that his remedy against the *benamidar* having become barred by limitation, the plaintiff could not recover against the transferee who had taken *bona fide* in ignorance of the plaintiff's interest. (7) Where property has been transferred *benami* in fraud of creditors and is sold by the ostensible owner, the real owner cannot afterwards be allowed to dispute the alienation. (8) But it must be remembered that there is a distinction between cases in which fraud is only attempted, and those in which it is actually carried into effect. It is only in the latter case that the court will refuse relief. (9) Misrepresentations made by a minor will estop him as much as an adult, (10) but the fraud of the minor must be shown to have deceived the other party into action. (11) § 284. When the real owner is excluded the *benamidar* is treated in all respects as the real owner, (12) and is bound to secure quiet possession to the transferee. (13)

(1) *Khwaja Muhammad v. Muhammad*, 1 I. L. R. 26 All. 490 (493).

(2) Cf. *Bommdewara v. Gundu Sastrulu*, 9 I. C. 504.

(3) *Ib.*

(4) *Baswantapa v. Ranu*, 1 I. L. R., 9 Bom. 86.

(5) *Ibid.* See also *Bisheshur v. Muirhead*, 1 I. L. R., 14 All., 362; *Chintaman v. Datreppa*, 1 I. L. R., 14 Bom., 506.

(6) *Mohesh Chunder v. Issur Chunder*, 1 I. J. (N. S.) 266; *Caspersz on Estoppel* (2nd Ed.), 194, 195.

(7) *Sundarlal v. Fakirchand*, 1 I. L. R., 25 All., 62; following *Thompson v. Clydesdale Bank Ltd.*, [1893], A. C., 282.

(8) *Lakhi Narain v. Taramani*, 3 W. R., 92; *Bhawani v. Abidan*, 5 W. R., 177; *Rauhan v. Karim*, 4 W. R., 12; *Rattan v. Raj Gauri*, 4 W. R., 72; *Poreshnath v. Anathnath*,

1 I. L. R., 9 Cal., 265, P. C.; *Gulzar v. Fida Ali*, 1 I. L. R., 6 All., 24; *Mahomed v. Kishori*, 1 I. L. R., 22 Cal., 909, P. C.

(9) *Kalicharan v. Rasiklal*, 1 I. L. R., 23 Cal., 962 (note); *Goberdhone v. Ritu Roy*, *ib.*, p. 962.

(10) *Ganesh v. Bapu*, 1 I. L. R., 21 Bom., 198.

(11) *Dharmo v. Brahmo*, 1 I. L. R., 25 Cal. 616 (O. A.); *Brahmo v. Dharmo*, 1 I. L. R., 26 Cal., 381; dissenting from *Ganesh v. Bapu*, 1 I. L. R., 21 Bom., 198; *distinguishing Mills v. Fox*, 37 Ch. D., 153; cf. *Wright v. Snow*, 2 De G. & J., 8., 321; *Nelson v. Stokers*, 4 De G. & J., 458.

(12) *Nandkishorelal v. Ahmad*, 1 I. L. R., 18 All., 69.

(13) *Somasundram v. Fischer*, 1 I. L. R., 19 Mad., 60.

704. The title of transferee may be attacked on any of the several grounds foreshadowed in the section, namely, by shewing either that he had direct notice, or something which amounts to constructive notice of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it. (1) A title originally infirm may gain in strength with time, and a strong case would have to be established to defeat a possessor for a long period, of property for which full value had been given to the apparent owner. (2) On the other hand a mere permissive possession unsupported by consideration or the other usual accompaniments of a valid transfer proportionately tend to undermine a title. (3)

705. Benami Transactions.—The equitable doctrine of this section has been largely applied to *benami* transactions—a practice which is, as observed by the Privy Council, inveterate in India, (4) and although looked upon with jealousy by the Courts, (5) is applicable alike to Hindus (6) and Mohamedans. (7) As it was observed in a Calcutta case: "While it is impossible to ignore the existence of *benami* transactions in Bengal, we have no doubt that they must be judged by the ordinary and well established rules of law, and that a third party cannot be made to suffer by the voluntary acts of owners of property. It is not to be supposed that because the existence of *benami* transactions has been recognized by our Courts, parties are at liberty to use the system to the injury of others, whether by direct fraud, or by putting other parties in a position to defraud, or take undue advantage of innocent persons." (8) Indeed, it is not to be supposed that the law of *benami* is founded on principles peculiar to India, for it is an application of the equitable rule that if *A* purchase in the name of *B*, there is a resulting trust of the whole to *A*. (9) Where property is held *benami* and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act. (10) So if property is purchased in the name of a *benamidar*, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and the purchaser took with notice of that fact. (11) Of course, in such cases, it may not be possible to give direct proof, but if so, it must be established from circumstances justifying a legal inference. (12) Facts warranting a mere suspicion cannot take the place of legal testimony. (13) In cases of alleged *benami* transactions the true criterion is to ascertain from whose funds the purchase-money proceeded, but that fact alone does not create anything more than a strong

(1) *Ram Coomar v. McQueen*, 11 B. L. R., 46 (53), P. C.; *Parbat Chand v. Saiyida*, I.L.R. 23 All., 442 (447).

(2) *Ram Coomar v. McQueen*, 11 B. L. R. 46 (51), P. C., followed in *Mahomed v. Kishori Mohun*, I.L.R., 22 Cal., 909, P.C.

(3) *Cf.*, *Bishan Dial v. Ghaziuddin*, I.L.R. 23 All., 175 (180).

(4) *Judonath v. Shumshoonissa*, 11 M. I. A., 551; *Mt. Buhuns Kowur v. Lalla Buhoree Lall*, 14 M.I.A., 496; *B. Dowzelle Kedar-nath*, 7 B.L.R., 720 (726); *Muthu Naiyan v. Sinnia*, I. L. R., 28 Mad., 526 (529); *Narayan-asami v. Govindasami*, I. L. R., 29 Mad., 473, F. B.; overruling *Narayana v. Chokkappa*, I.L.R., 25 Mad., 655.

(5) *Nawab Azimat v. Hurdwarree*, 13 M.I. A. 396.

(6) *Gopeelkrist v. Gungapershad*, 6 M.I.A., 53.

(7) *Moulvie Sayyad v. Mt. Bebee Ultaf*, 13 M. I. A., 232; *Mt. Ameeroonissa v. Mt. Ashrufoonissa*, 14 M.I.A., 433.

(8) *Rakhaldas v. Bindoo*, 1 Marsh 293 (295).

(9) *Pelham v. Gregory*, 1 Eden., 516, followed in *DeSilva v. DeSilva*, 5 Bom., L. R., 784.

(10) *Brojonath v. Koilash Chunder*, 9 W. R., 593.

(11) *Bhugwan v. Upoock Sing*, 10 W. R., 188.

(12) *Sreeman Chunder v. Gopaul*, 11 M. I. A., 28 (43, 44).

(13) *Id.* pp. 43, 44; *Ebrahim v. Foolbai*, 4 Bom., L. R. 180.

presumption which may be rebutted. (1) The question is one of intention, (2) and while it has been held that the purchase by the father (3) or brother, husband (4) or other near relation in the name of his son, brother, wife, or other relation being referable to the promptings of affection is usually regarded as *benami* with no intention of effecting any real transfer by execution of a mere conveyance, still there may be circumstances which might rebut that presumption and evince a real transaction. In such and similar cases, possession and actual enjoyment of the property affords another criterion for determining the question of *benami* (5). As the Privy Council in one case remarked, in such cases the Courts have largely to rely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct. (6) But while as observed before, the habit of holding land *benami* is inveterate in India, that does not justify the Courts in making every presumption against apparent ownership. (7) The mere permission to hold possession cannot alone give or transfer a title from the *benamidar* in favour of the real owner, for no transfer of property exceeding Rs. 100 in value can legally be effected except by means of a registered instrument. (8) Heirs are bound by the misrepresentations made by their ancestor. (9) but a mere *benami* transfer does not of itself constitute such a misrepresentation as to bind all persons claiming under the person who creates the *benami*, (10) but if in the beneficiary's conduct there was nothing to put the purchaser upon inquiry, both he and his representatives will be bound by any alienation made by the *benamidar*. (11)

A document executed by a *benami* purchaser professing to relinquish in favour of the real purchaser, any claim which he might have in virtue of the purchase is a release, and should be so stamped. (12) If in any transaction a person is *benamidar* for another, he is not a necessary party to a suit in respect of that transaction. (13)

(1) *Ram Narain v. Muhammad*, I.L.R., 26 Cal., 227, P. C.; *Tatia v. Ambu* [1875], B. P. J., 245; *Sayyad Uzeur Ali v. Ullaf Fatima*, 13 W. R., 1. P. C.; *Akbar Ali v. Mahomed*, 15 W. R., 12; *Luchmee Kuar v. Futteh Sing*, 24 W. R., 400; *Sham Lal v. Johri Mal*, 1 I. C., 732; *Dalib Singh v. Nawne Kunwar*, I. L. R., 30 All., 258; *Ram Narain v. Muhammad*, I.L.R., 26 Cal., 227; *De Sylva v. De Sylva*, 5 Bom. L. R. 784; *Bai Motivahoo v. Purshotam*, I. L. R., 29 Bom. 306; *Abid Ali v. Asgar Ali*, 7 N. L. R., 159.

(2) *Ismail Kuttajee v. Hafiz Bo*, I.L.R. 33 Cal. 773 (785) P. C.

(3) *Mombire Sayyud Uzeur Ali v. Bebee Ullaf*, 13 M. I. A., 232 (247); *Bhagbut Chander v. Huro Gobind*, 20 W. R. 269.

(4) *Bai Motivahoo v. Purshotam*, I. L. R., 29 Bom. 306 (314); *Dharnikant v. Kristo Kumari*, I. L. R., 13 Cal 181 (186); *Gitan Prasad v. Mahatub Kuar*, 5 I. C., 85 (87) purchase of property in the name of mistress.

(5) *Zeemut Ali v. Mt. Alimoonissa*, 10 W. R., 277; *Ram Narain v. Muhammad* I.L.R., 2, Cal. 227; *Abid Ali v. Asgar Ali*, N.L.R., 17 156 (160).

(6) *Dalip Singh v. Nawal Kunwar*, I. L. R., 258 (266), P. C.

(7) *Moonshree Buzloor v. Shumsoonissa*, 8 W.

R. 3 (11) P.O.S.C.; *Sub nom Jodonath v. Shumsoonissa*, 11 M.I.A. 551 cited *supra*.

(8) *Bishen Dial v. Ghaziuddin*, I. L. R., 23 All., 152 (180); explaining *Mt. Buhuns Kowar v. Lalla Buhoree Lal*, 14 M. I. A., 496; *Lokhee v. Kalypuddo*, L. R., 2 I. A., 134; dissenting from *Monappa v. Surappa*, I. L. R., 11 Mad., 234.

(9) *Chunder Coomer v. Hurbans*, I. L. R., 16 Cal., 137; *Krishnaji v. Moro*, I. L. R., 15 Bom., 32; *Ravji v. Lakshmibai*, I. L. R., 11 Bom., 381; *Kannamal v. Virasami* I.L.R., 15 Mad., 486; *Luchman v. Kally Churn*, 19 W. R. 292.

(10) *Ram Coomar v. McQueen*, 11 B.L.R., 46, P. C.; *Sarat Chunder Dey v. Gopal Chunder*, I. L. R., 16 Cal., 148 (O. A.), I. L. R., 20 Cal., 296, P. C.; *Mahomed v. Kishori Mohun*, I. L. R., 22 Cal., 909, P. C.; *Jokhu v. Mehdi Husain*, 1 A. W. N., 67; *Sitaram v. Willyath*, 6 A. W. N., 101.

(11) *Ramcoomar v. McQueen*, 11 B. L. R., 292, P. C., and cases cited *supra*.

(12) Art. 55, Sch. I., Indian Stamp Act, 1899; *Reference under the Stamp Act*, I. L. R. 24 All., 372 F. B.

(13) *Maung Dya v. Maung San*, 10 I. C., 779.

706. Where the purchaser of an equity of redemption allows the name of his vendor to remain on the Collector's register, and on its strength the mortgagee made further advances to the mortgagor under the supposition that he was still the owner of the equity of redemption, it was held that the purchaser's conduct amounted to a standing by and that he was liable to pay off not only the mortgage-debt but also the subsequent advances. (1) The registration of a person as the owner of property in the Collector's books for fiscal purposes is, however, only some evidence though by no means conclusive of his title. But it may be sufficient to shift the burden of proof. (2) Nevertheless, the purpose for which the Collector's books are maintained should not be ignored, and it has been accordingly held that the registration of the name of a person coupled with the payment of revenue is strong evidence of possession though not of title. (3)

707. Rule When Inapplicable.—In England the doctrine here enunciated is inapplicable to cases in which the transferee has merely an equitable interest. Thus while a trustee with whom the *cestui que trust* has in accordance with custom deposited the deeds, borrowed money by depositing the deeds fraudulently representing them to be his own, it was held that the creditor could not enforce his equitable charge against the real owner. (4) But in such a case a trustee left in possession of the deeds, may convey a legal estate to a purchaser for value and without notice who would obtain a good title against the equitable owner, provided, of course, that he had made all the enquiries which as a prudent man he was bound to make. (5) (§§ 109—111). The mere fact that a person allows another to be in possession of goods, and allows him to deal with goods under an authority, which is not known to the person who deals with the servant and who does not profess to act upon any such authority, will create no estoppel in favour of persons dealing with such person in possession. (6)

708. Transferee must take in Good Faith.—The rule requires that the transferee must not only make enquiry but he must act in good faith. Now, there may be enquiry without good faith and good faith without enquiry. An honest dupe may take for granted without enquiry the title asseverated by his transferrer, or a dishonest transferee well aware of the infirmity of his transferrer's title may cause widespread inquiries to be made—but in neither case could the real owner be affected by any transaction with the apparent owner. The "good faith" required in this connexion is honesty. A man may blunder, but then he must be an honest blunderer. No purchaser can protect himself against the claim of a real owner merely by saying that he had no notice of the real owner's title. A purchaser is not justified in shutting his eyes and purchasing recklessly from a vendor without any inquiry, and resisting the real owner on the ground that the real owner did not come forward. He must not only make some reasonable inquiry into title, but he must also use reasonable care to see that what he is purchasing his vendor has really the right to sell. (7) For instance, where the transferee was residing in the neighbourhood of the

(1) *Govindrav v. Ravji*, 12 Bom., 33; *Umesh Chandra v. Khulna Loan Co.*, 1 L. R., 34 Cal., 92.

(2) *Pandurang v. Anant*, 5 Bom., L. R., 956 (1921).

(3) *Deoji v. Godabhai*, 2 B. L. R., 85 P.C.; followed in *Pandurang v. Anant*, 5 Bom., L. R., 956 (1921).

(4) *Shropshire Union Ry. Co. v. Reg.* L. R., 7 H. L., 499. explained *per Chitty, J.*,

in *Carritt v. Real and Personal Advance Co.*, 42 Ch. D., 263 (1899, 270).

(5) *Ibid.* pp. 269, 274, *Per Pearson* in *Lloyd's Banking Co., v. Jones*, 29 Ch. D., 221 (1898).

(6) *Farguharson & Co., v. King & Co.*, [1902]. A. C., 325.

(7) *Zangabai v. Bhawani*, 9 Bom., L. R., 388; *Maung Ba Tin v. Maung Po Kin*, 14 Bur., L. R., 329; *Maung Po v. Ma On*, 12 I. C., 858.

transferrer and had had previous dealings with the latter's family, the Court presumed that he was aware of all the circumstances of the family and as such held him disentitled to the priority here conferred on a *bona fide* transferee.⁽¹⁾ And so where a person took a mortgage and afterwards purchased the same property from the son of an heiress who was outcasted on account of living in adultery, and whom the transferee believed to have forfeited her title to the property, the Court held that since the purchaser had notice of the existence of the true owner a mere misconception as to her rights was insufficient to protect the transferee under this rule.⁽²⁾

709. Plea Allowed though not Pleased.—Ordinarily, the burden of proving that the transfer was made after enquiry is on the transferee.⁽³⁾ Where, however, the Court sees that the rights of one of two innocent parties must be sacrificed, it is essential to consider whether anything in the conduct of the party who comes into court and seeks relief has debarred him from asserting his right. The Court is not precluded from basing its decision upon a ground not specifically pleaded by either of the parties.⁽⁴⁾ But as a rule the plea of purchase without notice should be specifically put forward in the plaint or pleadings or should at least be involved in the issues.⁽⁵⁾ (§ 684). If a party does not plead at all he will not be allowed to go at the hearing into evidence on that point.⁽⁶⁾ In any case the plea cannot for the first time be raised in appeal.⁽⁷⁾ A mere plea of purchase for value does not go far enough, for the plea must be of *bona fide* purchase and without notice, and the burden of proving it is upon the party who pleads it.⁽⁸⁾

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets the house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B, should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

710. Analogous Law.—The provisions of this section (and of section 53, paragraph 1) are taken from section 5 of the Statute 27 Eliz., c. 4,⁽⁹⁾ relating to fraudulent conveyances, repealed by the Statute Law Revision Act of 1863 and the provisions of which ran as follows: "That if any person or persons have heretofore since the beginning of the Queen Majesty's reign that has passed, made or thereafter shall make any conveyance, gift, grant, demise, charge,

(1) *Pateshri v. Nageshar*, 8 A. L. J., 358 (1963).

(2) *Angammal v. Venkata*, I. L. R., 26 Mad., 509 (513).

(3) *Zungabai v. Bhawani*, 9 Bom., L. R., 388.

(4) *Thakuri v. Kundan*, I. L. R., 17 All., 280.

(5) *DeSilva v. DeSilva*, 5 Bom. L. R., 784; *Mulji v. Mcleod*, 5 Bom. L. R., 991

(1995); *Phillips v. Phillips*, 4 De G. F. & J., 208.

(6) *Mulji v. Mcleod*, 5 Bom. L. R., 991 (1995); *Hira Singh v. Narain*, 10 C. P. L. R., 107; *Gopal v. Ganpat*, 13 C. P. L. R., 172.

(7) *Annamalai v. Pitchu*, 15 M. L. J. R., 28.

(8) *Mulji v. Mcleod*, 5 Bom. L. R., 991 (1995).

(9) Passed in 1584 A. D.

limitation of use or uses or assurance of, in or out of any lands, tenements or hereditaments with any clause, provision, article or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in or out of the said lands, tenements or hereditaments or of, in or out of, any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant, or gift; (i) and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey, or charge, the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in or by the said secret conveyance, assurance, gift or grant); (ii) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements and hereditaments, so after bargained, sold, conveyed, demised or charged, against the said bargainees, vendees, lessees, grantees, and every one of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons who have, shall, or may lawfully claim anything by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate and of no effect, by virtue and force of this present Act." This section may be compared with section 27, *ante*.

711. Principle.—This section contemplates the case of two transfers, one conditional and the other absolute. It lays down that where the transferor reserves to himself power to revoke the first conveyance, and transfers the same property to another, the latter transfer operates as a cancellation of the first transfer subject only to the fulfilment of the condition upon which revocation was dependent. The object of this section is to validate such transfers and to declare that in such a case the subsequent transfer has the effect of cancelling the former, for the subsequent transfer being only possible when it is made to take effect in defeasance of the prior transfer, the latter is deemed to have been thereby revoked by necessary implication.

In construing the section the intent of the statute "is to be expounded against fraud and to suppress fraud and to maintain just dealing." (1) The fact that the two transfers were made by different persons does not matter, if the transfer in the two cases represented identical interests. (2)

712. Meaning of Words.—"Reserving power to revoke the transfer" means such reservation as is allowed by law. In other words the transfer should not be subject to *restrictive covenants not enforceable in law*. (3) "*To the extent of the power*," implies that the revocation is not absolute but is subject to the non-fulfilment of the condition attaching to the anterior transfer. "*Subject to any condition attached to the exercise of the power*:" as for example, where it is provided, that on the power being exercised, the proceeds of the sale of property of equal value shall be paid over to the transferees of the settlement and not to the transferor. A deed with a power of revocation is not *ipso facto* void, and even if it be voluntary, it is only void against a subsequent purchaser so far as it breaks in upon his rights, so that a subsequent lease to another person, (4) or a

(1) *Bullock v. Thorne*, F. Moo., 615.
The case is reported in May's *Fraudulent Conveyances*, pp. 198-201.

(2) *Bullock v. Thorne*, F. Moo., 615.

(3) *Mozer v. Whisker*, 6 C., 120; *Bowman Hyland*, 8 Ch. D., 588.

(4) *Coke v. Bullock*, Cro. Jac., 49.

mortgagee⁽¹⁾ is only a revocation *pro tanto*. But it appears that if on a subsequent sale taking effect, the prior voluntary transfer is revoked, it does not revive if the sale for any reason goes off. ⁽²⁾

A power of revocation on payment of a fair equivalent of the value of the land is not a power within the meaning of the English statute, but revocation on payment of a trifling sum, as that the lease shall be void on payment of 10s. is within the statute, and such lease may be avoided at the instance of the purchaser.

713. Power of Revocation.—It is immaterial whether the first transfer is or is not for valuable consideration. And in cases decided under the statute it was resolved that reservation of a power of revocation at a future time or on the happening of a given contingency fell within the intent of the Act, and that a voluntary conveyance which was originally subject to a power of revocation could not stand against a *bona fide* purchaser for valuable consideration.⁽³⁾ But if the first transfer had been for consideration, it is probable that it could not be revoked until the event happened upon which the exercise of the power was contingent. It would appear that a power of revocation could only be exercised *bona fide* in the interest of the second purchaser. Thus, if for the purpose of extinguishing it, a second transfer is made, it does not extinguish it. So if A had reserved to himself a power of revocation with the consent of B, and afterwards A sold the property to another, the latter transaction is good, "for otherwise the good provision of the Act, by a small addition and evil intention would be defeated."⁽⁴⁾ As observed by Dart, "The 5th section of 27 Eliz., c. 4, seems to comprise all settlements, although made for valuable consideration, ⁽⁵⁾ which reserve what is, either expressly or virtually, a power of revocation to the settler, *e.g.*, an unlimited power to charge by way of mortgage, ⁽⁶⁾ or a power to revoke on payment of 10s., ⁽⁷⁾ or with the consent of the person nominated by the settler, or simply at a future date; but a power to charge a reasonable specified sum, ⁽⁸⁾ or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties interested under the limitations, ⁽⁹⁾ seems to be unobjectionable. Lord St. Leonards expresses an opinion,⁽¹⁰⁾ that where a settlement made for valuable consideration, contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settler: probably the result might be the same, although there were no consideration for the release, if the purchaser had notice of it, but a secret release will not affect a purchaser."⁽¹¹⁾ Under the same statute, it was held that if a man reserves a power of revocation to be exercised with the consent of a person named, it is fraudulent if the person is a man of straw whose consent is at his own command, as where he is his own relation, but the case is different if the person be his wife's friend who cannot be supposed to consent except on good grounds. ⁽¹²⁾

(1) *Perkins v. Walker*, 1 Vern., 97; *Thorne v. Thorne*, *ib.*, 141; May's Fraudulent Conveyances, 198.

(2) *Dame Ever's case*, 2 Roll. Rep., 34.

(3) *Standen v. Bullock*, 3 Rep., 826.

(4) *Twyne's case*, 3 Rep., 826; May's Fraudulent Conveyances, 196.

(5) See Sugd., 721; *Smith v. Hurst*, 10 Ha., 30.

(6) *Tarback v. Marbury*, 2 Vern., 510.

(7) *Griffin v. Stanhope*, Bro. Jac., 455.

(8) *Jenkins v. Keynis*, 1 Lev., 150.

(9) See *Doe v. Martin*, 4 T.R., 99; Sugd., 721.

(10) Sugd., 722.

(11) *Bullock v. Thorne*, F. Moo., 615; Dart., pp. 1021, 1022.

(12) *Leigh v. Winter*, W. Jo., 411; *Lord Banbury's case*, Freem Ch., 8.

A power to mortgage to any extent, or to lease for any term, would appear to be construed as a power of revocation, ⁽¹⁾ but a power to charge a sum certain is differently regarded. ⁽²⁾

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferrer may acquire in such property, at any time during which the contract of transfer subsists.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu who has separated from his father B, sells to C three fields, X, Y, and Z representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale may require A to deliver Z to him.

714. Analogous Law.—This section is analogous to section 18 of the Specific Relief Act ⁽³⁾, the provisions of which are in a measure supplementary. It runs thus:—

18. Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

Purchaser's rights against vendor with imperfect title.

(a) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary to validate the title and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

(c) where the vendor professes to sell unincumbered property but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has, in fact, only right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit interest and costs on the interests of the vendor or lessor in the property agreed to be sold or let.

715. This provision does not apply to a mortgage, ⁽⁴⁾ but it applies to all property, whether moveable or immoveable, whereas the section, while applying to all transfers including a mortgage, relates only to immoveable property. The rule in the section is not intended to operate on involuntary sales, as in execution of a decree, and its principle has not been so applied, ⁽⁵⁾ nor

(1) *Tarback v. Marbury*, 2 Vern., 511 (a case decided on the 13 Eliz., C. 5; *Lavender v. Blackstone*, 2 Lev., 146; *May's Fraudulent Conveyances*, 198).

(2) *Jenkins v. Keymis*. 1 Lev., 550.

(3) Act I of 1877.

(4) But the rule was on equitable grounds extended to cover a case of mortgage: *Deolie Chand v. Nirban*, I. L. R., 5 Cal., 253.

(5) *Alukhmonnee v. Banne Madhub*, I. L. R., 4 Cal., 677.

is it applicable to a transfer forbidden by law on the ground of public policy.⁽¹⁾

The proviso in favour of *bona fide* transferees for value, overrules the view previously taken in a case that the purchaser takes subject to the equities which affected the property in the hands of the transferrer. (2)

The rule was, for the first time, introduced by the legislative enactment of 1877.⁽³⁾ prior to which it was purely an English rule, and was held to be inapplicable to Hindus.⁽⁴⁾ Similar provisions relating to moveable property are to be found inserted in the Indian Contract Act. (5)

The authorities cited in the foot-note, are acknowledged in justification of the section (6) which is founded on a rule well established in English law. (7)

716. Under this section the right is declared to exist only as against the transferrer and persons claiming under him, *e.g.*, the heir. (8) Thus where he is deprived of the property in an execution-sale, it has been held that the transferee cannot follow up the property in the hands of his auction-purchasers. (9) But under the English law such a right would avail against purchasers from the transferrer and his heirs, as well as against him. (10) As Taunton, J., put it: "The assignee of a lease stands in the position of the assignor for all purposes better or worse"; (11) or, as Lord Mansfield said, "that he who takes an estate under a deed is privy in estate, and therefore never can be in a better situation than he from whom he takes it." (12) Under the English law, the benefit of the implied covenant runs with the land (13) Under this section, however, the purchaser cannot follow up his claim to the property in the hands of a stranger unless the latter take with notice or is a gratuitous transferee. (14)

717. Principle.—It is the general rule of equity that where a transferrer purports to convey a particular property and has not the title under which he professes to convey, the transferee must be satisfied out of any title which the transferrer then has, or afterwards acquires in the same property. "If a man," observes Lord St. Leonards, "sell an estate to which he has *no title*, and after the conveyance acquires the title, he will be compelled to convey it to the purchaser. But this is said to be a personal equity attaching on the conscience of the party and not descending with the land; and therefore that, if the vendor do not in his

(1) *Narahari v. Siva* 24 M.L.J., 462; 19 I.O., 881; following *C. Ramasami v. Ramaswami*, I.L.R., 30 Mad., 255, dissenting from *L. Agaunayya v. Daopoor*, 18 M. L. J., 247 (248).

(2) *Mahomed v. Karamut-oollah*, 4 N. W. P. H.C. R., 11 (12).

(3) Specific Relief Act (I of 1877).

(4) *Ram Niranjan v. Prayag*, I. L. R., 8 Cal., 138 (144); explaining *Dooli Chund v. Birj Bhokun*, 6 C. L. R., 528 (P.C.) also reported in 10 C. L. R., 61 P. C.

(5) S. 109 (seller's responsibility for badness of title). S. 110 and S. 118, Right of buyer of breach of warranty in respect of goods not ascertained—Act IX of 1872.

(6) Canadian Code, S. 1488, Sugd. V. & P. (13th Ed.), 297. Now see 14th Ed., 298—Marginal note to the section in the Bill

(7) *Seabourne v. Powell*, 2 Vern., 11; *Noel v. Bewley*, 3 Sim., 103 (116); *Jones v. Kear-*

ney, 1 Dru., & War., 134 (158, 160); *Smith v. Baker*, 1 Y. & C. C. C., 223; *Smith v. Osborne*, 6 H. L. C., 375 (390, 398.)

(8) *Radhey Lal v. Mahesh*, I.L.R., 7 All., 864.

(9) *Alukmonee v. Banee Madhub*, I.L.R., 4 Cal., 677.

(10) *Onward Building Society v. Smithson* [1893], 1 Ch., 1; *Right v. Bucknell*, 6 B. & Ad., Ch., 278; *Health v. Crealock*, 10 Ch. D., 15; *General Finance Mortgage and Discount Co. v. Liberator Society*, L.R., 10 Ch., 22; *Fosler v. Mackinnon*, L.R. 4 C.P., 704.

(11) *In Doe v. Mills*, 2 Ad. & E., 17, 20.

(12) *In Taylor v. Needham*, 2 Taunt., 278.

(13) Conveyancing Act, 1881, S. 7. Sub-S. 1 (A); *David v. Sabin* [1893], 1 Ch., 523.

(14) *Radhey Lal v. Mahesh Prasad*, I.L.R., 7 All., 364; *Sarat Chunder v. Gopal Chunder*, I.L.R.; 20 Cal., 296 P.C.

lifetime confirm the title, and the estate descends to the heir-at-law, he will not be bound by his ancestor's contract. This opinion, however, deserves great consideration." (1) And similarly it has been observed by Dart who says: "It was treated by the court, as well established that where a lessor, without any legal estate or title, demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground; and it is immaterial that it appears on the face of the deed that the lessor has only an equitable title." (2) If the lessor subsequently acquires a title, the lease and reversion then take effect in interest, and not by estoppel; and an action will lie, either way for breach of the covenants in the lease. And the Court also laid down the doctrine that the assignee of a lessor, who has no estate in the land, has the reversion by estoppel, as against the lessee." (3)

The rule enunciated in the section, and to be presently discussed, assumes that the transferor had no title over at least a portion of the property he had engaged to transfer; but which he has since acquired, in which case upon the principles of elementary equity he is bound to make good his representations to the transferee. Obviously, the section has no application to cases where the title itself being clear, the transfer is vitiated for any other reason. (4)

718. Meaning of Words.—"Erroneously represents" must include all misrepresentations tainted or untainted with fraud; (5) and whether made by a declaration, act or omission within the meaning of section 15 of the Indian Evidence Act. (6) "To transfer certain immoveable property," As stated before, since a mortgage debt is moveable property (S. 64) the assignment of a mortgage is not transfer of immoveable property within the meaning of this section. (7) "Option of the transferee" leaves the latter option to abandon his right under this section and claim only damages. "During which the contract subsists," i.e., so long as the relation of transferor and transferee continues. If the relation is determined either by mutual consent, cancellation of the contract, or its satisfaction in any other way, this section will cease to apply. Contract merging in a decree does not cease to subsist till it is satisfied. (8) "Transferor" under this section includes also other persons claiming under him, but no *bona fide* purchasers, (9) or persons claiming adversely to him.

719. Transfer of after-acquired Property:—The rule here enacted, may be regarded as only an extension of the law of specific performance of contracts, so that if there is a contract for sale, law compels the vendor to perform the contract specifically by conveying to the vendee the property sold: to have a defective conveyance supplied, and it is a species of relief which the courts are in the constant watch of giving either against the

(1) Sugd. V. & P., (14th Ed.), 355, (745).

(2) Morton v. Woods, 4 Q.B., 299

(3) Dart's V. & P. (6th Ed.), 1001: Wills' V. & P., p. 1055.

(4) *Kadha Bai v. Kamod Singh*, I.L.R. 30 All., 383; *Narahari v. Siva*, 24 M.L.J., 462; 19 I.C., 881; following *C. Ramasami v. Ramasami*, I.L.R. 30 Mad., 255; *Contra L. Angannayya v. Darpoor*, 18 M.L.J., 247 (248); dissenting from; also *Contra Magni Ram v. Bakubai*, I.L.R. 36 Bom., 510.

(5) *Radheylal v. Mahesh Prasad*, I.L.R., 7 All., 564; *Sarat Chunder v. Gopal Chunder*, I.L.R., 20 Cal., 296; P.C.; following *Cairncross v. Lorimer*, I.L.R., 3 H.L., 829; *Pickard*

v. Sears, 6 A. & E., 469; *Freeman v. Cooke*, 2 Exch., 654; *Cornish v. Abington*, 4 H. & N., 549; *Carr v. Lord and North-Western Ry. Co.*, 4 C.P., 316, *Luchmun v. Kals Churn*, 19 W. R., 292; overruling *Ganga Sahai v. Hira Singh*, I.L.R., 2 All., 809; *Vishnu v. Krishnan*, v. I.L.R., 7 Mad., 3.

(6) Act I of 1872.

(7) *Maung Ba v. Maung Po*, 14 Bur. L., R. 329.

(8) *Ajijuddin v. Sheikh Burdan*, I.L.R. 18 Mad., 492 (495); following *Debi Chand v. Nirban*, I.L.R., 5 Cal., 253.

(9) Specific Relief Act, S. 27, cls. (b) & (c); *Munro v. Taylor*, 8 Hare. 51.

vendor himself or any claiming as heir or volunteer under him, whether the contract for the sale remains wholly unexecuted, or is defectively executed and whether the vendor had good title to the premises at the time of the sale, or whether such title accrued to him afterwards on the same principle if the vendor having contracted to sell one property acquires another in exchange or substitution therefor, justice demands that he should be compelled to convey the property he has so acquired, and which in the eye of the law becomes impressed with the same obligation as that for which he has received it in exchange.⁽¹⁾

720. Conveyance of Imperfect Title:—The only elements necessary for bringing the rule into operation are (i) an erroneous representation by the transferrer of his authority to transfer the property, and (ii) its actual transfer, (iii) and for valuable consideration. The rule does not require that the representation if erroneous should also be fraudulent, for fraud is not a necessary ingredient of the law of estoppel.⁽²⁾ Indeed, as observed by the Privy Council, it may be that the transferrer may not be himself conscious or possess full knowledge of the circumstances and may be himself under a mistake or misapprehension of his title. He may have been himself earnestly mistaken or misled.⁽³⁾ "If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do."⁽⁴⁾ This raises another question upon which the section is silent, *viz.*, should the transferee have been induced to accept the transfer believing his transfererr's misrepresentation, or in other words should he be a *bona fide* transferee without notice of the truth. The section lays down no such qualification and to quote the words of the Privy Council used with reference to the construction of s. 115 of the Indian Evidence Act⁽⁵⁾ "the Court is not warranted or entitled to add any such qualifying conditions to the language of the Act".⁽⁶⁾ The question may then arise, what are the equities of the transferee who knows the truth, and who is in no way misled by his transferer's representations. It might be contended, that the rule operates on the subsequently acquired interest independently of the transferee, and with reference only to the transferer, who having covenanted to part with a certain right, is bound to make good his promise when he becomes possessed of it. This is one view⁽⁷⁾ but the contrary has also been laid down on the ground that there can be no estoppel by a false statement, when the truth as to the matter stated is known to both parties.⁽⁸⁾ Consequently, where the mortgagee in possession

(1) *Byjnath v. Ramoodeen*, 21 W.R., 233 (P.C.) See for a fuller discussion, heading "substituted security" under s. 65 *post*.

(2) *Sarat Chunder Dey v. Gopal Chunder Laha*, I. L. R. 20 Cal. 236, (310) (P. C.).

(3) *Ib.* pp., 310, 311.

(4) *Ib.* p., 311.

(5) Act I of 1872.

(6) *Sarat Chunder Dey v. Gopal Chunder Laha*, I.L.R., 20 Cal., 296 (310) (P. C.).

(7) *Sinclair v. Subab Khan* 3 C. P. L. R., 72 (73).

(8) *Gangabai v. Baswant*, I. L. R., 34 Bom. 175 (189) relying on *Mt. Udey Kunwar v. Mt. Ladu*, 6 B. L. R. 283 (291) (P.C.) in which their Lordships said "There is in the first place, no consideration whatever for this conveyance of her particular interest; even

if she had it, she receives nothing for it. Neither does Udey Kunwar act on any representation made by her or alter her position in any way. There is no representation to Udey Kunwar of any secret or kind. Udey Kunwar was acquainted with the actual facts of the case, just as much as Mt. Ladu was". The decision was given in 1870 long before the present section was conceived and the statement would fall under the exception made therein. In *Jagannath v. Dibbo*, I. L.R., 31 All., (53 55) also the transfer was without consideration and the question in the text was neither directly raised or considered. The same remark applies to a *dictum* occurring in *Sheolal Singh v. Goor Narain*, 7 I.O. 218 (224); *Sita Ram v. Mt. Harkubai*, 4 N.L.R., 28.

of Deshghat Vatan knew that the interest mortgaged to him was the life interest of his mortgagor, in his hereditary office, its subsequent enlargement enabling the vatandar to alienate it permanently, would not enlarge the mortgagee's interest so as to enure beyond the mortgagor's lifetime. (1) But in this case, though reference is made to this section, it does not appear that the mortgage of 1850 sued on, purported to convey any but the life interest of the mortgagor, and which was all that the latter then possessed and could convey. (2) If so, the mortgagee apart from section 70 (to which no reference is made in the judgment), had no right to claim the enlarged interest under this rule. And as it is worded, the question as to whether the transferee is a *bona fide* transferee, without notice of the infirmity of his transferor's title, would seem to be immaterial. He may know that his transferor was attempting to convey what he could not presently convey, but then he could not be deprived of the interest which would have presently passed in his favour, if his transferor had it, and it could not prejudice him, if he acquires that interest subsequently.

721. The only thing that could affect the question is the intervention of a third party who takes the enlarged interest in ignorance of the option. And his right is preserved by the last clause. Viewed in this light the rule would still fall within the principle of estoppel by which a person is held bound by his statement or recitals in a deed to which he is a party, whenever they refer to specific facts, and are certain, precise and unambiguous. (3) Such a case is not contemplated by section 115 of the Indian Evidence Act which is not exhaustive of the law of estoppel, (4) and though the illustration appended thereto would clearly fall within the rule here propounded, its converse should not be assumed.

722. Erroneous Representations:—This section speaks of the effect of an "erroneous representation" while section 115 of the Indian Evidence Act (5) speaks of the effect a "declaration, act or omission," but it is apprehended that the two terms connote the same meaning, since an act may equally involve and amount to a declaration, and so may an "omission" to speak when one is bound to disclose the truth. A representation may then be expressed or implied, articulated, acted or suggested—since words alone are not vehicle of thought. Cases under this section would, ordinarily, be those of express representation, since it is not a representation alone but an actual transfer made under the circumstances stated, that puts the transferee upon election. But it is possible for the representation to be made independently of the deed, or when it is contained therein it may consist as much of an express erroneous declaration as of a misleading silence. Then again in the former case it may be only partially true, or true in a given set of circumstances, in all of which cases there may be occasion for the rule. But such representation must be distinguished from what fall short of it, since a representation must be as to some state of facts alleged to be at the time actually in existence, of a title

(1) *Gangabai v. Baswant*, I.L.R. 34 Bom. 175.

(2) *Ib.*, pp. 177, 179.

(3) 13 Halsbury's Laws of England, ss. 510, 515.

(4) *Ganges Manufacturing Co. v. Saurajmull*, I.L.R. 5 C. 669. *Rupchand v. Sarveswar*, I.L.R. 33 Cal., 915 (921); *Municipal Corporation v. Secretary of State*, I.L.R. 29 Bom. 580 (607). S. 115 deals with the rule of evidence, while there is a rule of equity,

which is independent of that section. The latter is an inexhaustive rule taken from the judgment of Lord Devman in *Pickard v. Sears*, 6 & E. 40, which of course was not intended to deal with an infinite variety of cases classed as estoppels but which are not covered by s. 115 of the Indian Evidence Act. *Contra* suggested in *Asmatunnessa v. Harendra Lal*, I.L.R. 35 Cal., 904 (907), is, it is submitted, incorrect.

(5) Evidence Act I of 1872,

asserted or claimed and on the faith of which the transfer is made. If it is merely the expression of a non-committal, *hope*, legal opinion⁽¹⁾ of a possibility—"puffing praise" but no warranty, then the transferee could not appeal to the equity here enacted. A statement by the transferor with regard to his intention may be legally operative as a promise: but such a statement does not come within the section.⁽²⁾ If the representation is in fact erroneous, it will suffice for the rule even though it be made innocently, or through ignorance⁽³⁾ or mistake⁽⁴⁾. But, of course, the transferee cannot avail himself of a mis-statement induced by himself.⁽⁵⁾

723. Title by Estoppel.—Upon the principle of this section which allows a subsequently acquired interest to feed the estoppel,⁽⁶⁾ it has been held that where the transferor subsequently acquires the same property though under a different title, he is bound by his covenant. The holder of a reversionary interest expectant on the death of a Hindu widow first mortgaged it to his creditors, and afterwards sold it to another. After the date of the mortgage the widow died, and the reversioner came into possession of the property. The mortgagee then sued both the mortgagor and the purchaser to enforce his mortgage, but the courts having held that a mere expectancy could not be mortgaged, it was contended for the mortgagee on the strength of this section that the mortgagor was bound to deliver him the property of which he had since come into possession, upon the death of the widow. The contention was however not expressly decided upon, as the intervention of the purchaser who was held to be a transferee in good faith and for consideration without any notice of the existence of the option referred to in the section rendered the decision unnecessary, but it seems to have been conceded that, were it not for the presence of the purchaser the mortgagee might well have enforced the equity.⁽⁷⁾ Similarly, in England, where at the time of the sale the vendor had no more than only a contingent remainder in fee, and then the contingency happened, he was bound to make good the conveyance to him.⁽⁸⁾ So, where a man upon a sale conveyed a contingent remainder to the purchaser, which was afterwards destroyed by the tenant for life, who, having acquired the fee, by his will gave the seller, other interests in the estates, the latter was compelled to convey those interests to the purchaser.⁽⁹⁾ But where a man in his marriage-settlement described himself as entitled to an expectant estate, in remainder, in two pieces of land, and covenanted that when "such remainder" shall become vested in possession, he will convey it to the uses of the settlement, if he becomes possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it, for "to hold that because he agreed to settle what he should succeed to render his grandfather's will, therefore

(1) *Morgan v. Conchman*, 23 L.J.C.P., 36; *Raj Narain v. Universal Life Assurance Co.*, I.L.R. 7 Cal., 594 (604).

(2) *Jethabhai v. Nathabhai*, I.L.R., 23 Bom., 399 (407); *Citizen's Bank of Louisiana v. First National Bank* L.R., 6 H.L., 352; *Maddison v. Alderson*, 8 App. Cas. 473.

(3) *Horsfall v. Halifax and Huddersfield Union Banking Co.*, 52 L.J. Ch. 599; *Sarat Chunder Dey v. Gopal Chunder Laha*, I.L.R., 20 Cal., 296 (P.C.); *Cornisle v. Abington*, 28 L.J. Ex., 262.

(4) *Sarat Chunder Dey v. Gopal Chunder Laha*, I.L.R., 20 Cal., 296 (P.C.).

(5) *Porter v. Moore*, [1904] 3 Ch., 367.

(6) *Dooli Chand v. Brij Bhokun*, 6 C. L. R., 528 (533), P. O., again reported in 10 C. L.R., 61 P. C.; *Mokhoodi Debi v. Umesh Chundri*, 7 C.L.J. 381 (383); *Maung Ba v. Maung Po*, 14 Bur. L.R. 329.

(7) *Nand Kishore v. Kanee Ram*, 6 C.W. N., 395 (399). (The meagre report of the case does not state when the purchase was made, for if the purchaser also bought a mere expectancy, what status did he then have in the case.)

(8) *Ascough v. Johnson*, 2 Vern., 66.

(9) *Noel v. Bewley*, 3 Sim., 103; *Jones v. Kearney*, 1 Dru. & W., 159.

he is bound to settle what he should succeed to under his grandfather's will, therefore he is bound to settle whatever interest he might derive *aliunde* in the same lands, is to make a new covenant for him, not to enforce that into which he actually entered. (1)" A decision in a case like this must then depend upon the construction of the words of the covenant. And so in applying the rule, regard must always be had to what was intended by the parties to be conveyed. If a person had agreed to sell and convey an estate *absolutely* in the first instance, then if he had no title at the time of the contract, and afterwards acquired one, he would be bound to make good his contract, and to convey it; but if he never covenanted *absolutely* to convey, but only conditionally, and the condition was never fulfilled, he was under no such obligation. (2) In a case, *A* holding a certain *mahal* as a ghatwal, mortgaged it to *B* by way of a *zuripeshgee* lease for twenty-one years. Shortly after the granting of the lease, the Zemindar got a decree against *A* by which *A*'s ghatwali right was determined, the Zemindar taking *khas* possession of the *mahal*, which, however, he subsequently many years after granted to *A* perpetual *mukarraree* lease. In a suit against *A* instituted by the assignee of *E*'s rights in the *zuripeshgee*, it was held that *A* must out of his present *mukarraree mahal*, make good the *zuripeshgee*. (3)

724. As one outcome of the rule here enacted is the principle that a person is bound to make good his erroneous representation, not only out of the property subsequently acquired by him, but also out of the property which he then possessed and which he purported to, but could not sell; as for example, where it is a coparcenary interest in a joint property. So, where a member of a joint Mitakshara family in Bengal, who had represented to his purchasers that he had power to charge joint family property, which he knew he did not possess, he was held bound to make good his representation as far as he could, by the exercise of such proprietary right over the property as he individually possessed, namely, by a partition of the property by an ascertainment of the shares in which it was thereafter to be held by the joint family, in defined shares, and the shares of the alienating members should be held subject to a lien for the purchaser's claim. (4) And if in a partition, the interest of the coparcener is separated, the transferee would be entitled to enforce his transfer against the interest so acquired. (5)

725. The rule is then equally applicable to leases for a term of years. The contract to lease by indenture for a term, creates an obligation on the part of the lessor which he is during the term estopped from denying. In England, this was no more than the result of the lease being required to be made by *deed*, the solemnity of which was anciently regarded as too great to allow the parties to deny it. (6) But the law went further and provided that, should the lessor have

(1) *Smith v. Osborne*, 6 H.L.C., 375 (392); following *Tayleur v. Dickenson*, 1 Russ., 521.

(2) *Per* Lord Wensleydale in *Smith v. Osborne*, 6 H.L.C., 375 (398), who while admitting the general principle enunciated in *Noel v. Bewley*, 3 Sim., 103, adverted upon its misapplication to the facts of that case, but the case was not overruled—*ib.*, pp. 394, 399.

(3) *Lornarain v. Showkeelal*, 2 O.L.R., 382; *Mokhoda v. Umesh Chandra*, 7 O.L.J. 381.

(4) *Mount Ram v. Barham Deo*, 14 C.W.

N. 552.

(5) *Parsidh Narain Singh v. Janiki Sing*, 7 O.L.J. 644 (646); *Mahabeer Pershad v. Ramayari Sing*, 12 B.L.R., 90; *Jamna Prasad v. Ganga Pershad*, I.L.R. 19 Cal. 401; doubting *Jala Parbhu Lal v. Mysene*, I.L.R. 14 Cal. 401.

(6) T.B. 30 Edw. I. p. 158, Britt. Bk. I, Ch. 29, ss., 17 19, 2 Pol. & Mait. His. Eng. Law, 218, 220, 222. It should be noted that the strict English doctrine of estoppel by deed does not apply to India; *Gaurevallaba v. Virappa*, 2 M.H.C.R. 174.

purported to convey an interest which he subsequently acquires, the lease which formerly operated only by estoppel, shall now take effect out of the newly acquired interest of the lessor, and shall become for all purposes a regular lease for the term stipulated. (1) Thus if *A*, a lessee for the life of *B*, leases for a term, his interest and afterwards acquires the reversion, and then *B* dies, *A*'s interest would then determine, although the term may not have expired, but since on *B*'s death, the lessor would obtain the property, *A* may compel him to make good the term out of the interest he had acquired. (2) But should the interest acquired be less than that conveyed, such interest alone will pass, and the lease will thereafter have no further effect by way of estoppel. (3) It was at one time held that subsequent purchasers from the mortgagor took subject to the equities which affected the property in his hands, (4) but this view is directly opposed to the principle of the section. In a case decided in 1880 the Privy Council seem to have maintained that the principle since enunciated in this section did not apply to Hindu conveyances, (5) but subsequent cases decided after the passing of this Act, have clearly applied the rule to Hindu and Mahomedan conveyances. (6) Thus, where the mortgagor mortgaged the whole of a certain land in which her three younger children were entitled to certain shares, and a decree on the mortgaged property was passed against all of them, providing that the debt in suit should be recovered "on the responsibility of the first and second defendants' shares" discharging however the three sons from liability, and where, upon the death of one of the sons, his share reverted to the mortgagors, it was held on the strength of this section, that his share was liable. (7) The mortgagee can in such case recover both his principal and interest. (8) It would appear that on a similar equitable principle, all the after-acquired property of the insolvent, vests in the official assignee for the benefit of his creditors. (9)

726. Since a mortgage is a transfer, the principle of this section equally applies to mortgages of immoveable property. (10) Consequently, a mortgagee is entitled to enforce his security against the interest subsequently acquired by the mortgagor, in the estate which he professed to mortgage, although such interest had no existence at the date of mortgage, provided the mortgage-debt subsists at the time of the acquisition of such interest. (11) *A* validly transferred his house and 120 acres of *sir* land to his wife in lieu of her dower. He then mortgaged the *sir* land to *B*, who obtained a decree thereon, and which was made absolute in 1885. *A*'s wife died in 1886, when he succeeded to the land as her heir, whereupon *B* claimed possession of the *sir* which *A* resisted on the ground that he had no right to mortgage *sir* when he did so, and that the mortgagee could not claim more than his mortgagor then possessed, but the court applied this rule and held *B* entitled

(1) Co. Litt. 47 Bac. Abr. Leases (O.) 2, Prest Abst. 211; *Webb v. Austin*, 7 Man and Gr. 701, Will's R.P. (18th Ed.), 476.

(2) 2 Pres. Abst. 217.

(3) Co. Litt. 47b.; *Hill v. Saunders*, 4 B. & C., 529; *Doed Strode v. Seaton*, 2 C. M. & R. 728 (730).

(4) *Mahomed v. Karamatoolah*, 4 N. W. P.H.C.R., 11.

(5) *Dooli Ohand v. Brij Bhodkum*, 6 C.L.R. 528 (539), P.C.

(6) *Viraya v. Hanumanta*, I. L. R., 14 Mad. 459; *Ajijuddin v. Sheikh Badan*, I. L. R., 18 Mad. 492.

(7) *Ajijuddin v. Sheikh Badan*, I. L. R., 18 Mad. 492 (495).

(8) *Lachman v. Khunmulal*, I. L. R., 9 All. 26 F.B.

(9) In the matter of *Donoghue*, I. L. R., 19 Bom. 232; *Rowlandson v. Champion*, I. L. R., 17 Mad., 21; *In re Ackbill*, I. L. R. 18 Mad., 24.

(10) *Sarju Prasad v. Bindeshi*, I. L. R., 33 All., 382 (384); *Hanuman Das v. Gursahay*, 18 C.L.J., 181; *Sri Raja Bommadendra v. Gundu Sastrulu*, 9 I.C. 504 (505).

(11) *Ganpat Rao v. Ramchand*, 2 C.L.R., 90.

to the *sir*. (1) From the same principle, it follows that where a person mortgages his interest in a property—that interest being restricted or limited in some manner at the time of the mortgage—the mortgagees' lien is not limited to the interest so restricted and does not cease on the restriction being removed. The removal of encumbrances from the estate of a mortgagor effected by himself will, as a general rule, enure to the benefit of the mortgagee by increasing the value of the latter's security. (2) *A* mortgaged a fourteen annas share in a certain village to *B* who obtained a decree on foot of his mortgage, after which he purchased from *A* a two-annas share in the village, but which he resold to him. In execution of another decree obtained by *B* against *A*, the twelve annas-share in the village belonging to *A*, was brought to sale and purchased by *B*, after which he sued out execution for sale of the remaining two annas in execution of his mortgage-decree. It was held that, so long as *A* had only a twelve-annas share of the property in his possession, *B*'s security was of necessity reduced to that amount, but on *A*'s again becoming the owner of the whole fourteen-annas, *B* had an equitable right to demand that the fourteen-annas should be held subject to his mortgage. (3) Where a person who had merely a *ghatwali* interest in certain land, mortgaged it on the representation that it was his *jagir*, and he subsequently obtained a *mukarrari* right from the landlord. It was held that, on a decree for sale upon the mortgage, the *mukarrari* interest of the mortgagor passed to the mortgagee. (4) On the same principle the mortgage of non-existent property, though inoperative as a transfer for the time being, operates as an executory agreement, which attaches to the property the moment it is acquired, and which, in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. (5) In no case, can the mortgagor question his own right to mortgage the property. (6) So a mortgage of property in which at the time of the mortgage, the mortgagor had only a right of pre-emption, and which he subsequently acquired by putting in force that right, would be valid as to the property so acquired, and the fact that the mortgagor had intended to create a present mortgage would make no difference. (7) But while a person alienating lands to which he has no title is bound to carry out the transfer, if he subsequently acquires a good title to it, the rule does not hold good if he mortgages a portion of *his own share* of a joint holding which he had already alienated, and in which case he cannot be compelled to make the transfer good, out of the *other half* share to which he has subsequently succeeded. (8) On the principle underlying this section, it has been held that a mortgagor paying off a mortgage or purchasing the mortgaged property, in execution of a decree on the mortgage, cannot use the mortgage-rights so acquired as a shield

(1) *Sinclair v. Sitab Khan*, 3 C. P. L. R. 72.

(2) *Shyama Churn v. Ananda*, 3 C.W.N. 323.

(3) *Deoli Chand v. Nirban Singh*, I.L.R. 5 Cal. 253.

(4) *Mokhoda v. Umesh Chadra*, 7 C.L.J. 381.

(5) *Holroyd v. Marshall*, 10 H.L.C. 191; *Collyet v. Isaacs*, 19 Ch. D. 342; *Tribby v. Official Receiver*, 13 App. Cas. 523; *Khobhari v. Ram Prasad*, 7 O. L. J. 387 (392, 393); *Bansidhar v. Sant Lal*, I.L.R. 10 All. 133; *Gaya Din v. Keshi Gir*, I.L.R. 29 All. 163.

(6) *Narayan v. Kalgaunda*, I. L. R., 14 Bom., 407; *Jayram v. Narayan*, 5 Bom.L. R., 652.

(7) *Gayadin v. Kashigr*, I. L. R., 29 All., 163; following *Bansidhar v. Sant Lal*, I. L. R., 10 All. 133; *Holroyd v. Marshall*, 10 H. L. C. 191 (210, 211); *Collyer v. Isaacs*, 19 Ch. D., 342; See also *In re D'Epinemial*, 20 Ch. D. 758; *Clements v. Kettbews*, 11 D. B. D. 814; *Tailby v. Official Receiver*, 13 App. Cas., 523.

(8) *Babu Rai v. Shadi Ram*, 1 P. L. R. 337.

against subsequent mortgages executed by himself,⁽¹⁾ though a stranger acquiring the same right would, under the circumstances be so entitled.⁽²⁾

727. Duration of the Right.—The transferee's right endures only during the time "the contract of transfer subsists,"—words which have been held to be wide enough to embrace a case in which a decree has been obtained on the basis of a contract.⁽³⁾ If the contract has become merged or extinguished or otherwise rendered incapable of enforcement, the right here given cannot be enforced. So in the case of a mortgage, the right can be exercised only so long as the mortgage itself subsists. A man cannot avail himself of the erroneous representation of another unless he can shew that the representation was the proximate cause of his loss.⁽⁴⁾ As regards limitation, since the transferee's right would only commence when the transferor acquires the property, the right may be held in abeyance for an indefinite period, if only in the meantime the property has not passed to a *bona fide* transferee for consideration, that is, for valuable consideration, for good consideration, as in a gift, does not count.⁽⁵⁾

728. Limits of the Rule.—The rule here enacted assumes that the transfer intended, would be otherwise good, except for the want of present title in the transferor, and which is made up for, by the erroneous representation of the transferor. The rule further assumes that, the transferor is *sui juris*, and that the property he proposes to transfer is transferable. If, therefore, its transfer was prohibited by law on grounds of public policy, the transferor's agreement to transfer such property is not a "contract" of transfer within the meaning of law,⁽⁶⁾ and as the germination and duration of the right depends upon a valid contract, it follows that the principle of this section cannot be invoked to compel one to transfer property in fraud of the statute.⁽⁷⁾ For instance, under several local Acts passed for the relief of incumbered estates, their proprietors are, as soon as the Government decides to assume management, declared "disqualified proprietors" and one of the disabilities attaching to this declaration is, that they are rendered incompetent to transfer all or any portion of their estates. Such a provision exists in the Jhansi Incumbered Estates Act.⁽⁸⁾ Where, therefore a proprietor, so declared disqualified under it executed a mortgage of a portion of his estate and on removal of the disqualification, the mortgagee sued to enforce his mortgage, relying upon the principle of this section to uphold his mortgage, but the Court overruled his contention on the ground that this section could not protect a transfer which if permitted would defeat the provisions of the Jhansi Incumbered Estates Act.⁽⁹⁾ Such was also the view taken of the sale of the property of the holder of a service *inam*, which was untransferable by law⁽¹⁰⁾ on the date of the transfer, but which was subsequently enfranchised and a patta for it granted to the transferor, and whereupon the transferee

(1) *Manjappa v. Krishnayya*, 1. L. R., 29 Mad., 113.

(2) S. 101, *post*.

(3) *Ajijudeen v. Sheikh Badan*, 1. L. R., 18 Mad., 492 (495); *Durga Das v. Muhammad*, (1908) A.W.N. 155.

(4) *Bell v. Marsh* [1903], 1 Ch., 528 (541); following *per* Wilde, B., in *Swan v. North British Australasian Co.*, 7 H. & N., 603 (633).

(5) *Baru Gir v. Mahunt Tulsi Das*, 6 I.C. 37; *Jadu Bano v. Sheojit* 16 I.C. 448. Cf. *Ajijudeen v. Sheikh Badan*, 1. L. R., 18 Mad., 492.

(6) Ss. 23 Indian Contract Act (Act IX of 1872.)

(7) *Narahari v. Sira Korithan*, 24 M.L.J. 462, 19 I.C., 881; following *C. Ramasami v. Ramaswami*, 1. L. R., 30 Mad. 255; *Redha Bai v. Kamod Singh*, 1 L.R. 30 All. 38; *contra Magni Ram v. Bakubai*, 1. L. R. 36 Bom. 510; *L. Angannaya v. Darpoor*, 18 M.L.J. 247 (248).

(8) S. 8, Act XVI of 1882.

(9) *Radha Bai v. Kamod Singh*, 1. L. R., 30 All., 38 (39, 40); followed in *Bhagannab v. Chandhi Singh*, 14 O.C. 295, 13 I.C. 466.

(10) S. 5, Act VI of 1895.

sued for the land, but the Court threw out his claim and said "The principle of section 43 of the Transfer of Property Act has no application to such a case, where the invalidity of a transfer is due merely to the transferrer, not having a title or having only a defective title, the subsequent acquisition of a good title would enable the transferee to claim the benefit of the title acquired under the rule laid down in the section, but, it can have no operation where the alienation is forbidden by law on grounds of public policy."⁽¹⁾ This was the view taken in another case, in which the plaintiff having sued the defendant in ejectment the latter pleaded in bar, his right to obtain from the plaintiff specific performance of the contract of sale, of the self-same property. But referring to section 54 the court said that inasmuch as the defendant had failed to obtain a registered sale deed, and apart from such sale, a mere contract gave him no legal right to possession. It was contended on the strength of English precedents⁽²⁾ that the defendant was in equity entitled to resist the suit, as the title in equity passed to him with the contract, but the court overruled the contention holding

"that it is not in accordance with sound canons of construction, or with public policy to read into such an enactment propositions of equity, which have been laid down with reference to some other enactment not altogether *in pari materia* ... We are not bound, and I do not think we are under any obligation in law to engraft these decisions, whenever they can be said to be in point, or to the enactment in question; and on grounds of public policy, I do not think it desirable to do so."⁽³⁾ "The application of the letter of the law leads to certainty of title, and to a diminution of the opportunities for perjury. The tampering of the letter of the law by recognising equities would take a case out of the statute, leads in precisely the opposite direction."⁽⁴⁾ But these considerations were overlooked in a case in which, the plaintiff had purchased property from the defendant in violation of the terms of section 325-A of the Code of Civil Procedure, 1882.⁽⁵⁾ He was put in possession of the property, but having been subsequently ejected, he sued for recovery of possession, and the court decreed his claim, holding that the disability created by the Code having been removed, the defendant was under the rule here enacted bound to convey the property when the disability to convey it, created by the Statute had been removed.⁽⁶⁾ But the same decision might have been supported on the ground that, section 325-A of the Procedure Code was in the nature of *lis pendens* enacted to safeguard the rights of transferees in execution of decree, and that prohibition against alienation was intended to serve that purpose—and as there was no public policy satisfying a more absolute prohibition, the removal of the disability set the vendor free to do what he had contracted for. The correct rule would appear to be that while estoppel cannot legalize what is declared illegal, by statute, still in giving effect to the rule regard must be had to the nature and policy of the statute, and its prohibitions. This was taken into account in a case in which the plaintiff

(1) *Narahari v. Sira Korithan*, 24 M.L.J. 462; 19 I.O. 831.

(2) *Edwards v. West*, 7 Oh. D. 858; *In re Adams* 27 Ch. D. 394.

(3) *Kurri Veerareddi v. Kurri Bapireddi*, I. L. R. 29 Mad., 336 (345) (F.B.); *contra Sheoram v. Lahman*, 13 C. P. L. R. 163; *Jeyram v. Ganpati*, 17 C.P.L.R. 19; *Gangabisan v. Tullaram*, 5 N. L. R. 70 (75). See these cases discussed under s. 54 *post*.

(4) *Ib.* p. 344.

(5) Now sch. 3, p. 11, Civil Procedure Code, 1908.

(6) *Magniram v. Bakubai*, I.L.R. 36 Bom. 510 (514). In this case the court relied on *Hillaya v. Narayanappa*, I. L. R. 36 Bom., 185 which they said established the proposition that an occupancy tenant incompetent to transfer without the consent of the *Khat* has been estopped from contending that the consent had not been obtained. But this is by no means obvious from the report which merely establishes that a reversionary heir to a Hindu widow who obtained possession from her purchaser is as against the latter's mortgagee estopped from disputing the mortgage.

complained that, during his minority, his mother had illegally mortgaged his *vatan* land to the defendant, and which was in contravention of section 5 of the Vatan-dar Act, which prohibits any alienation of *vatan* lands without the sanction of Government and provides that any alienation so made might be rescinded by the Collector.⁽¹⁾ But the Court held that the prohibition was not absolute, and that the plaintiff could not appeal to it to undo his own contract.⁽²⁾ Such a case, would fall within the principle that where the statute prohibits an act prescribing a penalty for doing it, the prohibition cannot be carried further beyond imposing the penalty; and also that where the prohibition is not dictated by public policy, but is intended to preserve or protect a private right, then its violation could ordinarily be availed of, and might be condoned only by the person possessing such right. In such cases, there would be still room for the application of this section. But, in other cases, a right conferred under this section, might be defeated if it cannot be enforced owing to the provisions of some other Act. Thus, for example, section 317 of the Code of Civil Procedure, prohibits the institution of a suit against the certified purchaser "on the ground that, the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims." Hence, if a person (A) mortgage property, a portion of which belongs to C, to B, and C's interest be afterwards in execution of a money-decree, against him, sold and purchased by D, wife of the mortgagor A; the mortgagee (B) would be precluded by the terms of the section in the Code from showing that D's purchase was really purchased by A and therefore equally liable to his mortgage.⁽³⁾

It should be noted that, while section 18 of the Specific Relief Act does not apply to a case, where the transferrer sells property professedly not his own, while this section does not apply, where there is no erroneous representation by the transferrer.⁽⁴⁾

729. The section is, of course, inapplicable to a case, where a person does not profess to act in his personal capacity. For instance, where a Hindu mother contracted to sell immoveable property belonging to her son, not in her personal capacity, but as the mother and next friend of the latter, there can be no suit for specific performance against her, as neither this section nor section 18 of the Specific Relief Act would be applicable.⁽⁵⁾ Again, the rule applies only to voluntary transfers, and has no application on involuntary transfer, as for instance, made through the Court in execution of a decree against the transferrer.⁽⁶⁾ The latter takes merely the right, title and interest of the judgment-debtor with all its defects,⁽⁷⁾ as does also the gratuitous transferee. But a transferee for valuable consideration though it be inadequate is entitled to a different treatment, provided that a third party with superior equity has not in the meantime intervened to defeat his claim.

(1) Act III of 1974.

(2) *Narayan v. Kalgaunda*, I. L. R. 14 Bom. 404.

(3) *Ram Narain v. Mohanian*, I.L.R., 26 All., 82.

(4) *Jagannath v. Dibbo*, I.L.R. 31 All. 53 (65).

(5) *Rash Moni v. Surja Kanta*, I. L. R. 32 Cal., 882.

(6) *Alukmonsee v. Banee Madhub*, I.L.R. 4 Cal., 677 (682).

(7) *Ram Tukul Singh v. Bissewar*, L. R. 2 I. A. 131; *Deen Dyal v. Jagdeep Narain*, I. L. R. 9 Cal., 198 (P.C.); *Dorab Ally v. Abdul*

Aziz, I. L. R. 3 Cal., 806 (P.C.); *Ali Sahab v. Kazi Ahmed*, I.L.R. 16 Bom., 197; *Sundara v. Vencata*, I.L.R. 17 Mad., 228; *Hira Lall v. Karimunnissa*, I.L.R. 2 All., 780 (783); *Ram Narain v. Mahtab Bibi*, I.L.R. 2 All., 828 (829); In *Balgobind Das v. Narain Lal*, I.L.R. 15 All., 339 (P.C.), the Privy Council allowed the execution purchaser without notice priority over the mortgagee from a co-parcener on the ground that the mortgage of co-parcenary interest in the U.P. and Bengal was without the consent of co-parceners, invalid. To the same effect—*Bhagannab v. Chandi Singh*, 14 O.C. 295, 13 I.O. 466.

730. Such person is described in the last clause. The policy of reserving the rights of *bona fide* transferees for consideration without notice of the said option, is founded upon the assumption that such covenant is personal to the parties, and does not run with the land. As the heir of the transferor is not a transferee for consideration, the property devolving on him charged with all the burdens to which it was subject, while in the hands of his predecessor, he cannot plead want of notice, to repel a claim made under this section. One Sheikh Abdullah executed a deed granting to his sister and her heirs an annuity charged on certain lands in his possession, providing that in case of his failure to pay the annuity, the grantee and her heirs should be entitled to take possession of the property. Subsequently, he mortgaged the same property so charged to the defendant, declaring in the deed, that the same was unincumbered and absolutely his own. His sister died and the mortgagor became her heir and as such entitled to the annuity, and the charge created by himself on the property in favour of his sister's heirs. On his death, he was succeeded by his own sons, who were also the heirs of Abdullah's sister and whose assignee sued the mortgagee, to enforce the charge; but the court held that in view of his covenant that the property mortgaged to the defendant was unincumbered, as Abdullah would have been estopped from setting up the charge, his sons and their assignee were equally precluded from enforcing it.⁽¹⁾

731. Excluding their heirs and gratuitous transferees, and transferees with notice, the option is contingent upon the interest remaining in the hands of the transferor. But, even where a transferee for consideration without notice has intervened, the right of the prior transferee cannot be defeated if it can be enforced without impairing the right of the subsequent transferee. Such a case arose upon the following facts. A the owner of land had in 1897 agreed to lease it to B for fifteen years, but before B's lease could be executed and registered, A executed a lease for two years of the same land to C, who was a lessee without notice of B's prior contract. Thereupon, the court adjusted the equities between B and C by ordering that B should have his lease on expiry of C's term.⁽²⁾ So, in another case, the owner had let out his land to B, and sold it to C who could only claim one-fourth of the property sold to him, but B having subsequently died the owner's interest was enlarged to a moiety and the benefit of which was held to pass to C.⁽³⁾ It should be noted that the clause only saves a transferee, and not merely one who has the benefit of an obligation, but in whose favour the transfer contracted for, has not been completed. In 1898, A mortgaged his land to B describing it as a *jagir*. It was in fact held in *ghatwali* tenure. On the 30th September 1901, A secured *mukarrari* rights in respect of the land. B sued on his mortgage and obtained a final decree for sale on 15th March 1902, after which A entered into a contract for sale with C, but no sale took place until the 30th April 1902. C sought to press into his service the equity here enacted, but the Court held the contract to create no right in derogation of the decree.⁽⁴⁾

732. Limitation.—It has been held that the limitation in such suits is governed by article 136 or article 144, giving twelve years from the time when the vendor is first entitled to possession, or when his possession becomes adverse

(1) *Radhey Lal v. Mahesh Prasad*, I. L. R., 7 All., 864.

(2) *Sarju Prasad v. Wazib Ali*, I. L. R. 23 All., 119.

(3) *Virayya v. Hanumanta*, I. L. R. 14 Mad 459.

(4) *Mokoda v. Umesh Chandra*, 7 C. L. J. 381.

to the transferee. (1) In one case, the Allahabad Court held article 123 applicable. In that case, a Hindu mother by name Mt. Ganeshi had in 1898 sold certain property belonging to her minor son but which she misdescribed to be her own. The son died in 1905 and the mother succeeded to the property. Two years later the reversioner sued for a declaration that the sale was not binding on him, and it was held that the reversioner's cause of action arose on the death of the son, whereupon Ganeshi's transfer took effect under the terms of this section, and that his suit was such as was contemplated by article 123, schedule 2 of the Limitation Act. (2)

44. Where one of two or more co-owners of immoveable property legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interests, and so far as is necessary to give effect to the transfer, the transferrer's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

733. Analogous Law.—The proviso did not find place in the Bill of 1879, but was subsequently added by the Select Committee with a view to prevent a stranger from claiming joint possession of a family dwelling-house. In cases determined before the Act, it was held that according to the law as administered in Bengal, the purchaser at a court-sale of the rights of one member, may be entitled to be put into physical possession even of a part of the family house, which could only be obviated by purchase of the right, by the other members at the sale, or by a suit for partition. (3) The inconvenience and inequity of permitting a stranger to intrude himself upon the privacy of a joint Hindu or Mahomedan family residence was manifest, and the proviso was accordingly necessary.

734. Prior to the passing of this Act, there was a considerable difference of opinion between the several Indian High Courts as to the legal competency of the transferee to enforce partition. In one case such a right was denied. (4) But under the Bengal Regulation, (5) it was held by the Privy Council that, in such a case, the other co-sharers could enforce partition and that the mortgagee would be bound by it, although, he neither was nor could be a party to those proceedings. (6) While

(1) *Sheoprasad v. Udai Singh*, I.L.R., 2 All., 718.

(2) *Barn Gir v. Mahunt Tulshi Das*, C. 61. I. O. 37.

(3) *Ramtonoo v. Gobindo* (1957), S. D. A., 1885; *Koonwur Bijoy v. Shama Soonduree*, 2 W. R., 30 (Mis.). F. B.; *Eshan Chunder v. Nund Coomar*, 8 W. R., 239.

(4) *Mayne's Hindu Law*, s. 330 *et seq.*;

Kusso Beg v. Thakoor Bhuwanee Singh, (1855), S. D. A. N.W.P., 453 (where partition was refused).

(5) XIX of 1814.

(6) *Macpherson on Mortgage* (7th Ed.), 287; *Byjnath v. Ramooddeen*, 21 W. R., 233 P. C., overruling *Baboo Nishan v. Babo Jagdeo*, 4 B. L. R., App., 97.

in a case decided in 1871, before the last-named precedent, it was held that such a person would not be bound.⁽¹⁾

735. Principle.—This with the three following sections (45 to 47), set out the law relating to the transfer of property where the transferrer or transferee possesses or obtains only a partial interest therein. As the transferee acquires all the right, title, and interest of the transferrer conveyed to him, it follows that he is entitled to joint possession like his predecessor in title, but since the presence of a stranger might lead to serious breaches of peace, these sections confer on certain parties the right to partition. The second paragraph has been inserted in accordance with the judgment of Westropp, C. J., who said: ⁽²⁾ "We also deem it a far safer practice, and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with members of a Hindu family, which may be not only of a different caste from his own, but also different in race and religion."

736. Meaning of Words.—"Co-owners" of property may be either joint-tenants (or co-parceners) where they hold by the same title, or tenants-in-common where they hold by different titles. "An estate held in a co-parcenary," says Blackstone,⁽³⁾ "is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law, or particular custom. . . . And in neither of these cases, all the co-parceners put together make but one heir, and have but one estate among them."⁽⁴⁾ The properties of co-parceners are, in some respects, like those of joint-tenants, they having the same unities of interest, title and possession. Tenants-in-common are such as held by several and distinct titles, but by unity of possession. "*His share*:" where this is undefined, it would appear that this section has no application. In such a case, the transferee must file a partition-suit against the other members of the family, for the ascertainment of the share of his vendor, and for the allotment to himself of his vendor's share in the particular portion in which he is interested.⁽⁵⁾ In such a suit, however, all the co-sharers must be joined as parties.⁽⁶⁾ "*So far as is necessary*" implies that the transferee is entitled to only limited powers in this respect. He can enforce partition only so far as is necessary for the full enjoyment of the property transferred to him. "*Conditions and liabilities*;" the conditions and liabilities attaching to the share pass with the transfer.

737. Incidents of Co-ownership.—A co-owner in joint possession is entitled to joint enjoyment and the severance of his share on partition. "*As a general rule, every joint-owner of property should be held entitled to obtain partition, or, in other words, to be placed in a position to enjoy his own right separately and without interruption or interference by his co-sharers. It is against good sense, if not also against good morals, as the Roman law viewed it, to compel joint-owners, to hold a thing in common, since it would not fail to occasion strife and disagreement among them.*"⁽⁷⁾ In this view the High Court held that even a

(1) *Shaikh Muzhur v. Hur Pershad*, 15 W.R. 353.

(2) *Balaji v. Ganesh*, I.L.R., 5 Bom., 504 (1880).

(3) 2 Comm. p. 187.

(4) Co. Litt, 168.

(5) *Pandurang v. Bhasker*, 11 B. H. C. R. 72.

(6) *Uchhab v. Sabhan*, 9 C. P. L. R., 93.

(7) *Hemadri Nath v. Ramant*, I.L.R., 24 Cal., 575 (580), F. B.; following *Shama Sundari v. Jardine Skinner & Co.*, 8 B. L. R. Ap., 120; *Story's Eq. Juris.*, § 648; *Baring v. Nash*, 1 V. & B. 551; *Heaton v. Dearden*, 16 Beav., 147.

subordinate holder, like a *patnidar*, can sue for partition as against the superior holder.

738. The right of a co-sharer in a joint estate is a right of common enjoyment of the lands and premises, together with the tenants of the co-sharers, in like manner as the co-sharers themselves would have it.⁽¹⁾ Co-sharers occupying separate portions of an estate are limited to possess and hold their separate portions. If one holds a portion larger than his share, the inequality may be rectified by a partition, or if a dispute arises on a division of the annual profits, it may be adjusted in a suit for an account.⁽²⁾

739. Ordinarily, as between co-sharers, the court is reluctant to interfere unless there has been a direct infringement of a clear and distinct right.⁽³⁾ Unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but all must join in a suit to recover their property. The fact that the sale-deed is in the name of one co-owner alone is not by itself sufficient to take the case out of this general rule.⁽⁴⁾ It is not competent for owners of property in this country, by any arrangement made in their own discretion, to alter the ordinary incidents of property which they possess; a joint property, therefore, cannot be made impartible in perpetuity by any such arrangement, though the owners may, for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose by a contract which could be enforced against them personally.⁽⁵⁾ The purchaser of a share being entitled to joint possession comes into all arrangements made in respect to the collections,⁽⁶⁾ and if he acquires a share in a tenure let out to a tenant in its entirety, it does not of itself necessarily effect a severance of the tenure or an apportionment of the rent, but if the purchaser of the share desires to have such a severance, he is entitled to enforce it, by giving due notice to the tenant, and if the parties interested do not agree, by suing for apportionment, in which case, the other co-shares must be made parties.⁽⁷⁾ Amongst co-sharers *inter se* they have a right to joint possession, a right which they may enforce, if necessary by a suit, without being driven to sue out a partition.⁽⁸⁾ But, of course, the only relief which the Court in such a case could give is a decree putting the plaintiff in joint possession with the other co-owners.⁽⁹⁾ As such, he is entitled to receive his proper share of the profits. But apart from joint possession, a co-sharer cannot claim to hold any specific land in severalty, and for which he must maintain a suit for partition. But apart from this, he cannot take possession even of some derelict land

(1) *Hulodhur v. Gcoroo Das*, 20 W. R. 126.

(2) *Kalee v. Lutafut Hossein*, 12 W. R. 418.

(3) *Gopee Kissen v. Hem Chunder*, 13 W. R. 322.

(4) *Balkrishna v. The Municipality*, I.L.R., 10 Bom., 221; *Navhari v. Shek Jamal*, 5 Bom. L. R., 577.

(5) *Radhanath v. Tarrucknath*, 3 C. W. N., 126.

(6) *Ram Nath v. Gondee Singh*, 10 W. R., 441.

(7) *Ishwar Chunder v. Ram Krishna*, I.L.R., 5 Cal., 902.

(8) *Dilbar v. Hossein Ali*, I.L.R., 26 Cal., 553; *Naranbhai v. Ranchhod*, I.L.R., 26 Bom., 141; following *Babaji v. Vasudev*, I.L.R., 1 Bom., 95; *Kallappa v. Venkatesh*, I.L.R., 2

Bom., 676; *Ram Chandra v. Damodar*, I.L.R., 20 Bom., 467; *Parashram v. Miraji*, ib., 569; *Mana v. Appa*, ib., 627; *Ram Charan v. Kavleshwar* (1904), A.W.N. 199; *Nanhi v. Daulat Singh*, 2 A.L.J. R., 256; *Ram Jatan v. Jaisar* (1894), A.W.N., 166.

(9) *Bhola Nath v. Buskin* (1894), A.W.N., 127; *Ram Jatan v. Jaisar Sukal* (1894), A.W.N., 166; *Rahman v. Salamat* (1901), A.W.N., 48; *Ram Sarup v. Gulzar* (1905), A.W.N., 160; *Jagat Nath v. Jai Nath*, I.L.R., 27 All., 88, in which, however, it was erroneously held that the court could only declare the plaintiff to be entitled to joint possession. The correct view was however taken in the later cases—*Rampcharan v. Kauleshar*, I.L.R., 27 All., 153; *Bhairon v. Saran Rai*, (1904), A.W.N., 106, F.B.

which has been abandoned by the tenant,⁽¹⁾ and in respect of which also the Court could only *declare* the plaintiff to be entitled to joint possession.

740. The purchaser of a part of an undivided property from a co-owner is entitled to obtain joint possession of the property, or to enforce its partition. This is a right which all co-sharers enjoy *inter se*, and if by purchase a stranger becomes a fractional proprietor of an undivided property, he acquires both a right to partition and a liability to have his share partitioned off by the other co-sharers.⁽²⁾

This section which confers on the transferee the right of joint possession or partition to the extent enjoyed by the transferor, would apply to transferees of all kinds, including mortgagees and lessees⁽³⁾. Where a co-sharer purports to mortgage the whole estate, the other co-sharers may obtain a declaration that the mortgage does not affect their shares, and this notwithstanding that subsequently to the suit the mortgagor had paid off the mortgage-debt⁽⁴⁾.

741. By tacit agreement, co-parceners in a joint property may have temporarily an exclusive use of different portions of it without prejudice to the common rights of all, or to the right of each, or any of them, to enforce at pleasure a partition of the whole.⁽⁵⁾ The possession of one co-sharer cannot be adverse to the other co-sharers,⁽⁶⁾ unless it is shown that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to him.⁽⁷⁾ Such an intention cannot be inferred from possession held with the tacit assent of the other proprietors.⁽⁸⁾ A decree for joint possession may be passed in a suit for exclusive possession, and such a decree should be not only declaratory, which would serve no purpose beyond merely establishing his right, but it should place him in joint possession.⁽⁹⁾ A decree for partial ejectment and joint possession can be made in favour of a co-owner of property.⁽¹⁰⁾ But as of right, no co-sharer has a right to *khas* possession over his share, and there may be cases in which even a decree for joint possession would be inappropriate. The law on the subject has been clearly expounded by their Lordships of the Privy Council, who said: "If there be two or more tenants-in-common and one (*A*) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation, as if it were his separate property, and another tenant-in-common (*B*) attempts to come upon the said part, for the purpose of carrying on operations there, inconsistent with the course of cultivation, in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle

(1) *Rahman v. Salamat* (1901), A.W.N., 48.

(2) *Ramasami v. Alagirisami*, 14 M.L.J. R., 14.

(3) *Mhd. Jafar Khan v. Mazhar-ul-Hasan*, 3 A.L.J.R., 474.

(4) *Sonabkan v. Nathmal*, 8 O.L.J., 185.

(5) *Yasuf Ali v. Bhubbes Singh*, 5 N.W.P., H.O.R., 122; *Chowahry v. Ahlad Singh*, 5 W.R., 287; *Ramachandra v. Damodhar*, I.L.R., 20 Bom., 467.

(6) *Baroda Sundari v. Annoda Sundari*, 3 O.W.N., 744; following *Asud Ali v. Akbar*

Ali, 1 O.L.R., 364; *Bidhata v. Ramachandra*, 6 O.L.J., 651.

(7) *Rakhal Das v. Indu*, 1 O.L.R., 155; *Gangadhar v. Parashram*, I.L.R., 29 Bom., 300.

(8) *Jahanoby v. Umbica Pershad*, 17 W.R., 74.

(9) *Naranbhai v. Ranchhod*, I.L.R., 26 Bom., 141 (145).

(10) *Kamal Kumari v. Kiran Chandra*, 2 C.W.N., 229; *Hulodhur v. Gosroo Dass*, 20 W.R., 126; *Radha Prasad v. Esuf*, I.L.R., 7 Cal. 434.

B to a decree for joint possession." (1) The same tribunal went on to say: "In India a large proportion of the lands including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the estate may, by means of cross injunctions, have to remain altogether without cultivation, until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many years. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value." (2) This view was cited by the same Board in another case, not "in order to follow the decision, but for the purpose of showing authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates, as between their co-owners, though they will do so in proper cases." (3) Such a case, would, no doubt arise, if a co-sharer has without the consent of the other co-sharers expelled one of the common tenants, and has possessed himself to the exclusion of his co-sharers of the lands held by him, in which case, the prayer of co-sharers for joint possession cannot be resisted. (4) But where a co-sharer has been for many years in exclusive and peaceable possession of *sir* land in excess of his legitimate share, he cannot under ordinary circumstances be deprived of such-possession. (5) In a somewhat similar case, (6) it was remarked that in such a case the co-sharer would be entitled to only partition and not to joint possession with the other co-sharers. But, this remark has been explained in a subsequent case to be no more than an *obiter dictum*, and it has been there held that the purchase of an occupancy-holding by a co-sharer landlord, would entitle the latter to maintain a suit for joint possession apart from his right to seek partition. (7) But, of course, in such a case it may be shown that the plaintiff's predecessor in title had no right to joint possession of a particular area, or that his claim to possession has become barred by efflux of time. (8) This section gives the transferee a right to enforce partition.

742. All co-owners must be joined as necessary parties in a suit affecting their joint interests. (9) So, in a suit to recover property belonging to co-sharers, (10) all the co-sharers must sue jointly, those refusing to join being arrayed as defendants. (11) On the other hand, no suit in respect of the joint property can be made against any one of the co-sharers, nor can rent be legally

(1) *Watson & Co. v. Ramchund*, I.L.R., 18 Cal., 10 (21). P.C.; *Lachmeswar v. Manowar Hossein*, I.L.R., 19 Cal., 253. P.C.; *Batul Begum v. Mansub Ali*, 5 C.W.N., 886 (864), P.C.

(2) *Per Sir Barnes Peacock in Watson & Co. v. Ramchund*, I.L.R., 18 Cal., 10 (22), P.C.

(3) *Per Lord Hobhouse in Lachmeswar v. Manowar Hossein*, I.L.R., 19 Cal., 253 (265) P.C.

(4) *Dilbar Sardar v. Hossein Ali*, I. L. R., 26 Cal., 553 (555); *Wasuadeo v. Sakaram*, 13 O.P.L.R., 153.

(5) *Padam Singh v. Sahdeo*, 14 C.P.L.R., 76.

(6) *Palahdari v. Manners*, I.L.R., 23 Cal., 179 (185).

(7) *Dilbar Sirdar v. Hossein Ali*, I.L.R., 26 Cal., 553.

(8) *Mahummad v. Badri Prasad*, I. L. R., 17 All., 423.

(9) *Pria Nath v. Ramtaran*, I. L. R., 30 Cal., 811, P.C.

(10) *Param v. Achal*, I. L. R., 4 All., 289; *Balahees v. Khooshal*, 3 Agra, 221; *Mookta v. Oomabuty*, 14 W.R., 31; *Sutaburi v. Lootf Ali*, 14 W. R., 339; *Alum Manjee v. Ashad Ali*, 16 W.R., 138; *Parbutty v. Protap Chunder*, 23 W.R., 276.

(11) *Kuttusheri v. Vallotil*, I. L. R., 3 Mad., 234. For mortgage cases, see *Ragho v. Balkrishna*, I. L. R., 9 Bom., 128; *Bhajan v. Moti*, I. L. R., 3 All., 177, and cases under S. 85, *post*.

claimed from him except on the ground of some agreement or undertaking, express or implied. (1) But the rule does not apply to members of a joint Hindu family who may separately sue on contracts individually made with them. (2) One tenant-in-common cannot eject another tenant-in-common, since the possession of one is the possession of the other. But if a tenant has been for a considerable time excluded from common enjoyment of rents and profits, the Court may presume an ouster, so that the party in possession will thenceforward hold adversely to the party excluded. (3) And where a co-sharer is found to have been ejected from his joint possession, the Court must confine itself to only declaring the co-sharer to be entitled to joint possession. It cannot go on to partially eject the other co-sharers in possession for the benefit of the ejected co-sharer. (4) Where, however, one co-sharer holds possession of certain land and deals with it in a particular way and in the ordinary course, and another co-sharer objects to that dealing or to that course of conduct, his proper remedy is to sue for partition, by which the rights of all the co-sharers may be adjusted and the laws sustained by one may be made good, at the expense of another. When one co-sharer landlord, in exclusive possession of a waste plot of land, although such exclusive possession may be held with the permission of the other co-sharer landlord, leases it out to a tenant, who improves it without any objection on the part of his co-sharer, it is not open to the latter to obtain *khas* possession of the land so improved, jointly either with the lessor landlord or with the tenant. (5) And while it is true that a co-owner of agricultural land in this country holding possession of a part of the joint land, to the exclusion of the other co-sharers, but without denial of his title cannot be proceeded against for joint possession, or by way of injunction, (6) still the rule has no application to land in the occupation of tenants and of which all co-owners were in receipt of rent. In such a case, if a co-sharer ejects the tenant, and himself takes possession of the land, the other co-sharers are entitled to their share of the profit, which they had been getting from the tenant and of which they cannot, be deprived by the possession of their co-sharer. (7) Where a party acquires two shares by his own act, he cannot, as owner of one share, exercise a right which he was precluded from exercising as owner of the other share. (8)

743. Co-sharers being all joint-owners of the village waste no individual

(4) **Right to common and building.** sharer can without the consent, express or implied, of the other co-sharers make use of waste land, in such a way, as to exclude permanently other co-sharers from all use and enjoyment of it. The law of joint-property entitles co-sharers to interfere and obtain restoration of the land to its former condition. (9) On a similar principle, no sharer can as of right, erect buildings, but before their demolition can be decreed, it must be shown that they have caused injury to the co-owners, (10) in

(1) *Gobind v. Ram Coomar*, 24 W. R. 393; *Parbutty v. Protap Chunder*, 23 W. R. 275; *Reily v. Hur Chunder*, I.L.R., 9 Cal. 722.

(2) *Anant Ram v. Chunnee Lal*, I. L. R., 25 All. 379.

(3) *Ramacharya v. Shrinivasa*, 5 Bom. L. R., 742; *Bully v. Doe d. Tarleyson*, 11 Ad. & Ed., 104.

(4) *Rahman v. Salamat*, 5 C.W.N., 48.

(5) *Madan Mohun v. Rajab Ali*, I. L. R., 28 Cal. 228.

(6) *Watson v. Ramchand*, I. L. R., 18

Cal., 10 P.C.

(7) *Ram Sankar v. Juanda*, 5 C.L.J., 267.

(8) *Holloway v. Muddun Mohun*, I. L. R., 8 Cal., 446.

(9) *Doulat Ram v. Tara*, 1 Agra, 12; *Drigpal v. Bhondo*, 2 Agra, 341; *Lloyd v. Sogra*, 25 W.R., 313.

(10) *Gurulas v. Bijaya*, 1 B. L. R. (A. C.), 108; *Bindubasini v. Patit*, 3 B.L. R. (A. C.), 266; *Lala Biswambhar v. Rajaram*, ib. (Ap.), 67; *Rajendro v. Shama Churn*, I. L. R., 5 Cal., 188 (no right to erect scaffoldings); *Nokuri Lal v. Bindabun*, I.L.R., 8 Cal., 708;

which case, the building, if still proceeding, may be restrained by a perpetual injunction. (1) So, where a co-sharer excavates a tank on the joint property, a *status quo ante* cannot be insisted on by another co-sharer without proof of some injury which materially affects his position. (2) A right otherwise good may be lost by acquiescence. (3) But in the absence of acquiescence or other intervening equity, the right is clear and the offending co-sharer is entitled to no compensation, for the demolition of his erections (4), although the Court will, before ordering demolition see, if justice cannot be otherwise satisfied. (5) The right of a co-sharer to enjoyment of the joint property depends upon the nature of the property. For example, a co-sharer of a mine already opened has the right to enter upon and work the mine, and the other co-sharer can neither restrain him from working, nor call him to account for working it, so long as he does not assert a hostile title. (6) And he cannot be called to account even if he has taken more than his legitimate share of the profits. Indeed, in many cases it is impossible to ascertain what would be the just share of profits of the working co-sharer, paying due regard to the capital and labour expended and the hazardous nature of his adventure. (7) But, of course, if one co-sharer obstructs or prevents another from common enjoyment, he is then accountable to him for mesne profits or a fair rent as his bailiff under contract express or implied. (8) But the exclusive appropriation by a co-owner of a part of the joint land to his own use by the erection of a permanent structure is not necessarily evidence of an ouster, so as to confer on the other co-sharer a right to obtain a decree for demolition of buildings or for joint possession without proof of substantial injury. (9)

744. Hindu Law.—But in the case of a Hindu to whom this section does not apply, (10) the question here raised would depend upon the legal competency of the co-sharer to transfer his undivided co-parcenary share, and of the transferee to enforce its partition. On this point the High Courts in this country have long been divided and on the principle of *share decisis*, while some Courts (11) have conceded to him that right, there are others who

Srichand v. Nim Chand, 5 B. L. R., (Ap., 25; *Nybin Chandra v. Mahes Chandra*, 3 B. L. R., (Ap.), 111; *In re Thakur Chander*, B. L. R. (Sup. Vol.), 595 (597) note; *Paras Ram v. Sherjit*, I. L. R., 9 All., 681.

(1) *Skadi v. Anup Singh*, I. L. R., 12 All., 436, F. B.; *Shamnugger Jute Factory Co. v. Ram Narain*, I. L. R., 14 Cal. 189.

(2) *Joy Chunder v. Bipro Churn*, I. L. R., 14 Cal., 236; *Atarjan v. Ashak*, 4 C. W. N., 788; *Kamakayya v. Narasimhulu*, I. L. R., 19 Mad., 38, in which an addition to a party wall the height of which had been raised by a tenant-in-common was removed as the erection might give rise to "inconvenience and quarrels"—following *Watson v. Gray*, 14 Ch. D., 192.

(3) *Nocuri Lall v. Bindabun*, I. L. R., 8 Cal., 708; *Doorga Lall v. Lalia*, 25 W. R., 308 (a case which perhaps goes too far).

(4) *Bishambhur v. Shib Chunder*, 22 W. R., 286.

(5) *Massim v. Panjoo*, 21 W. R., 373.

(6) *Freeman Co-tenancy and Partition* (2nd ed.), s. 294 A; *Mahesh Narain v. Nourat Pathak*, I. L. R., 32 Cal., 837 (845.)

(7) *Henderson v. Eason*, 17 Q. B. D., 801;

McMahon v. Burchill, 41-2 P. H., 127; 41 E. R., 889.

(8) *Mahesh Narain v. Nowpat Pathak*, I. L. R., 32 Cal., 837 (853, 854).

(9) *Ananda Chandra v. Parbati*, 4 O. L. J., 198 (205); *Shamnugger Jute Factory Co. v. Ram Narain*, I. L. R., 14 Cal., 189; *Joy Chunder v. Bipro Churn* ib., 236; *Atarjan v. Ashak*, 4 C. W. N., 788; *Madan Mohan v. Rajab Ali*, I. L. R., 28 Cal., 223; *Soshi Bhushan v. Ganesh Chunder*, I. L. R., 29 Cal., 500; *Fazilatunessa v. Ijaz Hassan*, I. L. R., 30 Cal., 901; *Mahesh Narain v. Nowpat Pathak*, I. L. R., 32 Cal., 837; *Paras Ram v. Shujit*, I. L. R., 9 All., 661; *Bhairon Rai v. Saran Rai*, I. L. R., 26 All., 568; *Ram Charan v. Kauleshar*, I. L. R., 27 All., 153; *Rohman v. Ralamat* (1901), A. W. N., 48; *Nanhi v. Daulat* (1905), A. W. N., 119; *Ram Sarup v. Gulzar*, ib., 160; *Raja Ram v. Lalji*, 2 A. L. J. R., 481; *Phani v. Nawab Singh*, ib., 233.

(10) S. 2, cl. (a), ante *Venkatrama v. Meera* I. L. R., 13 Mad., 275 (277).

(11) *Subba Row v. Anathanarayana*, 23 M. L. J. 64; 14 I. O. 524; *Iburaamsa v. Theruvankatasami*, I. L. R. 34 Mad. 269, F. B.; *Ayyagari v. Ayyagari*, I. L. R. 25 Mad. 690; *Gadadhar*

have denied it. (1) In the former case the transferee from a co-sharer would possess the same right as is here enacted, though in the latter case, he has neither right to joint possession nor partition. Even where the transferee possesses larger rights it has been held that the purchaser from a member of an undivided family cannot sue for partition of his share, alone, and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property. "The purchaser of a co-parcener's share can take no higher right than his vendor possesses, and that is not a right to a certain share in each particular item, with an incidental right to obtain a partition of the whole family property and have his share therein made over to him after due provision for the family debts and liabilities." (2) The right here conferred of partition on the transferee would, of course, equally avail in favour of the other co-sharers. (3) But a mortgagee of the undivided share of one co-sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers, but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed. (4) This principle has been held to be applicable to all assignees of any interest whatever. (5) But the purchaser in such a case does not become a co-parcener, whose assent may be necessary to any future dealings with the property by the other members. He is only a tenant-in-common with them, who may *inter se* continue to maintain their original status. (6) "In Bengal, where the co-parceners hold in *quasi*-severalty, each member has a right before partition, to mark out his own share, and to hold it to the exclusion of the others. Accordingly, it has been held that the purchaser at a court-sale of the rights of one member, is entitled to be put into physical possession, even of a part of the family house, the only remedy of the other members being to purchase the rights of the debtor at the auction-sale. (7) But it is otherwise in cases decided with reference to the Mitakshara law, under which no member has a right, without express agreement, to say that any specific portion is exclusively his. Consequently, the purchaser at a court-auction cannot claim to be put into possession of any definite piece of property." (8)

45. Where immoveable property is transferred for consi-

Joint transfer for con-
sideration.

deration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to

v. Balwant (1883) B.O.J. 250; *Diwaker v. Janardhan*, 3 C.P.L.R. 64; *Abdul Aziz v. Ajudhia*, 15 C.P.L.R. 156.

(1) *Sadabart v. Foolbush*, 3 B.L.R. 31; *Chamaiti v. Ram Prashad*, I.L.R. 2 All. 267; *Balgobind v. Narain Lall*, I.L.R. 15 All. 339 P.C. in which it was laid down that in Bengal and the N.W. (now United) Provinces a Mitakshara co-parcener has no right to alienate his undivided share without the consent of the other co-parceners, while such right was recognized in Bombay and Madras (*ib.* pp. 350. 351).

(2) *Venkatrama v. Meera*, I.L.R., 13 Mad., 275 (276).

(3) *Byjnath v. Ramooddeen*, 21 W. R., 233,

P. C.

(4) *Byjnath v. Ramooddeen*, 22 W.R., 233, P.C.; following in *Sharat Chunder v. Hurgobindo*, I.L.R., 4 Cal., 510.

(5) *Sharat Chunder v. Hurgobind*, I.L.R. 4 Cal., 510 (513).

(6) *Balla'h v. Sunder*, I.L.R., 1 All., 429 *Gauraj v. Sheozore*, I.L.R., 2 All., 898.

(7) *Ramtonoo v. Ishurchunder*, (1857), S. D.A. (1535); *Koonwur v. Shama Soonduree*, 2 W.R. (Mis), 3; *Eshan Chunder v. Nund Coomur*, 8 W.R., 239.

(8) *Mayne's Hindu Law*, § 329; *Kalee v. Choitum*, 22 W.R., 214; *Kallapa v. Venkatesh*, I.L.R., 2 Bom., 676; *Syud Tufuzzool v. Raghnunath*, 14 M.I.A., 50.

interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property, in proportion to the shares of the consideration which they respectively advanced

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

745. Analogous Law.—This section follows the English Law.⁽¹⁾ A similar rule is also laid down by the Indian Contract Act, for determining partner's mutual relations.⁽²⁾ The right of a co-owner as against a tenant of the common property will be found discussed under sections 106 and 111.

In England an advance made of money held on a joint account on the security of a mortgage or otherwise, is not similarly apportionable, but continues to remain joint, unless the shares are specified; and the survivor of the creditors or the personal representatives of the last survivor may thus validly collect and grant a receipt in writing for the whole debt.⁽³⁾

The section does well in sailing clear of the corresponding English nomenclature, and thus avoiding the technical and sometimes embarrassing distinctions drawn in that law between a joint tenant and a tenant-in-common. In India, where proprietary rights to property are recognized, to designate a co-owner as a joint-tenant, would have been singularly inapt and inaccurate, and yet such terms of English feudalism are often used in discussions on Indian law as if they had been part and parcel of Indian Jurisprudence.

746. Anyhow, the incidents of the law of joint tenancy have but limited application to the Indian co-sharer. In England, a joint contract for purchase by two persons with equal payments, creates a joint tenancy, and which therefore carries with it the right of survivorship.⁽⁴⁾ But it is by no means necessarily so in this country.⁽⁵⁾ Even in England a tenancy-in-common is presumed, if there are circumstances shewing that the right of survivorship was not intended to be preserved, or if the proportions of the contribution are not equal, or that the parties have been dealing with the estate as tenants-in-common.⁽⁶⁾ But, both in England, as well as in this country, a conveyance of land to two or more persons without words indicating an intention that they were to take as tenants-in-common constitutes a joint tenancy. In India with its institution of joint family, there is, of course, always a presumption that a gift to two or

(1) Sugd. V. & P. (14th Ed.), pp. 697, 698, Dart's V. & P. (6th Ed.), p. 1047; *Rigden v. Valliar*, 2 Ves., 252; *Aveling v. Knipe*, 19 Ves., 444; *Robinson v. Preston*, 4 K. & J., R., 286; *Bone v. Pollard*, 24 Beav., 283.

(5) *Mass.* 253 (Act IX of 1872).

(6) *Freem.* Conveyancing Act, 1881 (44 and (2nd ed.), s. 29, 41).

Pathak, I. L. R. v. Knipe, 19 Ves., 441; *Lake* (7) *Henderson v. Rq. Ca. Ab.*, 291 *Rigden v.*

Valliar, 2 Ves., 253. "There is nothing in equal contribution repugnant to joint-tenancy: on the contrary it is of course that joint tenants should contribute in equal proportions." (*Per Grant, M. R.*, in *Aveling v. Knipe*, 19 Ves., 441, 445).

(5) *Cf. Jogesswar v. Ramchand*, I. L. R., 23 Cal., 670, P. O.

(6) *Harrison v. Barton*, 1 John & H., 287; *Rigden v. Valliar*, 2 Ves., 258.

more members, e.g., brothers, would constitute them joint tenants and not tenants-in-common.⁽¹⁾

747. Principle.—This is a rule of construction based upon the principle that in the absence of evidence to the contrary, which the party alleging inequality must adduce, ⁽²⁾ all partners are to be deemed to be equally interested in the property jointly acquired by them, otherwise, their shares will be proportionate to the consideration paid by each, or in the case of the consideration being paid out of a joint fund to the interests to which the co-sharers were respectively entitled. It will be noticed, that this section does not declare whether in such a case the co-sharers would become joint-tenants or only tenants-in-common without the right of survivorship. The section defines only the *quantum* and not the quality of the interest of joint-transferees. Under the English law conveyance of land to two or more persons without words indicating that they are to take as tenants-in-common constitutes at law, a joint-tenancy. ⁽³⁾ The question there, is mainly one of intention. ⁽⁴⁾ "And, although the purchase-money may have been contributed in equal proportions, an intention to hold in severalty may be presumed *aliunde* . . . And, notwithstanding the Statute of Frauds, parol evidence of the contemporaneous circumstances, and of the subsequent dealings with the property, is admissible to prove an intention to hold in severalty; such evidence must be confined to facts as distinguished from mere statements of intention". ⁽⁵⁾ In one case, however, a mere statement of intention was admitted in evidence. ⁽⁶⁾

748. A familiar example of joint-tenancy in India is presented by the enjoyment of property in co-partnership by the members of an undivided Hindu family, otherwise, the principle of joint-tenancy appears to be unknown to Hindu law. ⁽⁷⁾ It should be added, that the rule of English law that a joint-tenant's interest does not descend upon his heirs is inapplicable to a bequest in joint-tenancy under Hindu law. ⁽⁸⁾

749. Meaning of words.—"And such consideration is paid out of a fund belonging to them in common : i.e., the purchase is made with a joint consideration. *Identical interests*" : means advantages proportionate to the fund contributed towards the transfer.

750. Interests of Co-owners.—The rights and liabilities of co-owners have been generally discussed in the preceding pages (§§ 737-743). It may be generally premised here that as regards the possession and enjoyment of the *quantum* of interest co-owners stand in the relation of partners to one another, and therefore any advantage secured by one ⁽⁹⁾ by means of any dealings within the scope of the business, ⁽¹⁰⁾ e.g., the renewal of a lease, ⁽¹¹⁾ or an abatement of incumbrances charged on the property, ⁽¹²⁾ or a secret bonus from the vendor for effecting the sale, ⁽¹³⁾ enures to the benefit of the others. On the other hand, one

(1) *Mankamma v. Balkishan*, I. L. R. 28, All., 38.

(2) *Judabram v. Bulloram Dey*, I.L.R., 26 Cal., 281, 282.

(3) *Coke*, Litt. 180b.; *Aveling v. Knipe*, 19 Ves., 441, 444; *Gobind Prosad v. Inayat Khan*, I.L.R., 27 All. 310.

(4) *Mander v. Harris*, 26 Ch. D., 166.

(5) *Dart's V. & P.* (6th Ed.), 1048; *Harrison v. Barton*, 1 J. & H., 287.

(6) *Devoy v. Devoy*, 3 S. & G., 408; but see *O'Brien v. Shiel*, 7 Ir. Eq. 255.

(7) *Gjeshwar v. Ramchand*, I.L.R., 23 Cal., 670 (679); P.C., overruling *Vyādinada*

v. Nayammal, I.L.R., 11 Mad., 258; *Bai Diwali v. Patel Becharadas*, I.L.R., 26 Bom. 445 (448).

(8) *Bai Diwali v. Patel Becharadas*, I.L.R., 26 Bom. 445 (448); *Navroji v. Perozbai*, I. L. R. 23 Bom., 80.

(9) *Somerville v. Mackay*, 16 Ves., 382.

(10) *Dran v. MacDowell*, 8 Ch. D., 344, 351.

(11) *Featherstonehaugh v. Fenwick*, 15 Ves. 293; *Clegg v. Fishwick*, 1 M. & G. 294.

(12) *Cartor v. Horns*, 1 Eq. Ca. Ab. 7, Dart. p. 1051.

(13) *Beck v. Kantorowicz*, 3 K. & J., 280.

co-owner cannot infringe the right of the other by either taking exclusive possession of the property or altering its conditions materially, without his permission.⁽¹⁾ He cannot exclude the other co-sharers from equal enjoyment.⁽²⁾ In any of these cases he can be restrained by an injunction,⁽³⁾ or the aggrieved party may obtain redress by a suit for partition⁽⁴⁾ or for compensation.⁽⁵⁾ Relief by way of an injunction being discretionary, the Privy Council has held that where no specific rule exists, the courts are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any shareholder to appropriate to himself the fruits of the other's labour and capital.⁽⁶⁾

751. In a transfer of this kind it may often be a question whether a co-sharer is entitled to transfer his individual undivided interest to a third party. The subject has already received extended consideration elsewhere to which reference should be made for more particular information. (§§ 204-205). The section as it stands defines only the *quantum* of interest possessed by co-sharers *inter se*; and it affords no authority for determining the question as to its mode of enjoyment. In England a tenant-in-common, may license a third party to do whatever he might have done himself, but he has no other power. It would appear that he cannot deal with a third party on the basis of his own share, for in the absence of partition of a mutual arrangement, a joint owner possesses the only remedy open to a tenant-in-common of bringing a suit for account.⁽⁷⁾ A co-owner being in joint possession is entitled to enjoy the common property, and cannot be treated as a wrong-doer by another, except for some act which amounts to an ouster of his co-sharer, or to a destruction of the common property. A co-owner may cut down trees which are fit for cutting, or take a crop of grass,⁽⁸⁾ or even commit equitable waste, but not malicious destruction of the property.⁽⁹⁾ But he cannot, as such, collect his separate share of the rent, though he may sue for the entire rent making the other co-sharers parties to his suit.⁽¹⁰⁾ A volunteer who acts as manager cannot claim remuneration from his co-sharers, without showing a previous consent on their part to pay him.⁽¹¹⁾

752. The principle of this case has been applied to a case, where an estate was divided into several shares and one of them was left as the *ijmal kalam* and for others separate accounts had been opened with the Collector, and the owners of the *ijmal kalam* having failed to pay their share of the revenue it was put up

(1) *Lala Bishambharlal v. Rajaram*, 3 B. L.R., (App.), 67; *Nocary Iall v. Bindabun*, I.L.R., 8 Cal., 708.

(2) *Shadi v. Anup Singh*, I.L.R., 12 All., 436, F.B.

(3) *Rajendrolal v. Shama Charan*, I.L.R., 5 Cal. 188; *Holloway v. Wahid Ali*, 12 B.L.R., 191.

(4) *Parasram v. Sherjit*, 1 L.R., 9 All., 161; *Shadi v. Anup Singh*, I.L.R., 12 All., 436.

(5) *Watson & Co., v. Ramchand*, I.L.R., 18 Cal., 10; P.C., overruling *Ramchand v. Watson & Co.*, I.L.R., 15 Cal., 214.

(6) *Watson & Co. v. Ramchand*, I.L.R., 18 Cal., 10 (22), P.C.

(7) *Per Willes, J.*, in *Jacobs v. Seward*, L. R., 4 C.P., 328 (329); *Hole v. Thomas*, 7 Ves., 589; *Martin v. Knowllys*, 8 T.R., 145; *Balvantrav v. Ganpatrav*, I.L.R., 6 Bom., 336.

(8) *Martyn v. Knowllys*, T.R., 145.

(9) *Per Eldon, L.C.* in *Hole v. Thomas*, 7 Ves., 589 (590).

(10) *Tarini v. Nund Kishore*, 12 C.L.R., 588; *Bissesswar v. Bojo Kant*, 1 C.W.N., 221; *Dwarkanath v. Tara*, I.L.R., 17 Cal., 160; *Shoshee v. Giris Chandra*, 1 C.W.N., 659; *Dintarini v. Broughton*, 3 C.W.N., 225.

(11) *Gundo v. Kristnarav*, 4 B.H.C.R. (A. C.), 55.

to sale but could not fetch a price sufficient to cover the sum in arrears, and each of the co-sharers paid the entire amount of arrear separately, and the Collector issued a certificate of sale jointly. It was held, that the different sharers should be entitled to equal shares in the purchased estate irrespective of their shares in the parent estate, and that in the absence of evidence showing how the Collector made up the arrear from the funds which the parties respectively advanced, the presumption was, that the Collector took from each of the funds an equal share. (1) So, following the rule here enacted, it has been held that property acquired out of the common fund by three brothers would be held by them, in proportion to their interest in the common fund. (2)

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferrers are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) *A*, owning a moiety, and *B* and *C*, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, *A* is entitled to an eighth share in Lalpura, and *B* and *C* to sixteen share in that mauza.

(b) *A*, being entitled to a life-interest in mauza Atrali, and *B* and *C* to the reversion, sell the mauza for Rs. 1,000. *A*'s life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. *A* is entitled to receive Rs. 600 out of the purchase-money, *B* and *C* to receive Rs. 400.

753. Analogous Law.—This section is the converse of the preceding section, which enunciates a similar rule of proportion. A similar provision relating to partners is made in the Indian Contract Act. (3)

754. Principle.—This and the following section, are also based on the rule of equitable apportionment. It has been laid down that the proper mode of apportioning the prices of a life-estate and reversion, when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price. (4) Where a transfer is made by only some of the co-sharers on behalf of the rest, it is their duty to sell the estate to the best advantage they can, that is, in the manner most beneficial to the *cestui que trust*. It is further their duty to take care to receive the purchase money, and to invest it properly according to the trusts. (5) In judging of fair value, they must take proper advice as to the value and act upon it. (6)

755 Distinct Interest.—The owner of a lease has a distinct interest from that of a reversioner, (7) so also has the owner of an undivided fourth part of an estate, joining with the owners of the rest, in selling the whole for a

(1) *Debi Pershad v. Mt. Aklio*, 4 C. W. N., 465.

(2) *Parsotam Rao v. Janki Bai*, 4 A. L. J. R., 257 (268).

(3) S. 253 (2), Act IX of 1872.

(4) *In re Cooper and Allen's contracts*, 4 Ch. D., 802; *Rede v. Oakes*, 32 Beav. 555;

Cavendish v. Cavendish, 4 L. R., 10 Ch. 319; *Morris v. Debenham*, 2 Ch. D., 54.

(5) *In re Cooper and Allen's contracts*, 4 Ch. D., 802 (816).

(6) *Ibid.*, p. 816.

(7) *In re Cooper and Allen's contracts*, 4 Ch. D., 802; *Clark v. Seymour*, 7 Sim., 67.

lump sum. (1) Again, a life-tenant who joins with the remainderman possesses a distinct interest within the meaning of the section. (2) A married woman under the English law has a distinct interest in her property, (3) and her husband is not a co-owner thereof. It is to be observed, that co-owners having distinct interest are not agents for each other, and, therefore, must all join in the sale and give separate receipts, otherwise there can be no valid sale. (4) Co-widows under the Hindu law, have not a distinct but joint interest in their husband's property, and being co-parceners with the right of survivorship, can only jointly alienate. (5)

47. Where several co-owners of immoveable property transfer a share therein, without specifying that the transfer is to take effect on any particular share or shares of the transferrers, the transfer, as among such transferrers, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share in mauza Sultaapur, transfer a two-anna share in the mauza to D, without specifying, from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A and half an anna share from each of the shares of B and C.

756. Principle—The subject of this section has been adequately discussed, in the preceding commentary. (§ 624). It is to be observed, that here the transfer takes effect according to the extent of the *shares* of each co-owner and not according to the *quantum* of *consideration* received by each. Probably this rule was enacted to guard against the complications which the latter course would have entailed. For, the value of two shares, otherwise equal, may considerably vary, and if inquiry had to be made as to the value of each share, much unnecessary inconvenience and delay would have been inevitable.

757. A general agreement to sell property implies sale of the proprietary rights therein, and a transfer of a limited interest cannot be inferred from the smallness of the price. (6) Where a person conveys property, a portion of which he has no right to convey, the purchaser is entitled to treat the whole contract as broken, and sue for damages; and the vendor cannot be heard to say, that he would make an allowance *pro tanto*, for the purchaser may reply that it is not the interest which he had agreed to purchase. (7) But in such a case, the purchaser may elect to take the interest which the seller has, with compensation. And in certain cases where the deficiency is not great, the purchaser may even be compelled to take it at a proportionate price. (8) But, if there be a material discrepancy between the property sold and the property offered, the court, so far from interfering in the vendor's favour, will assist the purchaser in recovering his deposit. (9) A purchaser cannot be compelled to adhere to a bargain brought

(1) *Powlett v. Hood*, L. R., 5 Eq., 115.

(2) *Morris v. Debenham*, 2 Ch. D., 540.

(3) Married Women's Property Act, 1882, sec. 2.

(4) *Matson v. Dennis*, 4 D. J. & S., 345; *Dart*, 745, 748.

(5) *Ram Piyari v. Mulchand*, I. L. R. 7. All., 114; *Bhugwandeon v. Myna Bae*, 11

M. I. A., 487; *Gajapathi Nilmani v. Gajapati Radhamani*, I. L. R., 1 Mad., 290 (300), P. C. but see comm. under s. 7 ante.

(6) *Hughes v. Parker*, 8 M. & W., 244.

(7) *Farrer v. Nightingale*, 2 Esp. 639.

(8) *Guest v. Homfray*, 5 Ves., 818; *Hauger v. Eyles*, 2 Eq. Cas., Abr., 689.

(9) *Long v. Fletcher*, 2 Eq., Ca. Abr., 5.

about by misrepresentation and affecting the probable duration of the interest, as where a life-interest *pur autre vie* was represented to be for a very healthy life although the sellers had recently insured it at a premium exceeding the highest rate for a healthy life at that age.⁽¹⁾ Any fraud of material misdescription, though unintentional, is sufficient to vacate the agreement, although the purchaser might have substantially got what he had agreed to purchase.⁽²⁾ But apart from fraud and material misdescription, the consequences of which have been set out elsewhere, the rule under discussion enables the transferee to compel the vendor to make good his representations as soon as he is in a position to do so. But if he elects to take what the vendor has presently got to give, the latter cannot refuse, for it is not for him to say that because he cannot carry out the entire contract, the purchaser shall not have the benefit of whatever he can purchase, and to an abatement.⁽³⁾ On the other hand, a vendor not having a title at the date of the contract, is entitled to specific performance if he has subsequently procured title.⁽⁴⁾ Thus where a person purchased certain property belonging to the family from a member of an undivided Hindu family, consisting of the transferrer, his adopted son and his uncle, and sued the latter amongst others for possession, who contested the propriety of the alienation on the ground of the absence of legal necessity, but during the pendency of the suit the uncle died, and thereby the transferrer's interest in the property was increased to a moiety instead of a quarter only of the property, it was held that apart from the question of transfer for necessity, the plaintiff was entitled to a moiety of the land sold to him.⁽⁵⁾ In another case, a Mahomedan woman together with her eldest son executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares. The mortgagee brought his suit on the mortgage joining as defendants the younger children as well as the mortgagors and obtained a decree, whereby the mortgage-amount was made payable "on the responsibility of the shares" of the co-mortgagors; the suit was otherwise dismissed and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one or the other defendants who died before the decree was executed. It was held that the increased shares of the mortgagors were liable to be sold in execution of the decree.⁽⁶⁾

48. Where a person purports to create by transfer at

**Priority of rights
created by trans-
fer.**

different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

758. Analogous Law.—This is a statement of the English equitable maxim "*Qui prior est tempore, potior est jure*"⁽⁷⁾—a relic of the primitive law to which the right of ownership in property may be ultimately traced.⁽⁸⁾

(1) *Brealey v. Collins*, 10. 317, Sugd. V. & P. (14th Ed.) 299.

(2) *Belworth v. Hassel*, 4 Cam., 140; *Inledon v. Watson*, 2 Fost and Fine, 841; S. 55, post.

(3) *Jenkins v. Hiles*, 6 Ves., 646; *Mortlock v. Buller*, 10 Ves., 292 (316).

(4) *Mortlock v. Buller*, 10 Ves., 292.

(5) *Vravya v. Hanumanta*, I. L. R., 14 Mad., 459.

(6) *Ajijudeen v. Sheik Budan*, I. L. R., 18 Mad., 492.

(7) "He who is first in time is better in law." Co. Litt., 14a, Broom's Legal Maxims (6th Ed.), 395.

(8) See Introduction, s. 63.

The section is, however, subject to the exceptions comprised in cases falling under sections 78 and 79 *post*. The rule, again, does not affect the specific provisions of section 50 of the Indian Registration Act,⁽¹⁾ under which registered documents relating to land, of which registration is optional, were for the first time declared to take effect against unregistered documents relating to the same property, not being a decree or order, whether such unregistered document be of the same nature as the registered document or not (§770). And as regards property generally, whether moveable or immoveable, a registered instrument relating to property is by another section declared to take effect against any oral agreement or declaration relating to such property except where the agreement or declaration has been accompanied or followed by delivery of possession.⁽²⁾ The combined effect of these sections will be found set out in the ensuing discussion.

This section states the rule to which section 78 is an exception of which the application is not confined to "mortgages" only, and it might have been inserted as a proviso to the rule here enacted.

759. Principle.—It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This rule, however, applies only to cases where the conflicting equities are otherwise equal. In other words, in a contest between persons having only equitable interests, priority of time is the ground of preference *last resorted to*; i.e., a court of equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground for preference between them. ⁽³⁾

760. Meaning of Words.—"Purports to create:" for the rights so created cannot co-exist or be concurrently exercised. "*Rights over the same property*:" means that the rights created in favour of one of the two transferees do not convey the entire interest. For in such a case there can be no priority, since one of the two transferees takes nothing, the transferee having nothing to give. "*Cannot exist together*," i.e., the two interests cannot be beneficially enjoyed without prejudicing each other (§761). "*Special contract or reservation*:" equitably the prior transferee has the preference unless there is a contract or reservation by which, he is bound or where through his fraud, misrepresentation or gross neglect, another person has been induced to advance money.⁽⁴⁾ In the latter case the prior transferee, being estopped, is postponed to the subsequent transferee.

761. Case for Priority.—The principle of the section cannot, as has been pointed out above, apply where the two interests do not conflict. Thus in a case where the property is mortgaged to one and subsequently sold to another, this section will not apply, for the purchaser has obtained only the equity of redemption an interest which can exist side by side with the mortgage.⁽⁵⁾ So there is no conflict between a completed sale and a contract for sale, as the latter confers no *right* on the property.⁽⁶⁾ An unregistered sale-deed, where

(1) Act III of 1877.

(2) *Ib.*, s. 48.

(3) Snell's Equity, pp. 21, 22; *Rice v. Rice*, 2 Drew., 78; see also *Spencer v. Clarke*, 9 Ch. D., 137; *Pilgrim v. Pilgrim*, 18 Ch. D., 93; *Gordon v. James*, 30 Ch. D., 249; *National Provincial Bank v. Jackson*, 33 Ch. D., 1;

Farrand v. Yorkshire Banking Co., 40 Ch. D. 182.

(4) s. 78, *post*.

(5) *Ramchandra v. Krishna*, I. L. R., 9 Mad., 495.

(6) s. 54, last para.

registration is compulsory, would confer also no rights upon the vendee, and he cannot, therefore, claim as against the registered transferee.⁽¹⁾ But it is otherwise if the latter had notice of the former,⁽²⁾ and in this respect the law is the same in this country as in England.⁽³⁾ If *A* mortgages or sells to *B* and afterwards *C* purchases at a court-sale the then existing right, title, and interest of *A*, *C* buys in the first case the equity of redemption, and in the second nothing at all. In such a case registration cannot help him, for, on the very face of his certificate of sale, the property comprised therein is not the property previously conveyed to *B*, but only the residue of *A*'s estate after such conveyance.⁽⁴⁾

762. As between the competing auction-purchasers the principles which govern preference are the same as those which regulate the claims of priority among mortgagees. Independently of any preference secured by reason of registration of possession, the purchaser must redeem all charges created before the sale. He must be held to have made his bid with full knowledge that the property was burdened with debts, and he can only claim possession by paying off those debts. His certificate of sale confers on him no right to require the later mortgagees or those purchasing under them as auction-purchasers to return back the money he paid either personally or out of the property.⁽⁵⁾ The plea of purchase without notice, though it may be a good defence against an equitable claim, is no defence, against a legal claim.⁽⁶⁾ A person purchasing property with notice of prior contract in favour of another is bound to hold the property for his benefit to the extent necessary to give effect to that contract.⁽⁷⁾ Where the subsequent transferee has taken a conveyance, the prior transferee suing for possession will get a decree declaring that the subsequent transferee holds the property for the benefit of the plaintiff to the extent necessary to give effect to his contract, and that he do execute to the plaintiff a proper conveyance; and a decree for possession.⁽⁸⁾ Where the prior transferee suing his vendor for specific performance of his contract knows of the subsequent interest he should also implead him in the same suit⁽⁹⁾ but where, of course, he is ignorant of the subsequently created right a separate suit would then be necessary.⁽¹⁰⁾ Where a property which was hypothecated to Government under Act XII of 1884 by defendant I, was, in execution of a certificate under the Public Demands Recovery Act,⁽¹¹⁾ sold and purchased by defendant III, and subsequently the plaintiff brought a suit to enforce a mortgage of the said property on a bond executed by defendant I, it was held that the plaintiff was entitled to obtain a decree, and that defendant III did not acquire by the purchase anything but the judgment-debtor's right, title, and interest in the property at the date of the service of notice under section 10 of the Public Demands Recovery Act:⁽¹²⁾ in other words the interests acquired by defendant III was merely the equity of redemption of the mortgagor.⁽¹³⁾

(1) *Waman v. Dhondiba*, I.L.R., 4 Bom., 127; *Chundernath v. Bhoyrub*, I.L.R., 10 Cal., 250; *Ram Aular v. D'Monauri*, I.L.R., 8 All., 540.

(2) *Anundo v. Dhonendro*, 14 M.L.A., 101; s. 78, *post*.

(3) *Blades v. Blades*, 1 Eq. Ca. Abr., 358; *Sheldon v. Cox*, 2 Eden., 224; *Cater v. Cool*, 1 Cox, 182; *Greaves v. Tofteld*, 14 Ch. D., 563; *Pomfrei (Earl) v. Nelson (Lord)*, 2 Ves., 485.

(4) *Sobhagchand v. Bhaichand*, I.L.R., 6 Bom., 193 F. A.; followed in *Ramraja v. Arunachal*, I.L.R., 7 Mad., 248; *Dagdu v. Kahuam* (1895), B.P.J., 27.

(5) *Bajinath v. Bhimappa*, 3 Bom., L. R.

92.

(6) *Per Lord Thurlow in Williams v. Lambo* 3 Ch. Cas., 263; cited in *Amirbibi v. Abdul*, 3 Bom., L.R., 658 (666).

(7) *Gaffur v. Bhikaji*, I.L.R., 26 Bom., 159; S. 91 Indian Trusts Act, (II of 1882).

(8) *Gaffur v. Bhikaji*, I. L. R., 26 Bom., 159.

(9) S. 27 Specific Relief Act (1 of 1877)

(10) *Gaffur v. Whikaji* I. L. R., 26 Bom., 159 (162).

(11) Beng. Act VII of 1880, and Act I of 1895.

(12) *Luchmi Narain v. Raghu*, 6 C.W.N., 484.

(13) *Lachmi Narain v. Raghu*, 6 O.W.N.,

763. A case for priority can only arise when two or more inconsistent

rights are created over the same property which cannot both or all be concurrently enjoyed. Thus, if the same property be sold to A and then to B, the latter takes nothing, for his vendor had nothing to give, and if he agreed to sell it to A and then sold it to B, even then there is no conflict, for an agreement to sell is not a transfer and in such a case the rule enacted in the section has no application. (1) A mortgage of future property being in the nature of an agreement is clearly outside the scope of the rule. (§ 184). So again, if a conveyance fails of its effect for want of proper execution or necessary registration, there is then no conflict, and the rule does not apply. But, if on the other hand, two successive usufructuary mortgages of the same property are created in favour of two different persons, it is clear that the two rights cannot be simultaneously exercised, and the transfer subsequently created would, therefore, give way in so far as it clashes with the essential incident of the prior mortgage. (2) Successive mortgages of the same property rank in their order of creation, but the priority so acquired may be forfeited for reasons enumerated in sections 78 and 79. The principle of this case appears to have been lost sight of in an Allahabad case in which the lessor having agreed to lease certain immoveable property to one, Wazir Ali for fifteen years, subsequently let the same property to another person for two years, whereupon the first lessee sued both the lessor and the subsequent lessee for the specific performance of his contract and for the cancellation of the subsequent lease as made in defeasance of his rights. It appeared that the second lessee had no notice of the prior agreement, and it was probably, therefore, held that the first lessor could take but subject to the rights of the second lessee. But the reasons given in the judgment are unintelligible, for the court said: "When a party enters into a contract without power to perform that contract, and subsequently acquires power to perform his contract, he is bound to do so. In this case the defendant No. 1 (the lessor) by his own action rendered himself temporarily unable to perform the contract. Certainly his position, in our opinion, can be in no sense better than that of a person who laboured under the same disability before he entered into the contract." (3) Now this was hardly the point at issue in the case, which took no account of the interest of the subsequent transferee. In reality the case was one of conflict between an agreement and a transfer which has been discussed in the preceding pages. Of course, if the transferrer and the transferee agree that the latter shall not enforce his rights against the holder of a subsequently created interest he cannot break through his covenant.

764. When does a Transfer take Effect.—For the determination

Starting point for priority.

of the question as to the priority of rights created by transfer, it is in the first place essential to inquire as to the exact time from which a transfer begins to operate,—a question which in its turn depends upon the mode and nature of the transfer, and the amount of the consideration for which it is made. Dividing all transfers into those made by contract and those effected by operation of law, the former

484 (486); following *Mahomed v. Gujraji*, I. L.R., 20 Cal., 826; *Boijnath v. Ramgout Singh*, I.L.R., 23 Cal., 775; *Khute Chand v. Kallian*, I.L.R., 1 All., 240, F.B.; dissenting from *Emam v. Raj Coomar*, 23 W. R., 187; *Nansidas v. Joglekar*, I.L.R., 4 Bom., 57.

(1) See S. 40, *ante*.

(2) *Sirbah Rai v. Ragunath*, I.L.R., 7 All., 568 (572); *Karamat v. Samniddin*, I.L.R., 1 All., 409 (418).

(3) *Sarju Prasad v. Wazir Ali*, I.L.R., 23 All., 119 (121).

species of transfer may be made only in a certain manner. Thus, a sale⁽¹⁾ or a mortgage,⁽²⁾ or an exchange⁽³⁾ of immoveable property of a value of less than Rs. 100 may be made either by a registered instrument or by delivery of the property. A lease of immoveable property for more than one year can only be made by a registered instrument,⁽⁴⁾ and a gift of whatever value must needs be registered.⁽⁵⁾ The assignment of an actionable claim requires writing. In cases where a transfer may be validly made by delivery of possession, it will only take effect from the instant possession is transferred, but in other cases where registration is resorted to, the transfer is deemed to take effect not from the date of the registration, but from the date of the execution of the conveyance,⁽⁶⁾ Now, since a document may be presented for registration at any time within four months,⁽⁷⁾ and in special cases within eight months,⁽⁸⁾ it is conceivable that by merely antedating a deed one transfer may obtain priority over another and thereby defeat its purpose. Easily as it lends itself to fraud, the present state of the law in this respect can be regarded as scarcely satisfactory. In England, although the law as to registration is not general and compulsory, it is enacted by the Yorkshire Registries Act⁽⁹⁾ that all assurances entitled to be registered thereunder shall have priority according to the date of the registration, which, save in case of fraud, or actual notice implying fraud,⁽¹⁰⁾ is not forfeited by any notice, actual or constructive. But the courts of equity have in some measure relieved the rigour of the enactments by holding that a purchaser or mortgagee of land in a register county with a clear previous actual notice of a prior unregistered assurance should not be permitted to obtain priority over the person claiming under the previous assurance, and that the *legal* estate which he acquired by priority of registration must be held as a transfer for the prior claimant who had the equitable estate.⁽¹¹⁾ But, as Lord Hatherley, L. C., said, "it must be actual notice, which renders it fraudulent to attempt to obtain priority, or to advance money when knowing that another person has already advanced money upon the same security, and afterwards unrighteously to attempt to deprive him of the benefit of that security by taking advantage of the Registration Act."⁽¹²⁾

765. Priority counts from Execution.—Other things being equal, a deed takes effect from the moment of its execution, though it be compulsorily registrable, and its registration is delayed. Execution of a deed must be in accordance with law, so that if it requires attestation, it must be duly attested, otherwise, the affixation of the executant's signature suffices to complete it. Where a

(1) S. 54.

(2) S. 59.

(3) S. 118.

(4) S. 107.

(5) S. 123.

(6) S. 47, Indian Registration Act (III of 1877): *Santaya v. Narayan*, I. L. R., 6 Bom., 182; *Magantal v. Kharnar* (1897), B. P. J., 407; *Bhagat Singh v. Ram Narain* (1893), P. R., No. 93. The same rule was enacted by the previous Registration laws. S. 67, Act XVI of 1864; S. 47, Act XX of 1866, and Act VII of 1871. But a different rule was enacted by the two earlier Registration Statutes—Act I of 1843, Act XIX of 1843, Bom. Reg. IX of 1827 (repealing Reg. I of 1800); *Hari v. Ramji* (1878), B. P. J., 122. As to the effect of the Bom. Reg., see *Parshotam v. Jagjivan*, 1 B.H.C.R. 60. As to Acts I and XIX of 1843,

see *Gandharee v. Sonatun*, 10 W.R., 215.(7) *Ib.*, S. 23.(8) *Ib.*, S. 24.

(9) 1884, 47 & 48 Vict., C., 54, ss. 4 & 14, as amended by 48 & 49 Vict., C. 26, S. 4.

(10) *Hine v. Dodd*, 2 A. & K., 275; *Wyatt v. Barwell*, 19 Ves., 435; *Rolland v. Hare*, L. R., 6 Ch., 678 (681). Registration was compulsory in respect of lands situate in Middlesex or Yorkshire including the town and country of Kingston-upon-Hull, 7 Anne. C. 20 for Middlesex, 2 & 3 Anne. C. 4, 6 Anne. C. 20 for the West Riding of Yorkshire; 6 Anne. C. 62, for the East Riding and Kingston-upon-Hull, 8 Geo., II C. 6, for the North Riding—all repealed and re-enacted by 47 & 48 Vict., C. 54. The deeds must be first only stamped 54 & 55 Vict., C. 39, S. 17.

(11) *Le Neve v. Le Neve*, Amb., 436 (681).
 (12) *Rolland v. Hare*, L. R., 6 Ch., 678.

deed consists of several pages, its execution is not complete until the executant has signed either all the pages or one page intending to sign the whole. If the executant signs only the first page of a deed but discovering that it is not in accordance with what was agreed to, does not sign the other pages, the document is a nullity, and it does not require to be set aside or cancelled.⁽¹⁾ In the case of illiterate executants the usual practice is for the executant to touch the pen of the scribe who then makes a mark for him in token of his execution. In such cases execution would be complete and equally effective as soon as the executant touches the scribe's pen in token of his consenting to the contract and the scribe makes his mark.⁽²⁾ When the execution of a deed is proved, it will be presumed to be the deed duly executed and what it purports to be. It is not necessary to show that the transferee has taken the interest which the deed purports to convey, nor is it necessary to show that it is supported by consideration.⁽³⁾ On a question arising as to the effect of two deeds relating to the same subject-matter, both executed on the same day, it must be proved which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, then the court will presume that the deeds were executed in such order as to give effect to that intention.⁽⁴⁾ A title originally defective as founded on an unregistered document, may be perfected by twelve years' adverse possession.⁽⁵⁾

766. As regards transfers by operation of law it is provided in the Code of Civil Procedure that an auction-sale vests the property "so far as regards the parties to the suit and persons claiming through or under them" from the date of the sale certificate.⁽⁶⁾ But as the certificate is to bear the date of the confirmation of the sale, it follows that from that date he acquires all rights including the right to take possession.⁽⁷⁾ An attachment does not confer any title, but merely prevents, alienation. No question of priority could therefore arise as from the date of attachment.⁽⁸⁾ Hence a judgment-creditor has no priority over the official assignee in respect of property attached by him previous to the passing of the vesting order. An auction-purchaser buys subject to all existing leases liens and mortgages⁽⁹⁾ as well as equities affecting the judgment-debtor.⁽¹⁰⁾

767. Crown has no Priority.—It was held in a case that the Government had a priority in a sale held to realize the court fee due from a pauper plaintiff by virtue of the prerogative of the Crown which gives it precedence to

(1) *Bhanku Behari v. Kristo Gobind* I.L.R. 30 Cal. 433 (497).

(2) *Krishnachar v. Vadichi*, 6 M.L.J., 209.

(3) *Chennari v. Ramchandra*, I.L.R., 15 Mad., 54 (55).

(4) *Gartside v. Silkstone and Co.*, 21 Ch. D., 761.

(5) Art. 144, Indian Limitation Act (XV of 1887); *Nallamuthu v. Betha*, I.L.R., 23 Mad., 37; *Umesh Chunder v. Zahur*, I.L.R., 19 Cal., 164 (168); P. C.; *Anundo v. Dhonendro*, 14 M.I.A., 111; *Manly v. Patterson*, I.L.R., Cal., 8947, P.C.; *Sambhubai v. Shivaldas*, I.L.R., 4 Bom., 98; *Tarubai v. Venkatrao*, I.L.R., 27 Bom., 43 (58).

(6) S. 316.

(7) *Mohima Chunder v. Nobin Chunder*,

I.L.R., 23 Cal., 48 (51).

(8) *Peacock v. Madan Gopal*, I.L.R., 29 Cal., 428, F.B.; following *Motilal v. Karra-buddin*, I.L.R., 25 Cal., 179 P. C.; *Soobul Chunder v. Russick Lal*, I.L.R. 15 Cal., 202; overruling *Anand Chundra v. Panchilal*, 5 B.L.R., 691, F.B. *Shib Kristo v. Kishan Chand*, I. L. R., 10 Cal., 150 (so far as the contrary view was there expressed).

(9) *Oojagur v. Ram, Khelawan*, 10 W.R. 384; *Enayet Hossein v. Girdhari*, 12 M.I.A. 366; *Bapuji v. Satyabimbabai*, I.L.R., Bom., 490; *Sobhagchand v. Bhaichand*, I.L.R., 6 Bom., 193; *Kishen Lal v. Ganga*, I.L.R., 13 All., 28.

(10) *Ram Lochun v. Ramnarain*, 1 C.L.R. 296.

all other creditors including a mortgagee⁽¹⁾ This view was evidently founded on the language of section 411 of the old Code of Civil Procedure which declared it to be a first charge on the subject-matter of the suit and which, therefore, was no authority for the displacement of existing incumbrances which could not be described as included in the subject-matter of the suit. The view was, therefore, obviously erroneous, and has been since overruled.⁽²⁾ But the point though overruled suggests another question. Has the Crown in this country any prerogative of precedence as regards recovery of debts, and if so, is it a right apart from the statute. It does not appear that even in England the Crown possesses anything more than a priority over other creditors of equal degree.⁽³⁾ It possesses no priority over mortgagees, and the priority it possesses, therefore, does not affect the principle enunciated in this section.

768. An exception to the rule "*qui prior est tempore*" is to be found in

(1) **Salvage charge.** the salvage charges created on account of advances made to save the encumbered property from loss or destruction. Such advances are payable in priority to all other charges of earlier date, and amongst themselves have precedence in the inverse order of their respective date.⁽⁴⁾ On the same principle, where the Court authorises the Receiver to borrow money on a mortgage directing that it should constitute a first charge on the property, it will take priority over any other mortgage though of an earlier date.⁽⁵⁾ But in order to confer such priority the loan must have been raised for the purpose of preserving the property.⁽⁶⁾ And if in such a case the Court even improperly confers priority, of which the mortgagees affected thereby have notice, the order may hold good against them unless it is set aside.

769. The rule also yields to the equitable principle of estoppel. Thus, in a case where the first mortgagee was a witness to the second mortgage, though there was no actual proof of his knowing the contents thereof, yet, since the presumption is that he might have known the same, he was postponed to the second incumbrancer.⁽⁷⁾ So also, where the registered purchaser was present when possession was made over to the unregistered purchaser, the former was on that account postponed to the latter.⁽⁸⁾ A party paying off a prior mortgage is not estopped, but has a right to use that mortgage as a shield against a subsequent mortgage if his intention was to keep the prior mortgage alive.⁽⁹⁾ No subsequent mortgagee is bound in law to give notice of his incumbrance to the prior incumbrancers, and even if he gives one, it does not give him a better equity,⁽¹⁰⁾ and the prior incumbrancer is not bound to give notice to the subsequent incumbrancers. In any case nothing short of *estoppel* would postpone him to the subsequent transferee. The rule is the same in England,⁽¹¹⁾ and no rule of Hindu law requires such a notice.⁽¹²⁾ Mere absence of activity on the part of an equitable incumbrancer cannot postpone his incumbrance.⁽¹³⁾

(1) *Collector v. Mohamed Daim Khan I.* L.R. 2 All. 196; *Ganpat v. Collector*, I.L.R., 1 Bom. 7.

(2) *Dost Mohamad v. Mani Ram*, 1 L.R. 29 All. 537 F.B.

(3) *Liquidators of Maritime Bank v Receiver General* [1892] A.C. 437 (441) *In re Benticks* 1 Ch. 673.

(4) *Fisher, Mortgage*, § 958.

(5) *Girdharilal v. Dharendra*, 1 L.R., 34 Cal. 427 (441).

(6) *Id.* p. 442.

(7) *Mocatta v. Murgatroyd*, 1 P.W. 934; *Eyre v. Dolphin*, 2 Ball & B., 290.

(8) *Somnathdas v. Sindhu*, 5 C. P. L. R. 97.

(9) *Ball & B.*, 290; *Power v. Standish*, 8 Ir. Eq. R. 526; *Gokaldas v. Puranmal*, I.L.R., 10 Cal. 1035, P.C.; *Sirbadh v. Raghunath*, 1 L.R., 7 All., 569; *Seetaram v. Lachman*, P.L.R., 70 S. 101 *post*.

(10) *Rooper v. Harrison*, 2 K. and J., 86, 104.

(11) *Wilmot v. Pike*, 5 Hare, 14.

(12) *Govindrao v. Raoji*, I.L.R., 12 Bom., 33.

(13) *Hewith v. Loosemore*, 9 Hare, 458; *Durga Prasad v. Sumbhoi*, I.L.R., 8 All. 96.

770. An instrument operates from the date of its execution,⁽¹⁾ and it is immaterial that it is compulsorily registrable, for in that

(3) By registration. case too, it will operate from the same date.⁽²⁾ Where two or more deeds are executed on the same day and the order of their execution cannot be ascertained, all the deeds will take effect at once, and *pari passu*.⁽³⁾ Such a case is analogous to that of a devise to A, and then a devise of the same estate to B in a subsequent part of the will, which will give the estate to A and B either jointly or as tenants in common.⁽⁴⁾ Where two deeds bearing different dates are registered on different days, priority as between them is ascertained with reference to the dates of the deeds and not with reference to the date on which they were respectively registered; and this priority is not influenced by the fact that the party having the later deed is in possession of the property.⁽⁵⁾ And where after execution, but before registration, the deed is lost and another had to be executed in its place, the vendor having between the two dates resold the property by a registered deed to another with notice of the prior sale it has been held that the first purchaser was entitled to a decree on his sale-deed.⁽⁶⁾ But since the passing of the Registration Act, 1877⁽⁷⁾ a registered instrument takes precedence over another not registered.⁽⁸⁾ No such priority was given by the previous Registration Acts.⁽⁹⁾ The Act of 1877 introduced a new and important change in the law which has been noticed by the courts in India.⁽¹⁰⁾ Indeed, the Madras High Court has in one case⁽¹¹⁾ held section 50 of the Registration Act to override even the equitable doctrine of notice, but the Bombay⁽¹²⁾ and Allahabad⁽¹³⁾ High Courts have not acceded to this view. And so it has been laid down in Allahabad that the holder of a registered conveyance, who took it with notice of a prior unregistered conveyance, should not be given priority against the holder of the unregistered deed.⁽¹⁴⁾ It is there held that the Registration Act was not to be made an engine to work injustice and that the protection which the Act was intended to afford was a protection against secret incumbrances, and that it could never have been the intention of the Legislature to put a man who had knowledge of a conveyance in the position of a man who was liable to be defrauded or injured by the existence of some secret dealings with the land. This is the language of Lord Hardwick⁽¹⁵⁾ where priority is always subordinated to notice. So Wood, V.C..

(1) S. 47, Indian Registration Act (III of 1877); *Ramchandra v. Krishna*, I.L.R., 6 Mad., 495; *Santaya v. Narayan*, I.L.R., 8 Bom., 182; *Magaula v. Khamar* (1897), B. P. J., 407; *Narayan v. Laxuman*, I.L.R., 29 Bom., 42; *Motichand v. Sogun*, I.L.R., 29 Bom., 46; *Bhagot Singh v. Ram Narain* (1883), P.R., No. 93, see § 600, ante.

(2) S. 47 of the Indian Registration Act (III of 1877); *Santayamangar Say v. Narayan*, I.L.R., 5 Bom., 182.

(3) *Hopgood v. Ernest*, 3 DeG.J. & S. 116, *Ram Ratan v. Bishun Chand*, 11 C.W.N., 732 (738) s. c. *Sub nom Ram Ratan v. Mahant Sahu*, 6 C.L.J. 74.

(4) *Hopgood v. Ernest*, 3 DeG.J. & S. 116; 46 E.R. 581 (582).

(5) *Narayan v. Laxuman*, I.L.R., 29 Bom. 42.

(6) *Nallappa Reddi v. Ramalingachi Reddi* I.L.R. 20 Mad., 250.

(7) Act III of 1877; now; Act XVI of 1908.

(8) Act XVI of 1864. Act VIII of 1871, but priority was given to registered deeds by Bom.

Reg. IX of 1827, Ss. 5, 6.

(9) S. 50, Indian Registration Act (III of 1877; now; S. 50 Act, XVI of 1908.

(10) *Kuar Gir Prasad v. Bansi*, I.L.R., 2 All., 431; *Lachman v. Dipchand*, I.L.R., 2 All., 851; affirmed in *The Himalaya Bank v. The Simla Bank*, I.L.R., 9 All., 23; *Kanikkar v. Joshi*, I.L.R., 5 Bom., 442; *Icharam v. Govindram*, I.L.R., 5 Bom., 653; *Shivram v. Say*, I.L.R., 13 Bom., 229; *Trikam v. Hirjieth*, I.L.R., 18 Bom., 392; *Jethabai v. Girdhar*, I.L.R., 20 Bom., 158; *Nallappa v. Ibram*, I.L.R., 5 Mad., 73; *Shib Chandra v. Jahoux*, I.L.R., 7 Cal. 570.

(11) *Nallappa v. Ibram*, I.L.R., 5 Mad., 73.

(12) *Shivram v. Genu*, I. L. R., 6 Bom., 515; *Dundaya v. Chenbasapa* (1883), B.P.J. 83.

(13) *Annu Mal v. The Collector*, I.L.R., 28 All. 315.

(14) *Annu Mql v. The Collector*, I.L.R., 28 All., 315.

(15) *La Neve v. La Neve*, 3 Atk., 646.

declared the law to be that "the conscience of a purchaser is affected through the conscience of the person from whom he buys, if that person is precluded by his previous acts from honestly entering into the contract to sell; and therefore, any one who purchases with the knowledge that his vendor is precluded from selling is subject to the same prohibition as the vendor himself."⁽¹⁾

771. It is, however, settled that a document registered under the present Registration Act is entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered bond.⁽²⁾ The principle of that decision is that the decree and the sale only give effect to the rights under the bond, and cannot confer any higher right.⁽³⁾ Of course, in no case can instruments executed before the passing of Act XX of 1864 be excluded on the ground of their non-registration.⁽⁴⁾ The Indian Registration Act, 1877,⁽⁵⁾ has effected an important change in the law affecting priority. Prior to this Act the earlier Registration Acts,⁽⁶⁾ provided for priority as between only certain optionally registrable documents. No provision was then made for priority in favour of compulsorily registrable instruments. By the older Acts it was provided that instruments affecting immoveable property of less than Rs. 100 in value⁽⁷⁾ and instruments acknowledging the receipt or payment of consideration on account of such right⁽⁸⁾ and leases for a term not exceeding one year,⁽⁹⁾ or in other words, all instruments described in section 18 (a), (b), (c) of the present and last Acts if registered, would take priority over similar unregistered instruments. The Act of 1877 provided that in addition to the priority obtaining in the above case (excepting leases then excluded), instruments of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17, would also be affected by the priority as above stated. The reason for the above change is thus stated by the Select Committee in their statement of Objects and Reasons appended to the draft Bill: "That section⁽¹⁰⁾ now provides that registered documents relating to the land, of which registration is optional, shall take effect against unregistered documents. But it makes no such provision as to documents, of which the registration is compulsory, and which have accordingly been registered. The result is that, although a registered deed creating a right of the value of Rs. 99 to land cannot be defeated by an unregistered deed, a registered deed creating a similar right worth Rs. 101 may be defeated by an antedated unregistered deed, creating a right worth anything under Rs. 100. The mischief feared, is, an extensive fabrication of falsely dated deeds, purporting to create rights of small value in order to defeat deeds creating rights of large value. The remedy which the Bill proposes is to make documents registered under section 17 take effect against unregistered documents."⁽¹¹⁾ The Act of 1877 was, however, not retrospective and therefore only applied, to documents registered thereunder. As between documents executed and registered before the Act of 1877 came into operation, their relative

(1) *Benham v. Keane*, 1 John & Hem. 702. To the same effect *Graves v. Tofield*, 14 Ch. D., 563.

(2) *The Himalayan Bank v. The Simla Bank*, I. L. R., 8 All., 23; *Dullabhdas v. Lakshmandas*, I. L. R., 10 Bom. 88.

(3) *Per Ranade, J.*, in *Jetha Bai v. Gir-dhar*, I. L. R. 20 Bom., 158 (165); *Keshav v. Vinayak*, I. L. R. 18 Bom., 355.

(4) *Tirumala v. Lakshmi*, I. L. R., 2 Mad., 147; *Khondur v. Tarachand*, I. L. R., 1 Bom. 574; *Drsai Lallubhai v. Mundas* I. L. R., 20 Bom., 390; *Hargovind v. Kishan*, 3 A. L. J. R., 320.

(5) Act III of 1877; Act XVI of 1906.

(6) The earlier Acts and the sections corresponding S. 59 of the present Act are Act XVI of 1864 (s. 68), Act XX of 1866 (s. 50), Act VIII of 1871 (s. 59).

(7) Ss. 17, 18 (1) of the Registration Acts of 1864, 1866 and 1871.

(8) S. 18 (2) Registration Acts, 1864, 1866 and 1871.

(9) S. 18 (3) Registration Acts, 1864, 1866 and 1871.

(10) S. 50 of Act VIII of 1871.

(11) *Gazette of India*, July 1st, 1876, Part 5.

positions to one another remained upon the footing provided for them by the Registration law in force when they were executed and registered.⁽¹⁾ And though by the explanation appended to section 50 of the past and present Acts, a document registered thereunder is favoured as against documents optionally registrable under the former Acts, ⁽²⁾ it has been held that since the Registration Act is not retrospective it cannot be construed to confer priority over instruments executed under the previous Registration Acts when registration was not compulsory.⁽³⁾ Hence an unregistered mortgage made in 1861 when registration was not compulsory, would have priority over a registered mortgage made in 1900.⁽³⁾

772. Unregistered Deed v. Registered Deed.—Section 50 of the Registration Act is limited to cases in which the party in possession can only rely on an unregistered instrument.⁽⁴⁾ A registered purchaser of land from an unregistered vendor has a better title than a second vendor from the original owner claiming under a conveyance posterior in date to that executed by the unregistered vendor ⁽⁵⁾ Since section 50 of the Registration Act merely provides for the preferential treatment of property held under registered title-deeds, it follows that in a competition between two incumbrances, the earlier if unregistered, would be treated as a puisne mortgage in relation to the later incumbrance if registered, and all equities between them would be adjusted on that basis.⁽⁶⁾ Of course, the section would not be called into requisition unless the two incumbrances are antagonistic and compete for priority. But once that is settled then the two would rank in all respects in the order of their seniority so that the prior mortgagee could redeem the later mortgagee as provided in section 74.

773. Section 78 enunciates the cases in which the rule of this section

would be departed from. Thus, it has been held that section **(4) By notice.** 50 of the Registration Act, 1877, did not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed not being compulsorily registrable, if in fact, the holder of the registered deed had, at the time of its execution, notice of the earlier unregistered deed.⁽⁷⁾ So where a *bona fide* contract, whether oral

(1) *Sri Ram v. Bhagirath*, I.L.R., 4 All., 227 (229); *Bholanath v. Baldeo*, I.L.R. 2 All., 189; *Shivram v. Saya*, I.L.R., 13 Bom. 229; *Kanikar v. Joshi*, I.L.R., 5 Bom., 442; *Icharam v. Govindram*, I.L.R., 5 Bom., 653; *Lakshmandas v. Dasrat*, I.L.R., 6 Bom., 168, 192, F.B; *Rupchand v. Daulatram*, I.L.R., 6 Bom., 495; *Nerbudda v. Gokuldas*, 1 Nag L.R., 158.

(2) *Janki v. Sri Mantangini*, I.L.R., 7 All., 577.

(3) *Hargovind v. Kishan* I.L.R., 28 All., 607.

(4) *Krishna v. Subramania*, 1 M.L.J.R., 43; *Nathamuthu v. B.tha*, 9 M.L.J.R., 258.

(5) *Krishna v. Subramania*, 1 M.L.J.R., 43.

(6) *Ram Lal v. Baccha Singh*, 10 A.L.J. 114; *Ishri Pershad v. Gopi Nath*, 10 A.L.J. 222.

(7) *Shivram v. Ganesli*, I.L.R., 6 Bom., 515; *Dundaya v. Chenbasapa*, I.L.R., 9 Bom., 427; *Hathi Singh v. Chenbasapa*, I.L.R., 6 Bom. 515; *Ganesh v. Bhaui* (1890), B.P.J., 101; *Nanaji v. Bopu* (1893), B.P.J., 107; *Vinayak v. Vasude* (1894), B.P.J. 133;

Karbasappa v. Dharmappa, 2 Bom. L. R., 223; *Fuzludeen v. Fakir Mohamed*, I. L. R., 5 Cal., 336 (where the subsequent transferee had actual notice of the prior sale); *Nemai Churan v. Kokil*, I.L.R., 6 Cal., 534; *Narain Chunder v. Dattaram*, I.L.R., 8 Cal., 597, F.B.; *Bhalu v. Jakhu*, I. L. R., 11 Cal; 667; *Obool Hoosin v. Raghu Nath*, I. L. R., 13 Cal., 70; *Hurnandan v. Jowad Ali*, I. L. R., 27 Cal., 468; *Krishnamma v. Suranna*, I. L. R., 16 Mad., 148. F.B., *Nallopai v. Ramalingachi*, I. L. R., 20 Mad., 250; *Chinnappa v. Manickavasagam*, I. L. R., 25 Mad. *Thimmajamma v. Aldulla*, 174 L.J.R., 319; *Kodu v. Ramapat* (1885), A.W.N., 57; *Ram Aular v. Dhanavari*, I. L. R., 8 All., 540; *Dwan Singh v. Jadho Singh*, I. L. R., 19 All., 145, s. c., I. L. R., 20 All., 252; *Madho Rao v. Jaggnath*, 8 C. P. L. R., 109; *Lehna v. Ganpat* (1890), P. R. No. 115; overruling *Nijamuddin v. Akbar* (1889), P. R., No. 143; *Tun Zan v. Moung Nyun*, 4 L. B. R., 26; *In Khiali Ram v. Hummiata*, I.L.R. 30 All., 238 (240): The rule was extended even to a case in which the purchaser obtained notice after the execution of his

or written, is made for the sale of property, and a third party, afterwards buys the property with notice of the prior contract, the title of party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase. (1) And if there is notice, delivery of possession is immaterial (2) for if there was delivery of possession, priority would be acquired irrespective of notice. (3) But according to the Punjab Court notice of, or possession under an unregistered deed compulsorily registrable does not give it any priority against a later registered deed relating to the same property. Thus, in a case the question for decision was whether the defendant, who set up an unregistered mortgage of the land in suit from the original owner, which required registration, and which was accompanied by possession had good and valid claim to the land in respect of his mortgage against the plaintiff who claimed to be a transferee by a registered deed from the heir of the said owner. It was held that, as the defendant did not claim to be the owner of the land, his possession of the mortgaged land could raise no presumption in his favour, and that therefore, the defendant could not claim priority over the plaintiff, it being immaterial that the latter had notice of the unregistered mortgage. (4) But where the purchaser was placed in possession and the sale-deed was not completed and registered as he had failed to pay up the full price, it was held in Madras that the purchaser could not be ousted in favour of a subsequent registered purchaser. (5) But in this case the question of notice was not gone into. But in a subsequent case it was held that if a deed of sale of immoveable property for more than Rs. 100 is lost within the time allowed for its registration, the purchaser may sue his vendor for the execution and registration of a fresh deed, and if the latter has after execution of the first deed resold the property by a registered deed and delivered possession to another who had notice of the prior sale, the first purchaser has priority over the subsequent purchaser whom he may displace in the same suit. (6) In the absence of clear proof of notice, the holder of a registered instrument should not be deprived of the advantage which registration would otherwise give him. (7) In order to be effective the notice required must be given before the subsequent transfer is completed. Ordinarily, such notice would have to be given before the execution of the conveyance, for it is as from that date that a transfer takes effect. But in an Allahabad case it was held that a notice given even before the registration of a document would be sufficient to postpone it, for it is said that even then the purchaser might resile from the contract. (8) [As to

sale deed though before its registration, but the sole reason given for this view is that he could have even then reconsidered his position and so he might at any time.

(1) *Chunder Kant v. Krishna*, I. L. R., 10 Cal., 710

(2) *Thimmajamma v. Abdulla*, 17 M. L. J. R. 319 following *Chinnappa v. Manikavasagam* I. L. R. 25 Mad. 1.

(3) S. 48, Indian Registration Act (III of 1877), *Thimmajamma v. Abdulla*, 17 M. L. J. R., 319.

(4) *Mushka v. Jafr Khan*, (1884). P. R., No. 126. (The ruling may be explained by the fact that possession being independent of the mortgage could not give notice of the latter). *Mathra v. Gurditta* (1885), P. R., No. 14; following *Nayn akka v. Vavana*, 5 M.H. C. R., 123; approved in *Harnam Das*

v. Hira (1885), P. R., No. 90: overruling *Akbar v. Prem Singh* (1885), P. R., No. 2; *Ghanshamdas v. Hemraj*, (1890), P. R., No. 92.

(5) *Moidin v. Avaram*, I. L. R., 11 Mad., 263.

(6) *Nallapa v. Ramalingachi*, I. L. R., 20 Mad., 250.

(7) *Barnhart v. Greenshields*, 9 Moo. P.C., 18; *Gumamun Nath v. Bussunt Kumari*, I. L. R., 16 Cal., 414; *Krishnamma v. Suranna*, I. L. R., 16 Mad., 148; *Ayyasami v. Virappa* I. L. R., 29 Mad., 362; *Diwan Singh v. Judho Singh*, L. R., 20 All., 252; followed in *Bhikhi Rai v. Udit Narain Singh*, I. L. R., 25 All., 366; *Bondrusa v. Sheorani*, 16 C.P., L. R., 95

(8) *Khali Ram v. Himmata*, 72 R. 30 All. 238 (240).

registration being itself a notice (see s. 101) under section 3, and on notice affecting priority see section 78 *post*].

*774. If a person about to take a mortgage which, must be made by registered deed, finds some person other than the intending

(5) *By possession.* mortgagor in possession, the fact of such possession is sufficient to put the would-be mortgagee on inquiry as to the title of such person, and if such person's title is that of a prior mortgagee under a document not compulsorily registrable, the second mortgagee cannot, by getting his mortgage registered, obtain priority over the first mortgagee. Possession in certain cases, is notice of the title of the person in possession (§ 137) and a party intending to deal with the property is bound to inquire into the nature of the possession. If he assumes that the occupant is a tenant and it appears that he had since purchased the land, the subsequent transferee would be affected with notice of the purchase. (1) By section 48 of the Indian Registration Act, (2) it is enacted that "all non-testamentary documents duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property unless where the agreement or declaration has been accompanied or followed by delivery of possession." This section is re-enacted from the corresponding section of the previous Registration Acts. (3) By the corresponding section of Act XX of 1866, however, registered instruments took priority over all oral transfers. The reason for the exemption made by the Act of 1877 in favour of an oral agreement accompanied by possession was that by such possession the parties, who relied on a subsequent registered deed, had or might if they had been reasonably vigilant have had, previously to entering into their contract with the vendor and taking a conveyance, notice by the fact of such possession, that there was some prior claimant to the property (§ 137-141). Therefore, where there is an *actual* notice of a prior oral agreement, although unaccompanied by possession the object of the Legislature is fully attained. (4) The words "followed by delivery of possession" are restrictive and exclude all oral transfers not so accompanied. (5) At the same time this clause has the effect of treating delivery of possession as equivalent to registration. (6) But obviously the section has no application to documents of which registration is compulsory, for such documents have no effect upon the property which they purport to deal with. (7) But where the agreement for sale was concluded for Rs. 300 out of which the purchaser had paid him Rs. 200, but failed to pay the remaining balance, and the sale-deed which had been already drawn up was consequently not executed or registered but the purchaser had been put into possession, it was held that he could not be ousted in favour of a subsequent registered purchaser. (8) Possession then must be in pursuance of an agreement or declaration which is in itself valid. The term "declaration" as distinguished from an agreement is meant to signify a

(1) *Kondiba v. Nana*, I. L. R., 27 Bom., 408; *Sharfudin v. Govind*, I. L. R., 27 Bom., 452.

(2) Act III of 1877; Now re-enacted as Act XVI of 1908.

(3) Act VIII of 1871; Act III of 1877.

(4) *Waman v. Dhondiba*, I. L. R., 4 Bom., 126, F.B.; *Chundernath v. Bhoyrub*, I. L. R., 10 Cal., 250; *Nemai Charan v. Kokil*, I. L. R., 6 Cal., 534; *Kannan v. Krishnan*, I. L. R., 13 Mad., 324; *Thimmajumma v. Abdulla*, 174 L. T. R., 319; but see *Kirty Chunder v. Raj Chunder*, 22 W. R., 273; *Nathu v. Phulchand*, I. L. R., 6 All., 581. Under the old Act,

Bhandu v. Damaji, 6 B. H. C. R., (A. C. J. 59; *Jivandas v. Framji*, 7 B. H. C. R., (O. C.), 45.

(5) *Fuztudeen v. Falcir Mahomed*, I. L. R., 5 Cal., 396 (347).

(6) *Kannan v. Krishnan*, I. L. R., 13 Mad., 324 (320).

(7) S. 49. Indian Registration Act (III of 1877); now re-enacted as Act XVI of 1908. *Ghanshramdas v. Hemraj* (1890), P. R., No. 92; *Chowgutta v. Chatar Singh*, (1878), P. R., No. 18.

(8) *Moidin v. Avaran*, I. L. R., 11 Mad., 263.

declaration of his wishes by the owner with reference to his property, not amounting to a contract, and which the maker is at liberty to recall, whereas an agreement if correct in form is binding on the parties. (1) A purchase of property for a consideration below Rs. 100 accompanied by delivery of possession, would be such an "oral agreement" although a written memorial of the sale may have been drawn up. (2) So where possession has been given under the unregistered lease, it is sufficient to hold its own as against a registered lease subsequently granted. (3) But an oral or even a written transfer without possession cannot withstand a title acquired by subsequent registration. (4) Possession in this connexion means possession according to the circumstances of the interest in the property sold and the agreement of the parties. Thus, if the vendor is in actual possession at the time of sale, actual possession should accompany or follow the sale. If, however, the property is in actual possession of tenants, then the possession to be given could only be constructive possession, as where the vendor in pursuance of an oral agreement to sell directed the tenants of the land to pay their rents to the purchaser to which they agreed, in which case the requirements of the section would be deemed to have been complied with. (5) Where the same property had been twice mortgaged, and the second mortgagee, sued on his mortgage, and in execution of his decree himself purchased the property and obtained possession before the first mortgagee, who having similarly enforced his security, obtained possession subsequently, but who, however, claimed priority on the leases of his prior mortgage, it was held that in a suit for priority *qua* purchaser he could not succeed, since the question of priority must be determined not by reference to the date of the mortgage but his recovery of possession. (6)

775. A decree or order passed in respect of a property does not give way

(6) **By decree or order.** to registered deeds. A decree or order obtained upon an unregistered prior deed against the mortgagor alone, subsequently to a registered transfer of the mortgaged property,

does not obtain preference in competition with the latter. (7) As Banerjee, J., observed: "The 'decree or order' referred to in section 50 of the Registration Act means the decree or order which can be evidence against the subsequent transferee under a registered deed; and in order that a decree or order may be evidence against a subsequent transferee, it must either be a decree or order to which the subsequent transferer was a party, or decree or order obtained against his transferor before the transfer to him, in which case also, the decree will be evidence against him. But where the decree or order is obtained upon an unregistered mortgage-deed against the mortgagor alone, subsequent to the registered transfer on which the opposing claim is based, then section 50 must, in my opinion, give priority to the claimant under the registered transfer; because in such a case the only basis upon which the mortgagee can rest his claim must be, not the decree which is not evidence against the subsequent transferee, but the prior unregistered mortgage and that by section 50 is entitled to no priority against the subsequent registered transfer." (8) But if a

(1) *Selam v. Boidonath*, 3 B. L. R., 312.

(2) *Krishnaji v. Ranaji* (1874), B.P.J., 44.

(3) *Narsing v. Mt. Bewah*, 5 B. L. R., 86;

Bahadur v. Mt. Grattan (1871), P. R. No. 47.

(4) *Koylash Chander v. Gopal Chunder*, 2 W. R., 78; *Kirty Chunder v. Raj Chunder*, 22 W. R., 273; *Nathu Ram v. Phulchand*, I. L. R., 6 All., 581.

(5) *Selani v. Selambara*, I. L. R., 9 Mad.,

267.

(6) *Akatti v. Chirayil*, I. L. R., 26 Mad., 486.

(7) *Ishan Chandra v. Gonesh*, I. L. R., 28 Cal., 139 (141).

(8) *Ishan Chandra v. Gonesh*, I. L. R., 28 Cal., 139 (141); following *Keshab v. Vinayak*, I. L. R. 18 Bom., 355; *Jethabhai v. Girdhar*, I. L. R., 20 Bom., 158; *Desai v. Mundasi*, ib., 390. *The Himalayan Bank v. The Simla*

decree is obtained before the execution of the subsequent registered transfer, it is valid, albeit it may have been passed on an oral mortgage without possession, and may not be a good decree on its merits.⁽¹⁾ A decree does not forfeit its place for non-registration, but it does not obtain priority over a subsequently executed and registered deed, if, at the time of its execution it had not been passed although it may relate to unregistered bonds previously executed.⁽²⁾ The decree or order which is not to be affected by a registered document must then be a decree or order made prior to the execution and registration of the registered document.⁽³⁾ Priority as between two or more decrees is determined according to their respective dates. Thus a decree, dated 11th June 1880, obtained upon a subsequent registered hypothecation bond, dated 15th May, 1874, has no priority over a prior decree, dated 5th June, 1880, obtained upon an unregistered hypothecation bond, dated 18th October, 1870.⁽⁴⁾ So a purchaser at the execution sale who has registered his certificate of sale and obtained possession without notice of any previous sale, is entitled to priority over a purchaser at a prior execution-sale who has not obtained possession, and whose certificate of sale is dated subsequently to the registration of the former.⁽⁵⁾ A decree or order does not obtain additional sanctity for registration. Thus a certificate of sale of land in a court-auction does not by registration entitle the holder thereof to priority over a purchaser of the land under an optionally registrable deed of sale.⁽⁶⁾ The purchaser cannot, by registration of his court's conveyance, enlarge the scope of the estate which the court has by its certificate conveyed to him.⁽⁷⁾ But at the same time a sale-certificate is not a "decree or order" within the meaning of section 50 of the Indian Registration Act,⁽⁸⁾ and if so, it is difficult to see why, if registered, it should not possess the same advantages as the documents favoured in the section.

§ 776. Where the same property is sold on the same day in execution of two decrees one of which enforced a charge created in 1864, and the other a charge created in 1867, the decree which enforced the prior charge was held to obtain priority,⁽⁹⁾ but this view is admittedly inapplicable to sales made in execution of money-decrees.⁽¹⁰⁾ A sale at first confirmed but subsequently set aside would take effect from its re-confirmation. It would therefore not affect a title acquired at a time when the first sale had been set aside.⁽¹¹⁾ In certain cases the court is empowered to confer priority on certain persons, and when it is so, priority would be determined by the terms of the order. A receiver appointed by the court may, for instance, be authorized by it to borrow money either by creating a first

Bank, I.L.R., 8 All., 23; *Jagrup Rai v. Radhey Singh*, I.L.R., 13 All., 288; dissenting from *Bajinath v. Luchman*, I.L.R., 7 All., 888; *Sarat Chundra v. Sheikh Meher*, 4 C.L.R., 490.

(1) *Shankar v. Ram Das* (1900), P. L. R. 131; distinguishing *Lehma v. Gunpat* (1890), P.R., No. 115.

(2) *Shabi Ram v. Shih Lal*, I.L.R., 7 All., 378; *The Himalaya Bank v. The Simla Bank*, I.L.R., 8 All., 23; *Kanhaya Lal v. Bansidhar*, (1884), A. W. N., 133; *Shabi Ram v. Saib Lal* (1885), A. W. N., 63; *Raghubans v. Ganga* (1886), A. W. N., 133; *Madav v. Subbarayalu*, I.L.R., 6 Mad., 88; *Jettealhai v. Girdhar*, I.L.R., 20 Bom., 158 (162).

(3) *Jagrup Rai v. Radhey Singh*, I. L. R., 13 All., 288.

(4) *Parshadi v. Kheshal*, (1882), A.W.N., 15; *Kanu v. Krishna*, 5 B.H.C.R., 147.

(5) *Lachminarayan v. Indrabhan*, (1883), B.P.J., 254; *Akatti v. Chirayil*, I. L. R., 26 Mad., 486.

(6) *Narasayya v. Jungam*, I. L. R., 7 Mad., 148, but a different view was taken in *Ramaraja v. Arunchala*, I. L. R., 7 Mad., 248.

(7) *Sobhagchand v. Bhaichand*, I. L. R., 6 Bom., 193 (202), F.B.; *Maganlal v. Shakra*, I.L.R., 22 Bom., 945 (947).

(8) *Ramaraja v. Arunachala*, I. L. R., 7 Mad., 248.

(9) *Janki v. Badri*, I. L. R., 2 All., 698; *Motilal v. Karrabuldm*, I.L.R., 25 Cal., 179, P.C.

(10) *Ajoodhya v. Mooracha*, 25 W. R., 254; explained in *Janki v. Badri*, I. L. R., 2 All., 698 (706).

(11) *Banke Lal v. Jagat Narain*, I. L. R., 22 All., 169.

charge on the property placed in his custody or by borrowing subject to the existing charges. In the former case all prior incumbrances will be necessarily postponed to the later charge which will have priority over them. But while the court has the power of conferring such priority, it can only exercise it whenever it finds it necessary for the preservation of the estate. (1)

777. A registered document which has been given, accepted and registered in fraud of a third party, and in collusion with the grantor, (2) confers no priority. Of course, registration was never intended to give to a merely fictitious transaction any effect which it would not otherwise possess. (3) Fraud is hydra-headed and is not susceptible of a simple definition, but fraudulent documents all appear to bear a family resemblance to one another, and they are either executed without consideration, (4) or are made with the object of overreaching someone interested in the property. The subject will be found discussed in the sequel. (5)

778. Neither section 48 nor section 50 of the Registration Act operates to give a registered bond relating to moveable property, priority over a prior unregistered bond, relating to the same property. (6) But money paid as owelty on a partition decree between co-sharers is entitled to priority over a mortgage on a portion of the property. (7)

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferrer actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

779. Analogous Law.—This section is in harmony with the dissentient judgment of James, L. J., in a case decided on the 8th April, 1881, but as the section was settled in the Bill of 1879, it has not been inspired, as might be supposed, by that decision. In that case the facts were as follows: A vendor contracted with a purchaser for the sale of a house which had been insured by the vendor against fire. The contract contained no reference to the insurance. After the date of the contract but before the time fixed for completion the house was damaged by fire, and the vender received a sum of money from the Insurance Office. Confirming the decision of Jessel,

(1) Karr on Receivers (5th Ed.), 213, *Greenwood v. Algenciras Railway Co.* [1894] 2 Ch. 205; *Girdharilal v. Paresb Nath* 4 C. L.R., 495.

(2) *Waman v. Dhandiba*, 1 L. R., 4 Bom., 192 (151), F.B.; *Agarchand v. Rakhma*, 1 L.R., 16 Bom., 678; *Joshua v. Alliance Bank of Simla*, 1 L.R., 22 Cal., 185.

(3) *Narasanna v. Gavappa*, 3 M. H. C. R. 270; *Sreenath v. Ramcomul*, 10 M. I. A. 230; *Netro Gopal v. Dwarkanath*, 1 W. R. 314; *Shristeedhur v. Kala Chand*, 3 W. R. 216; *Ram Chand v. Madhoo Soodun*, 7 W. R.

119; *Bhikdaree v. Kanhaya Lall*, 14 W. R., 24; *Dookhai v. Shaik Nassir*, 20 W. R., 100; *Mmusoor Ali v. Woomed Ali*, 22 W. R., 12; *Ramcomul v. Chundee*, 1 N. W. P. H. C. R. 287.

(4) *Ram Chand v. Madhoo Soodun*, 7 W. R., 119; *Sreenath v. Dwarkanath*, 14 W. R., 318.

(5) Ss. 53 & 78, post.

(6) *Janu v. Narayan* (1874), C. P. Sel. Cas., III, 7.

(7) *Sahzhada v. Hills*, 1 L. R. 35 Cal. 388.

M. R., Brett and Cotton, L. JJ., held that the purchaser, who had completed his contract, was not entitled as against the vendor to the benefit of the insurance. But James, L. J., who dissented from the judgment of the majority of the court, observed: "According to my view of the case the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence. I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que-trust*." Here "while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. That being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee—any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner."⁽¹⁾

The rights and liabilities of mortgagees as regards insurance-money are specially defined in the sequel.⁽²⁾

780. This section then states a rule in contravention of the decided cases in England, ⁽³⁾ where the contract for fire-insurance is held to be a contract for mere personal indemnity.⁽⁴⁾ Applying the same principle, it is further settled in England that where a vendor receives his purchase-money without any abatement on account of damage by fire pending completion, the insurance company is entitled to recover from the vendor out of the purchase-money a sum equal to the insurance-money upon the principle of subrogation.⁽⁵⁾ But in the English conveyancing it is usual to insert a clause providing for reinstatement in case of destruction, and such a condition is then, of course, enforced.⁽⁶⁾

781. Principle.—The principle of this section has been clearly expounded by James, L. J., in a case before cited (§779) and in which he observed: "I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser."⁽⁷⁾ In this view the moment the contract is made the transferrer is under obligation to see that all rights which he has, whether under a policy of insurance or otherwise as owner of the property, enure for the benefit of the purchaser. He is then not only under the obligation to pay over to the purchaser what he receives, but under the further obligation to see that the insurer holds to his contract and makes the requisite indemnity.

(1) *Rayner v. Preston*, 18 Ch. D., 1 (12).

(2) Ss. 72 & 76, post.

(3) *The North of England, &c., Co. v. The Archangel, &c., Co.*, L. R., 10 Q. B., 249; following *Pawles v. Innes*, 11 M. & W., 10; *Poole v. Adams*, 12 W. R. (Eng.), 693; *Colingridge v. Royal Exchange Assurance*

Corporation, 3 Q. B. D., 173.

(4) *Darrell v. Tibbitts*, 5 Q. B. D., 560.

(5) *Castellain v. Preston*, 11 Q. B. D., 380.

(6) *Dart's V & P*. (6th Ed.), pp. 196, 197, 913; *Garden v. Ingram*, 23 L. J., Ch., 479; *Lees v. Whiteley*, L. R., 2 Eq., 143.

(7) *Rayner v. Preston*, Ch. D., 1 (13).

782. Meaning of Words.—"Money actually received:" is in accordance with the judgment of James, L.J., in the English case above cited. The (§ 779) transferrer is liable for the money actually received by him. If the vendor refunds this money to the insurer, he has no less liability being trustee of the amount only from the date of its receipt. If the insurer, therefore, makes any claim for refund, he will have to make out as good a case as if he had made his claim against the transferee.

783. Transferee's Right under Policy.—The rule here enunciated is evidently applicable to a stage before the actual transfer of property. After its transfer the purchaser is liable to bear the loss arising from destruction or deterioration of the property not caused by the seller.⁽¹⁾ In England, the purchaser becomes in equity owner of the property, as from and by mere force of the contract, but in India this doctrine of the court of chancery having been expressly departed from,⁽²⁾ a novel question may, it is conceivable, present itself for solution, which the present section by no means attempts adequately to answer. For while it is clear that the transferrer may be compelled to apply the insurance-money which he *actually receives under the policy* in reinstating the property, what if he declines to receive it from the insurer? Having once completed the sale of the property and received the purchase-money the vendor may well decline to enforce payment of the insurance money, and the insurer may equally decline to make payment; for the contract being one of indemnity the insurer is not bound to pay when the assured has already recovered full value of the property.⁽³⁾ Of course, if the vendor's right under the policy has been assigned over to the purchaser, there is then no difficulty. But if, suppose, no such assignment has been made, the solution of the problem is only possible in accordance with the view expressed by James, L. J., in the case already cited, in which he describes the position of the vendor and purchaser as that of trustee and *cestui que trust* as long as the contract is *in fieri*, and therefore, "any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he takes as trustee for the beneficial owner."⁽⁴⁾ In this view, the vendor is both bound to recover the amount due under the policy and to pay it over to the purchaser, or as is enacted in the section, to apply it towards reinstating the property. The balance if any left, may have to be repaid to the insurer. On the other hand, the purchaser may compel the insurer to pay and the vendor to receive the money, if necessary. But if after actual conveyance and during the currency of the policy a fire had occurred, it is clear that the vendor would then have no right as against the insurance-office, and the purchaser too would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would, or might probably be, held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right—legal ownership and right in one person and equitable ownership in another. In such a case, of course, there is no occasion for the rule, but if there is a policy, it may be by accident, there is then such a right. Similarly, where there is a creditor, a debtor and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor

(1) S. 55 (5) (C). *post*.

(2) S. 54, *post*.

(3) *Castellain v. Preston*, 11 Q.B.D., 380; *West of England &c., Co., v. Isaacs*, (1896), 2

Q.B., 377, (383), O.A., [1897], 1 Q. B., 226.

(4) *Rayner v. Preston*, 18 Ch. D., 1 (13, 14).

had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such property or parting with such security would probably find himself in considerable peril.⁽¹⁾

§ 784. It would appear that the right of the transferee would remain the same even if the transferrer has received the money, not strictly due under the policy, but as an act of commercial liberality ; as where the damage being due not to fire but to the explosion of gunpowder caused by a fire in the neighbourhood, the insurer treated the damage from explosion as a damage by fire within the policy.⁽²⁾ It should be added, however, that the language of the section does not suggest the theory of trusts, and hardly makes provision for the difficulties which its loose wording may engender. At the same time the views above expressed are thoroughly consonant with equity and make the rule more intelligible.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent *bona fide*
paid to holder
under defective
title.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

785. Analogous Law.—This section is almost word for word the same as section 1 of Mesne-Profits and Improvement Act⁽³⁾ applicable only to cases under English law,⁽⁴⁾ and which has been repealed by this Act.⁽⁵⁾ The next section is similarly reproduced from section 2 of the same Act. A similar principle is expressed in section 109, paragraph 2, and section 130, proviso, of this Act, and in section 148 of the N. W. P. Rent Act.⁽⁶⁾ The section is drawn up in conformity with the Statute of Anne⁽⁷⁾ which similarly protects tenants in England. Sections 9 and 10 of this statute run thus :—

9. From and after the first day of Trinity Term (1705) all grants or conveyances thereafter to be made, by fine or otherwise, of any manors or reals, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes without any attornment of the tenants or such manors or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending as if their attornment had been had and made.

10. Provided, nevertheless, that no such tenant shall be prejudiced or damaged by payment of any rent, to any such grantor or conusor, or by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee for grantee.

The section, however, refers both to "rents and profits" and is thus more general in its operation than the above statute.

(1) Cf. *Rayner v. Preston*, 18 Ch. D., 1 (13, 14).

(2) *Taunton v. Royal Insurance Co.*, 2 H. & M., 135 ; cited *per* James, L. J., in *Rayner v. Preston*, 18 Ch. D., 1 (15).

(3) Act XI of 1855.

(4) S. 3, Act XI of 1855.

(5) See Schedule.

(6) See as to the scope of this section, *Shamsher Khan v. Zabur Husain*, 7 A. W. N. 94.

(7) 4 Anne, C. 16, S. 10.

786. Principle.—The rule here enacted depends upon a rule of general jurisprudence, that if a person enters into a contract, and without notice of any assignment, fulfils it to the person with whom he made that contract, he is discharged, from his obligation. Here the same rule has been enacted, and express provision made for the protection of the tenant, who *bona fide* pays rent to his landlord, having no notice of the transfer, or of some flaw in his title.⁽¹⁾ It even extends to cases where there has been no assignment by the lessor during the tenancy and the rent is paid to a person who is the ostensible or *de facto* landlord.⁽²⁾ A tenant is not bound to canvas his landlord's title more than is necessary for his purpose. Indeed, any attempt to probe into secret flaws in his landlord's title would in most cases have the effect of quickly determining his own tenancy. He is, therefore, protected from being again made liable for rent if already paid by him to his ostensible landlord. But it does not give to the payee the right to retain money so paid, or debar the person entitled to the money from recovering it from him.⁽³⁾

787. Rents and Profits paid in Good Faith.—The rule here enacted has a wider application than its English prototype which is limited to cases arising only as between landlord and tenant, whereas the principle here enunciated may equally well apply to co-sharers and, indeed, to any case in which profits may become realizable. The rule, again, is not only limited to cases arising on transfer, for the section is more general in its wording, and enunciates what may be regarded as a general equitable maxim, relating to the enjoyment of property. For convenience sake, however, the question may be looked at from the different aspects in which it may present itself, namely (i) in cases between landlord and tenant, protecting the latter from having to pay his rent twice over; (ii) in cases arising on a transfer of property; (iii) its application to realisation of profits by a person in possession.

788. As regards the first head it is sufficient to say that while the tenant is protected against having to pay his rent twice over if he has paid it in good faith to his grantor, it is also clear that if he has paid rent before it fell due, it could not be in fulfilment of the obligation imposed by the covenant to pay rent, but is looked upon in the shape of an advance made to the landlord, with an agreement that on the day when the rent becomes due such advance shall be treated as a fulfilment of the obligation to pay rent. If, therefore, before that day, the landlord assigned the reversion the receipt of the rent could not be treated as a discharge by the landlord, because by assigning the reversion before the rent fell due, he had parted with the power of giving such a discharge.⁽⁴⁾ Under this section, as also under the English law, payment of rent before it fell due, would not discharge the tenant from further liability.⁽⁵⁾ In such a case it may be said that, if the tenant had waited he might have learnt of the transfer. Such payment, moreover, is to be looked upon as an advance made to the landlord. This section, it will be noted, would equally apply to cases where there has been no transfer, in which case it would protect the tenant from liability on account of his landlord's defective title. Indeed, any other view might inflict an obvious injustice on the purchaser who bought the reversion on the faith

(1) *Alimudeen v. Hiralal*, I.L.R., 23 Cal., 87 (101), F. B.

(2) *Kaveriamma v. Lingappa*, 10 Bom. L.R. 1190.

(3) *De Nicholls v. Saunders*, L.R., 5 C. P., 589 (594); *Cook v. Guerra*, L. R., 7 C. P.,

192; *Govind Rao v. Gopal Rao*, 14 C. P. L. R., 65.

(4) *De Nicholls v. Saunders*, L.R., 5 C. P. 589; *Cook v. Guerra*, L. R., 7 C. P., 192.

(5) *De Nicholls v. Saunders*, L. R., 5 C. P. 589 (593).

that the rent was becoming due, but who would be defeated by a transaction between the landlord and tenant of which he had no notice.⁽¹⁾ So it was settled in an old case that in an English mortgage, although the mortgagor conveys his estate to the mortgagee, and himself becomes a tenant at will of the mortgagee, still he is entitled to recover rents from the tenants settled before the mortgage⁽²⁾ unless the mortgagee has given notice of his intention to take possession or to receive the rents and profits, in which case the mortgagee then places himself to every intent in the same situation towards the tenants as the mortgagor previously occupied.⁽³⁾ But if the mortgagee permits the mortgagor to remain in possession he is *presumptione juris* entitled to realize rents as an incident to his reversion, even by distress, if necessary.⁽⁴⁾ But while the mortgagor has a right in respect of a tenant who has entered *before* the mortgagee, the same rules do not by any means apply to tenants admitted *after* the mortgage. At common law such a tenant could have been ejected by the mortgagee without notice to quit, unless he entered with his privity.⁽⁵⁾ On the other hand, he could not by a mere receipt of rent or notice substitute himself for the mortgagor as landlord, without the consent of the tenant,⁽⁶⁾ and even in such a case a new tenancy would be deemed to have been created, the terms of which would have to be proved by evidence.⁽⁷⁾ But unless he is evicted by the mortgagee or has had notice of the mortgagee's claim a tenant is protected for payments made to the mortgagor.⁽⁸⁾ After notice he is equally protected if he pays his rent to the mortgagee.⁽⁹⁾ Indeed, the payment of rent to the landlord after notice of the transfer of his interest in favour of another is not a *bona fide* payment entitled to protection.⁽¹⁰⁾ The mortgagee is bound by the rule of estoppel and he cannot treat a tenant as being a trespasser if he has once recognized him as in lawful possession.⁽¹¹⁾ Receipt of rent has been held to be sufficient to estop a mortgagee.⁽¹²⁾ The common law rule has been, however, modified by the Conveyancing Act which confer on the mortgagor in possession certain limited powers of leasing.⁽¹³⁾

789. As regards the second class it is scarcely necessary to add that the

tenant is only protected for payments made in good faith.

(2) On transfer of property.

If he colludes with his grantor or pays with notice of the right of a third party, he does so at his own peril.⁽¹⁴⁾ Other-

wise no man can be blamed for fulfilling his obligation to one who, at the time

(1) *Moss v. Gallimore*, 1 Doug., 279. The law has been altered in conformity with the text by the Judicature Act. (36 & 37 Vict. C. 66, S. 25, Sub-S. 5).

(2) *Kaveriamma v. Lingappa*, 10 Bom. L. R. 1190.

(3) *Rawson v. Eicke*, 7 A. & E., 451; *Burrowes v. Gradin*, 1 D. & L., 213.

(4) *Trent v. Hunt*, 9 Exch., 14, in which it was held that the distress could be levied in the mortgagee's name as his bailiff). *Snell v. Finch*, 13 C.B. (N.S.), 651; *Reece v. Strousberg*, 54 L.T., 133.

(5) *Keech v. Hall*, 1 Doug., 21; 1 S.L.C. (10th Ed.), 494; *Thunder v. Belcher*, 3 East, 449; *Gibbs v. Cruickshank*, L.R., 8 C.P., 454; *Lows v. Telford*, 1 App. Cas., 414.

(6) *Partington v. Woodcock*, 6 A. & E., 690; *Brown v. Storey*, 1 Scott. N.R., 91; *Tower, son v. Jackson* [1891], 2 Q.B., 484.

(7) *Oakley v. Monck*, 1 Ex.D., 159.

(8) *Johnson v. Jones*, 9 A. & E., 809; *Un-*

derhay v. Read, 20 Q.B.D., 209; *Wheeler v. Branscombe*, 5 Q.B., 373.

(9) *Waddilobe v. Barnett*, 2 B.N.C., 538; *Willon v. Dunn*, 17 Q.B., 294.

(10) *Nobin Chandra v. Surendra Nath*, 7 C.W.N., 453 (456).

(11) *Brich v. Wright*, 1 T.R., 378. (A man cannot be treated at once both as a tenant and a trespasser).

(12) *Doe v. Hales*, 7 Bing., 322; *Doe v. Lewis*, 13 M. & W., 241; *Doe v. Goodier*, 10 Q.B., 957.

(13) S. 18, 44 & 45 Vict., C. 41. These powers will be found set out under S. 65 *post*.

(14) *Moss v. Gallimore*, 1 Doug., 279; (282); *Pope v. Biggs*, 9 B. & C., 245 (252); *Cook v. Guerra*, L.R., 7 C.P., 132; *Collector v. Hursoondery* (1864) W.R., Act. X 6 following *Thakoordass v. Petomber* (1859), S.D.A. 822.

it is fulfilled, was the person apparently entitled to it. So a payment to a creditor who has assigned the debt without notice to the debtor is similarly protected. So again, the payment of rent made to the successor of a zemindar as his Lambardar is protected, even though the payment may be shown not to have been made to him in his capacity as such.⁽¹⁾ In an English case, it was held that where the tenant pays rent to the mortgagee under the threat of eviction, he could set off such payment in answer to the claim for the rent by the lessor.⁽²⁾ In such a suit the tenant and the party receiving rent from him can both be impleaded; and if it is proved that the latter had no right to receive the rent, a decree would be given against him, the tenant being discharged.⁽³⁾

790. Lastly, the doctrine promulgated in the section should be equally

applicable to profits realized by a person in possession,⁽⁴⁾ as distinguished from the real owner, protecting payments made to a *benamidar*, or other ostensible owner. So a tenant may, in a suit for mesne-profits plead that he had made payments to the *benamidar*, or any other person who had the ostensible right to realize them. In such a case the real owner will have no remedy except against the person to whom payments had been made. In such cases, the rule, of course, applies independently of any assignment made by the lessor during the tenancy. A took possession of a certain property as an usufructuary mortgagee, and he then created a lease in favour of P, for a period of twelve years: A then died and his interest as mortgagee survived to his brother B, who also died; and thereupon A's widow C took possession of the property and managed the same, getting her name recorded in the revenue papers. The person really entitled to the property was B's sister D, and who thereupon sued the tenant P, for rent who pleaded its payment to C, it was held that having regard to the equitable rule here enunciated P had a good defence.⁽⁵⁾

51. When the transferee of immoveable property make any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction

Improvements
made by bona-fide
holders under de-
fective titles.

either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

(1) *Chattri v. Bahadur*, 8 A.W.N., 45.

(2) *Underhay v. Read*, 20 Q.B.D., 209; following *Johnson v. Jones*, 9 A.&E., 809; *Boodle v. Campbell*, 7 M.&G., 386; *Hickman v. Maehin*, 4 H. & N. 716.

(3) *Madan Mohun v. Holloway*, I.L.R., 12 Cal., 555.

(4) *Litchfield v. Ready*, 5 Exch., 919

(mortgagee could not sue for mesne-profits); *Barnett v. Guilford*, 11 Exch., 19 (doctrine applied to the heir); *Anderson v. Rutcliffe*, 28 L.J.Q.B., 321; J.C., 29 L.J.Q.B., 128 (applied to assignee).

(5) *Kaveriamma v. Lingappa*, 10 Bom. L. R., 1190.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

791. Analogous Law.—This section is substantially the same as section 2 of Mesne-Profits and Improvement Act ⁽¹⁾ referred to in the Commentary on the last section (§ 785) and which runs thus :—

"2. If any person shall erect any building or make an improvement upon any lands held by him *bona fide* in the belief that he had an estate in fee simple, or other absolute estate, and such person, his heirs or assigns, or his or their under-tenants, be evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief, estimated and paid or secured to him or them, or at the option of the person causing the eviction, to purchase the interests of such person in the lands at the value thereof, irrespective of the value of such building or improvement: Provided that the amount to be paid or secured in respect of such building or improvement shall be the estimated value of the same at the time of such eviction."

Similar provisions are to be found in the English Improvement Land Act, 1864; ⁽²⁾ and the Settled Land Act, 1882. ⁽³⁾

The section deals only with absolute transfers. Provision for improvements made by mortgagees and lessees has been made elsewhere. ⁽⁴⁾

792. This section declares only what has been the pre-existing law on the subject ⁽⁵⁾ and embodying as it does a rule of equity it is applicable alike to both Hindus and Mahomedans. ⁽⁶⁾ The Civil law carried its doctrine in cases of this sort much further, and allowed the purchaser or other person making improvements innocently and under the belief that he was the true owner, compensation for the benefit actually conferred upon the property. ⁽⁷⁾ And Domat lays down as a general doctrine that those who have spent money on improvements of all estate, have, by the Civil law, a privilege upon those improvements, as upon a purchase with their own money. ⁽⁸⁾

(1) Act XI of 1855, extended by Act XV of 1874, S. 3, to the whole of British India, except the Scheduled Districts.

(2) 27 & 28 Vict., C. 114.

(3) 45 & 46 Vict., C. 38, amended by 50 & 51 Vict., C. 30. See also the Board of Agriculture Act, 1889 (52 & 53 Vict., C. 30), S. 2. Tenants Compensation Act (53 & 54 Vic., C. 57; amends the law with respect to compensation due to tenants on land under mortgage. Agricultural Holdings Act, 1900 (63 & 64 Vict., C. 50), amends the law relating to agricultural holdings. A tenant may claim compensation under an agreement outside the Act: *In re Pearson & L'Auson* [1899] 2 Q. B., 618; *Newley v. Eckersley* [1899]. 1 Q. B., 465. Tenants from year to year are similarly protected; *King v. Eversfield* [1897], 2 Q. B., 475. Notice of claim must be given at least two

months before the determination of the tenancy; *Morley v. Carter* [1898], 1 Q. B. 8.

(4) S. 63 (for mortgagees); S. 103 (m), (p), (q) (for lessees).

(5) *In re Thakoor Chunder Paramanick*, B.L.R., (Sup. vol.), 595 F.B.; *Furzed Ali v. Ava Ali*, 3 C. L. R., 194; *Muhammad v. Maru*, 11 C. 821 (823); *Ramalinga v. Samiappa*, I.L.R., 13 Mad., 15 (16); *Mahadu v. Abdulla*, (1892), B.P.J., 135.

(6) See S. 2 (d), *ante*; *Durgosi v. Fakeer Sahib*, I.L.R., 30 Mad., 197.

(7) Dig. Bk., 50, tit. 17, I, 206. "*Jure nature æquum est, reminem cum alterius detrimento et injuria fieri locupletiores.*" A creditor was allowed lien for meliorations (Dig. Bk., 121, tit. 1, 1, 25; 1, Domat. Bk., 3, tit. 1, 5, arts. 5-7).

(8) 1 Domat. Bk., 3, tit. 1, § 6, art. 7. Story Eq. Juris. (2nd Eng. Ed.), § 1239.

793. The rule here enacted is much wider than that deducible from the English cases according to which it is necessary that the real owner must have had knowledge not only of the expenditure incurred, (1) but also of his own rights in the property. (2) *English law distinguished.* But this is by no means necessary under the section which only requires that the person making improvements must have acted in the *bona fide* belief that he was *absolutely* entitled to the property—a thing which is the only common element in the two rules. Provision for compensation for improvements under varying and various conditions is also made in the several Indian Acts which provide for compensation to tenants and persons occupying land. (3) So in England a claim to compensation for improvements may be made by tenants of agricultural and pastoral holdings. (4)

794. Principle.—This section is founded upon the principle that he who will have equity must do equity. As observed by Snell: "A constructive trust may also arise where a person, who is only part owner, acting *bona fide*, permanently benefits an estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements. (5) Thus, it was intimated in a leading case (6) that although a person expending money by mistake upon the property of another has no equity against the owner, who is ignorant of and did not encourage him in his expenditure, (7) yet if it were necessary for the true owner to proceed in equity, he would only be entitled to its assistance according to the ordinary rule, by doing equity and making compensation for the expenditure, so far, of course, and only so far, as expenditure was necessary and has proved permanently beneficial. But a person will have no equity who lays out money on the property of another with full knowledge of the state of the title; (8) or who lays out money unnecessarily or improperly." (9) So also it was remarked by Lord Cranworth, L.C., that "to raise such an equity, two things are required: *first*, that the person expending the money supposes himself to be building on his own land; and, *secondly*, that the real owner, at the time of the expenditure, knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For, if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me, to assert my legal rights. It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms a part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." (10) Under this section,

(1) *Ramsden v. Dyson*, L.R., 1 H.L., 141.

(2) *Willmott v. Barber*, 13 Ch. D., 96 O.A., 17 Ch. D., 772.

(3) S. 69 (1), Punjab Tenancy Act (XVI of 1887), The Central Provinces Tenancy Act (XI of 1898), Bengal Tenancy Act (VIII of 1885), Malabar Compensation for Tenants Improvements Act (Mad. Act I of 1900).

(4) Agricultural Holdings Act, 1883 (46 & 47 Vict., C. 61), repeating earlier Acts of 1875. A similar Act has been enacted for Scotland (46 & 47 Vict., C. 62).

(5) *Lake v. Gibson*, 1 Eq. Ca., Ab., 290.

(6) *Neeson v. Clarkson*, 4 Hare, 97.

(7) *Nicholson v. Hooper*, 4 My. & Cr., 186.

(8) *Rennie v. Young*, 2 DeG. & J. & O. 196; *Ramsden v. Dyson*, L.R., 1 H.L., 129; *Price v. Neault*, 12 App. Cas., 110.

(9) Snell's Equity, pp. 148, 149; Story's Eq. Juris. (2nd Eng. Ed.), §. 388.

(10) *Ramsden v. Dyson*, L.R. 1 H.L., 129 (141); following in *Kunhammad v. Narayamen*, I.L.R., 12 Mad., 320.

however, it is not necessary that the real owner should know that the land improved upon belongs to him—as required by the English law. It is sufficient that the transferee at the time believed in his absolute title, and this has been the law in India from before the passing of this Act.⁽¹⁾

795. It is not necessary that a claim to compensation should arise only under the section, for it may be made under any of the **Scope of the rule.** following circumstances :—

(1) When improvements are made by a person believing himself to be *absolutely* entitled to the property, in which case the question has nothing to do with the conduct of the real owner :

(2) But if the owner has encouraged or acquiesced in the improvements, then he would be debarred from ejecting the other. (2)

(3) When improvements are made by a co-owner on joint land *without* the permission of his co-owners, and even in spite of their protest, in which case the other co-sharer can obtain relief without proof of material injury. (3)

(4) Where improvements are made by holders of *limited* interest, in which case compensation is only admissible when the improvements can be traced to encouragement by the owner. Such claim may be made by the tenant against the landlord (4) or by a mortgagee against the mortgagor. (5)

(5) Where improvements are made by a person *without any status*, but who was encouraged by the owner to make them, in which case they are only paid for if the owner is equitably estopped under circumstances not dealt with in the Act. Under this head there may occur cases in which though no pecuniary compensation is allowed, still the person is permitted to remove his improvements. (6)

(6) Where improvements are made and by a *pure trespasser* without the consent of or encouragement by the owner, in which case compensation is ordinarily never allowed. (7)

This section deals only with case (i), while case (iii) has been dealt with elsewhere; the other three cases are nowhere specifically provided for, though reference to them would be necessary to obtain a comprehensive grasp of the rule here enunciated.

796. Though this section does not apply to purchasers at a court-sale; still as a rule based on broad equity it has been held to apply **Auction purchaser.** even to them, so that where a stranger to the suit purchases property sold in execution of a decree, which sale is for some defect or irregularity afterwards set aside, the purchaser is entitled not only to the recovery of his purchase-money but also to be reimbursed the expense incurred by him in its maintenance and improvements.⁽⁸⁾ In such case the question of good faith hardly arises. The case would, however, be different where the purchaser was also a party to the suit.

797. Meaning of Words.—The term "*Transferee*" does not include a person having only the benefit of an obligation—as under a contract to

(1) See *In re Thakoor Chunder*, B L.R., Sup. Vol., 595, F.B.; *Collier v. Baron*, 2 N. L.R., 34.

(2) *Ramisdan v. Dyson* L.R. 1 E. & I. App. 129 (168).

(3) *Girdhari v. Vilayat Ali* (1885) A.W. N., 277; *Wahid Ali v. Ghansham* (1887) A. W.N., 116; *Paras Ram v. Sherjot*, I.L.R., 9 All., 661 (664); *Bishwambhar Lal v. Raja Ram*, 3 B.L.R. (A.C.), 67; *Massim v. Panjoo*, 21 W.R., 373; *Necury Lall v. Bindabun*, I.L.R., 8 Cal., 708; *Joy Chunder v. Bipproo*, I.L.R., 14 Cal., 236; *Asarjan v. Ashak*, 4 C.W.N., 788; *Madan Mohun v. Rajab Ali*, I.L.R., 28 Cal., 223; *Shoshi Bhusan v. Ganesh Chunder*, I.L.R., 29 Cal., 500;

Fazilatunnessa v. Ejaz Hassan, I.L.R., 30 Cal., 901; *Ananda Chandra v. Parbati Nath*, 4 C.L.J., 198.

(4) S. 108 (m), (p), (q) post; *Beni Ram v. Kundan Lal*, I. L. R., 21 All., 496, P. C; *Raja of Venkatagiri v. Mukku*, 7 I.C. 202 (208)

(5) S. 63, post.

(6) This is dealt with by the local Acts before cited, of. §§ 74-80, ante.

(7) *Uda Begam v. Imamuddin*, I.L.R., 1 All., 82; *Dhurma Das v. Amulya*, I. L. R. 38 Cal., 1119 (1128, 1129) (case of a son building on his father's land).

(8) *Mathunsia v. Apsa Bin*, 21 M.L.J. 969; 12 I.C. 444.

purchase. "Believing in good faith that he is absolutely entitled." If there are circumstances which tend to shew that the transferee must have known that he was fraudulently in possession of property, he is entitled to no benefit under this section (1); otherwise good faith is consistent with negligence in investigating the title.(2) Good faith is, ordinarily, an honest belief in one's right, but it implies that if there was anything to put the man on inquiry, such inquiry was not consciously avoided. But there must have been something to inquire about.(3) "Absolutely" negatives protection to a tenant, or mortgagee in possession making improvements. The transferee must be under the belief of his being the *absolute* owner of the property, otherwise he cannot claim compensation for his improvements. He must not be a trespasser or a qualified holder.(4) "Good faith" may be inferred from circumstances.(5) "Improvement" is not defined in this Act. It may be taken perhaps in the same sense as in the Bengal Tenancy Act where it is thus defined :—

76. "For the purposes of this Act, the term improvement," used with reference to a raiyat's holding shall mean any work which adds to the value of the holding which is suitable to the holding, and consistent with the purpose for which it was let and which, if not executed on the holding, is either executed directly for its benefit or is, after execution, made directly beneficial to it.

(2) Until the contrary is shown the following shall be presumed to be improvements within the meaning of this section—

- (a) The construction of wells, tanks, water-channels and other works for the storage, supply or distribution of water for the purposes of agriculture, or for the use of men and cattle employed in agriculture ;
- (b) The preparation of land for irrigation ;
- (c) The drainage reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes or waste land which is cultivable.
- (d) The reclamation, clearance enclosure or permanent improvement of land for agricultural purposes.
- (e) The renewal or reconstruction of any of the foregoing works or alterations therein or additions thereto; and
- (f) The erection of a suitable dwelling-house for the raiyat and his family, together with all necessary out-offices.

(3) But no work executed by the raiyat of a holding shall be deemed to be an improvement for the purposes of this Act if it substantially diminishes the value of his landlord's property.(6)

"Secured to the transferee" implies that the amount of compensation may be declared as a charge upon the property.

"Compensation for improvements" does not mean the capitalized value of improvements, nor the estimated value at the then market rate, but only value for the work done by the transferee. Thus where the tenant grows cocoanut trees, he is not entitled to the capitalized value of the whole of the future annual produce.(7) The compensation given is not for the produce but for the work of planting, protecting and maintaining the trees.(8) And this may be valued at the market-rate. But a reduction of rent in consideration of improvements

(1) *Sadashiv v. Dhakubai*, I.L.R., 5 Bom. 450.

(2) *Nanjappa v. Peruma*, L.R., 32 Mad. 530 (531) *Mathuna v. Appabai*, 21 M.L.J. 969; 12 I.C. 444 (447, 448).

(3) *Abboy Churn v. Attornoni*, 13 C.W.N. 931 (936).

(4) *Mudhoo Soodun v. Juddoopully*, 9 W.R. 118.

(5) *Furzand v. Aka Ali*, 3 C.L.R. 194.

(6) S. 76, Act VIII of 1885. A more comprehensive definition of "Improvements," is given in S. 3 of the Malabar Compensation for Tenants Improvements Act (Mad., Act I of 1877) and which is discussed in *Kunhi Chandu v. Kunkan*, I. L. R., 19 Mad., 384.

(7) *Shagunni v. Verappan*, I. L. R., 18 Mad., 407.

(8) *Kunhi Chandu v. Kunkan*, I. L. R., 19 Mad., 384.

under an agreement not to claim compensation cannot negative the claim for it.⁽¹⁾

798. Equitable Claim to Land or Compensation:—Besides the usual modes of acquisition of property, law recognises others which lead to the same result, though upon different considerations and by a different process of reasoning. The leading distinction between the two cases might be stated to be that while in the first case law protects the transferee by virtue of his contract, in the second case law refuses to assist the true owner by reason of his conduct. Such a case may arise where the owner permits another to build upon his land in the *bona fide* belief that it belongs to him, in which case equity considers it to be dishonest that the owner should remain, passive and afterwards to interfere and take the profit.⁽²⁾ Such a case is nowhere provided for in the Act, and it may present several variations. For instance, (a), the owner may himself be in ignorance of his right (b) or he may have protested but without avail, or (c) the stranger may build knowing of his want of title; and in case (a) the stranger may have honestly believed that he was absolutely entitled to the property, in which case alone the equity here enunciated would come into operation. But in the other cases the stranger would have to give up the land with or without his improvements. Other cases are again possible: the stranger may possess or have been let into possession with limited rights in which case different equities would arise according to the nature and extent of the improvements and whether they were acquiesced in or not. As all such questions are often interrelated a short summary of the law stated in the form of leading principles relating to the equitable rights in land should be found useful.

799 The highest right which one man can acquire in another man's land, is the right, of its ownership. Legally such right might be acquired in any of the ways known to the law, *e.g.*, Sale, Exchange, or a Gift. Equitably such right cannot be acquired *alluende*, nor can equity, withhold its assistance to the true owner, thereby letting in the same right in the other. Any other view would contravene another doctrine of equity, *viz.*, that there can be no estoppel in fraud of the statute.⁽³⁾ Under English law cases have been decided where the courts have decreed retention of the property at a valuation by the transferee on the ground that nothing but perpetual retention of the property would satisfy the equity raised in favour of those who have spent money on it.⁽⁴⁾ But the wording of this section would hardly allow of such a relief being granted in India.

Consequently, no estoppel can involve the total deprivation of one's property in favour of a trespasser, though where a person has been let into possession under some title or acquired some right, then it is possible for equity to insure the continuity of his possession, as if a person is let in as a tenant for an uncertain duration, he may by the conduct of the true owner acquire all the

(1) *Gangadhar v. Damodar*, I. L. R., 21 Bom., 524 (527); *Municipal Commissioner v. Syed Abdul*, I. L. R., 18 Bom., 184; *Uthungavakkath v. Thazhatharayil*, I.L. R., 20 Mad. 435 (438, 439).

(2) *Ramsden v. Dyson*, I.R. 1 E. & Q.App., 129 (168).

(3) *Fairtitle v. Gilbert* 2 T. R. 169; *Barrow's case* 14 Ch.D. 432; *Hill v. The Manchester and Salford Water Works Co.*, 2 B. & Ad., 544 (553); *Doe v. Howells*, 2 B. & Ad. 745; *Doe v. Ford*, 3 B. & El. 649; *Doe v. Hares* 4 B. & Ad. 435; *Glasgow v. Independ-*

dent Co. 2 T. R. 279 (311); *Madras Hindu Mutual Benefit Permanent Fund v. Raghava*, I.L.R. 19 Mad. 200; *Kurri Verareddi v. Kurri Bapireddi*, I.L.R. Mad., 336 (F.B.); *Jogini Mohan v. Bhoat Nath*, I.L.R. 5 Cal., 146 (149); *Jagabhu v. Radha Krishna* I.L.R. 36 Cal. 920; *Abdul Aziz v. Kanthu Malliki*, I.L. R. 38 Cal. 672; *Sham Lal v. Hazari Mali*, 15 C.L.J. 451; *Trimbaok v. Hari* I.L.R. 34 Bom., 575.

(4) *Duke of Beaufort, v. Patrick*, 17 Beav., 60; *Dillwyn v. Llewelyn*, 4 DeG. F. & J., 517; 45 E.R. 1255.

right of a permanent tenant. (1) But otherwise the only relief to which a person in possession is entitled is compensation for improvements, and having regard to the common law of the land in all cases to remove them. It is however, said that where the acquiescence of the true owner amounts to fraud he may even be deprived of his legal right. "What then" observed Fry, J. are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal rights. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it; but, in my judgment, nothing short of this will do". (2) But it is submitted that all these elements are necessary to constitute acquiescence and there can be no fraud without deception or dishonesty while the five elements above enumerated are equally consistent with standing by.

(1) But if a person in possession under a lawful though limited title, such as a tenancy from year to year, or of uncertain duration or for a fixed term, but under a mistaken belief that he is a permanent tenant erects permanent buildings, and the owner knowing of his mistake abstains from interfering with him, or otherwise so conducts himself as is sufficient to justify the legal inference, that he had by plain implication, contracted that the right of tenancy, under which the tenant originally obtained possession of the land, should be changed into a perpetual right of occupancy, then he would be precluded from ejecting him. (3)

(2) In all cases not falling within this section, a claim to compensation is admissible only if the owner is shown to have encouraged or acquiesced in the improvements made by a person not wrongfully in possession of the property, or in possession under a *bona fide* belief of title, which the owner throwing of the mistaken belief in the other does nothing to correct. (4)

(3) But the mere erection by the tenants mortgagee, or holder of other limited interest of permanent buildings, to the knowledge of and without interference by the owner raises no equity against the latter entitling him to resist a suit for ejectment or claim compensation.

(4) But in the last case, since the maxim, *quicquid inædificatur solo, solo cedit* is not the common law of the land the tenant is entitled to remove his improvements. (5)

(1) *Beni Ram v. Kundan Lal*, I.L.R. 21 All., 796 P.C.

(2) *Willmott v. Barber*, 15 Ch. D. 95 reversed on appeal, on the question of costs only—17 Ch. D. 772.

(3) The same situation is logically possible in the case of an arrant trespasser, but it is

legally impossible because such a person knows that he can acquire no valid title to land without a formal conveyance.

(4) *Beni Ram v. Kundan Lal*, I.L.R. 21 All. 496 (502) P.C.

(5) *Beni Ram v. Kundan Lal*, I.L.R. 21 All. 496 (503) P.C.

(5) In the case of a pure trespasser, claiming either under a colourable title or no title at all, the owner is under no obligation to protest. (1) In such a case a claim for compensation would be admissible only if the trespasser, could prove facts from which the Court could infer an implied contract to legalize his trespass.

800. Case for Compensation.—The class of persons which is protected by the section is generally foreshadowed therein, but its importance calls for a detailed analysis. In the first place, the section is not limited to transferees for value, and a volunteer would then equally come in for protection under its terms. The rule is again independent of any acquiescence or standing by on the part of the real owner. It is not necessary that the real owner, should have encouraged the occupant to expend money on the land, or that the latter should have made the improvements with the knowledge of the real owner, or in the expectation of being compensated for them on eviction, for such cases are wholly outside the scope of the rule, although they too afford basis for the enforcement of a similar equity. The rule under notice only postulates the existence of three conditions, namely: (i) that the maker of the improvements be the transferee of property; and (ii) that he must have made the improvements (iii) believing in good faith that he was *absolutely* entitled to it. The transfer may not be absolute but the transferee must *bona fide* believe that he was absolutely entitled to the land. It is not necessary that his title should be unimpeachable, for if it is so he cannot be ejected, and it is only on ejection that a case for compensation here arises. Indeed, the case contemplated is that of a person to whom *uncertain* or *defective* title is conveyed but of which he had no notice. But there must be something to convey, some semblance of a title upon which the transferee may stake his money. An assignee from a trespasser is scarcely within the rule. (2) A person who is under a contract to purchase is similarly not within the rule. (3) So a purchaser from the assignees of the original mortgagee is not a person absolutely entitled to the property. He cannot, therefore, claim compensation for improvements although he may, on ejections, be allowed the cost of repairs. (4)

In the first place the rule as here enacted though forming part of a general principle, is restricted to the case of a transferee *inter vivos* of immoveable property. But as has been before stated **Improvements by the transferee.** persons other than such transferees are entitled to the same or similar equity, but it cannot be considered here. (§ 687). It is no part of the rule that the improvements made by the transferee should have been encouraged or acquiesced in by the transferrer, or that they should have been even known to him. If these elements exist it will strengthen the case for compensation, but they are no part of the rule.

The equity is personal to the transferee, who may or may not be a transferee for a valuable consideration, and which term is large enough to include his assignee, so that if A gift a property to B and B transfers it to C whether by sale or gift it is immaterial, and D claiming by a title paramount to A eject C, C would be entitled to improvements if he satisfies the other requirements of the section. But in the same case, if instead of being the transferee, C had trespassed on the property and even perfected his title by adverse possession against B, he could

(1) "Silence is innocent and safe where there is no duty speak"—*Per Lord Macnaghten in Chanwick v. Maning* (1896) A.C. 231 (238).

(2) *Souza v. Gulam Moidin*, 13 M. L. J. R., 214.

(3) S. 54, *post*.

(4) *Parashar v. Ganu*, 5 Bom. L. R., 643. For the mode of taking account, see *Narayan v. Ganoji*, I. L. R. 15 Bom., 692.

not claim for any improvements since the rule is enacted to protect only persons lawfully entering into possession of property, and not all those who, may acquire title *aliunde*. Again, in the case last supposed, if some portion of the property is transferred while the rest is trespassed on, it would be in accordance with the spirit of the rule to treat only with the transferee of the part, ignoring the trespasser. As a person having merely the benefit of an obligation is not a transferee, the fact that he was entitled to specific relief, or was put in possession of the property in pursuance of a contract of transfer would not entitle him to embark upon improvements and claim their value upon eviction.

But in all such cases though the section is inapplicable, it does not necessarily follow that the claim for compensation is necessarily futile, for as the section is inexhaustive: (§. 795) cases do arise and have been recognized as fit for compensation, even though the claimant had nothing beyond long possession to commend his case to the Courts. (§. 802.)

The transferee must have further made the improvements in the belief that he was "absolutely entitled" to the property. This would exclude all but those who claim under an out and out transfer, *e.g.*, by a sale, gift or an exchange. A permanent lessee could scarcely be regarded as "absolutely entitled" to the leasehold, ⁽¹⁾ though he too would come in for a similar equity under a different rule. ⁽²⁾ A claim under this section is not inconsistent with the transferor's limited ownership, though in such a case the transferee would have to show his belief in the existence of circumstances justifying a permanent alienation by the holder of a limited estate. ⁽³⁾

801. In the second place, then, the claimant for compensation must be a transferee, not merely one believing in good faith that he is a transferee but a transferee in fact. Nor need this transfer be unimpeachable, for if so, there would be no occasion for the intervention of the rule. But the transferee must have taken, under a title which he believed to be unassailable. As this cannot be predicated of a mortgagor, whose position is that of a person acquainted with the imperfection of his title, and one entirely of his own choosing, it has been held that he cannot claim emblements raised by him on the sale of his property. ⁽⁴⁾ And the mortgagee in possession is in a similar predicament, for he too cannot claim the value of the standing crops raised by him as against the auction-purchaser of land in execution of his mortgage-decree. ⁽⁵⁾ So, again, in the case of a tenant, if the tenancy in its inception was not permanent, and the lessee had no reason to believe himself to be a permanent tenant, no compensation could be allowed to him on eviction for improvements made or buildings, erected on the demised land, ⁽⁶⁾ except on the ground of acquiescence, which cannot be presumed from a mere non-interference on the part of the landlord. ⁽⁷⁾ Permanency may, however, be inferred not only from the nature of the tenure but also from the surrounding circumstances, in which case the tenant

Transfer must be absolute.

(1) *Raja of Venkatgiri v. Mukku*, 7 I.C. 202 (208); *contra Raja Rudra Partab v. Debi Pershad*, (1905) 8 O.C. 13.

(2) S. 108 (m) (p) (q) *post*.

(3) *Nanjanma v. Nacharammal*, 17 M.L.R., 622; *Nanjappa v. Peruma*, I.L.R., 32 Mad., 530 (531).

(4) *Land Mortgage Bank v. Vishnu*, I.L.R., 2 Bom., 670.

(5) *Ramalinga v. Samiappa*, I.L.R., 13 Mad., 15.

(6) *Ismail v. Kali Krishna*, 6 C.W.N., 134

(140); following *Shaikh Hosein v. Goverdhan*, I.L.R., 20 Bom., 1; *Jugmohan v. Pallonjee*, I.L.R., 22 Bom. 1; *Municipal Corporation v. Secretary of State*, I.L.R., 29 Bom. 580; *Narasayya v. Raja of Venkatagiri*, I.L.R., 37 Mad. 1 (14).

(7) *Nundo Kumar v. Banomali*, I.L.R., 29 Cal., 879; doubted but applied in *Narasayya v. Raja of Venkatagiri*, I.L.R. 37 Mad. 1 (14); *Seth Mohan Lal v. Choudhri Chunni Lal*, 2 N.L.R. 4.

will be entitled to compensation. Thus, where the *Gaokars* or village officers of a village who were responsible to the Government for the revenue, granted a certain land in 1801 to the plaintiff's grandfather "from generation to generation" at a fixed specified rent: the village having subsequently passed to the native chiefs and latterly to the British, the original grant was confirmed by both and was described by the British officers as *katuban*, i.e., land held in perpetuity at a fixed rent. The land was so assessed until 1889, when the survey-officers cancelled the entry, and in 1897 the Collector called upon the grantee to pay up the enhanced assessment made by the survey officers, but it was held that the case fell within the equitable principle which protects one who spends money on the improvements of land under an expectation of an interest therein created or encouraged by its owners.⁽¹⁾ So where the defendants' father was given a lease by the plaintiff's predecessor in title on an annual rent in perpetuity and in that expectation the defendant's father had made improvements, though the lease was not perpetual, it was held that since the defendant's father had presumably made improvements in the *bona fide* belief that his lease was perpetual, the defendant could not be ejected without being given compensation for the improvements.⁽²⁾ *A* held a decree of a competent revenue court for possession of certain land as against *B*, and obtained under that decree formal possession of it. He was, however, allowed to remain in such necessary possession of it as was requisite to enable him to remove a crop which was on it. *B* removed his crop, and thereafter sued in a civil court for a declaration that he was *A*'s tenant holding occupancy rights. *A* did not defend the suit and a declaratory decree was given to *B*. Subsequently, *B* sued *A* for damages in respect of the alleged removal by *A* of a second crop, but the court having held that *B*'s decree was passed by a court without jurisdiction, his possession, as a trespasser, it was held, could not be improved by the decree passed in his favour.⁽³⁾

802. It would appear that a case for compensation within the rule would

**Long possession
when sufficient.**

be made out from the occupant's possession for a number of years, and so in a case, equitable relief was given to a tenant who had been suffered to erect buildings for a period of twenty-five years during which he continued to receive rents.⁽⁴⁾ And in a Colonial appeal the Privy Council appeared to have further widened the scope of the principle by throwing out that "the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated."⁽⁵⁾ The court may presume a permanent grant from possessions for sixty years,⁽⁶⁾ or from a period sufficiently long standing.

Apart from the cases, in which the title of the occupant is referable to a grant there still remains a large number of cases in which no such presumption is possible, but in which some such relief may still be admissible. Such a case was contemplated by Lord Wensleydale, who, in a leading case, said: "If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value

(1) *Secretary of State v. Dattatraya*, I. L. R., 26 Bom., 271.

(2) *Rudra Partab v. Debi Pershad*, 8 O.C. 13.

(3) *Udit Narayan v. Shib Rai*, I.L.R., 20 All., 198.

(4) *Yeshwadabai v. Ramchandra*, I.L.R., 18 Bom 66.

(5) *Plemmar v. Mayor*, 9 App. Cas., 699.

(6) *Gungadhur v. Ayimuddin*, I.L.R., 8 Cal., 960.

which the occupier has independently added to it. If a tenant of a mine does the same thing he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build."⁽¹⁾ But in India, in the latter case, the occupier is conceded the right of removing his structure,⁽²⁾ though he cannot claim compensation,⁽³⁾ even though he had acted in a mistaken belief as to his rights in which the landlord may have shared.⁽⁴⁾

Of course, in such a case relief merely by way of compensation would be out of question because to confirm a trespasser's possession in such a case would be to enable him to purchase another man's property against that man's will.⁽⁵⁾

803. Thirdly, the transferee must believe in good faith that he is absolutely entitled to the property. Now "good faith" implies a certain degree of circumspection, some inquiry where inquiry was natural, though it is consistent with negligence.⁽⁶⁾

So it has been observed: "We are not prepared to say that good faith within the meaning of section 51 of the Transfer of Property Act is necessarily precluded by facts showing negligence in investigating the title. In fact, to hold that every default in investigating the title, *ipso facto* makes section 51 inapplicable would be to exclude a very large class of cases, from a rule which is based on obvious considerations of justice."⁽⁷⁾ But there is necessarily a limit to this rule. For instance, a purchaser from a Hindu female may be at least presumed to have known that his vendor had no absolute power of disposal of immoveable property, and, consequently, he should be wanting in good faith if he did not inquire into the existence of circumstances which alone entitle a Hindu female to make an absolute transfer of property.⁽⁸⁾ A person may act in good faith, though he acts under a mistake of law.⁽⁹⁾ The question is one of fact⁽¹⁰⁾ dependant upon the facts available and the facts and circumstances known to the claimant from which the court has to find whether the improvements were made in the honest belief of his absolute title. The fact that the transfer was for a valuable consideration is material, but is not conclusive of good faith.⁽¹¹⁾

804. Right to Buildings.—According to the usages and customs of this country, buildings and other such improvements made on land do not, by the mere accident of their being attached to the soil, become the property of the owner of the soil. The general rule is, that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation

(1) *Ramsden v. Dyson*, L.R., 1 H.L., 129, (168), on this point Lord Cranworth, L. C., concurred (p. 140) while Lord Kingsdown's dictum is not different (p. 170); *Yeshwada v. Ramchandra*, I.L.R., 18 Bom., 66 (79, 79); It will be observed that all these are cases of encouragement by the owner, classified in § 795.

(2) *Narayan v. Bholaqir*, 6 B.H.C.R., 80; cf. *Shaik Husain v. Gobardhandas*, I. L. R., 20 Bom., 1 (7); *Jethalal v. Lalbhai* I.L.R., 28 Bom., 298; *Mahan Lal v. Chunni Lal*, 2 Nag. L.R., 4.

(3) *Shaik Husain v. Govardandas*, I.L.R., 20 Bom., 1 (7).

(4) *Jugmohandas v. Pallonjee*, I.L.R., 24

Bom., 1.

(5) *Jethalal v. Lalbhai*, I.L.R., 28 Bom., 298.

(6) S. 3 (20) *General Clauses Act* (Act X of 1897); *Muthunsa v. Apsabai* 21 M. L. J. 969; 121 C. 444 *Collier v. Baron*, 2 N.L.R. 34.

(7) *Nanjappa v. Peruma* I.L.R. 32 Mad. 530 (531.)

(8) *Nanjappa v. Peruma*, I.L.R. 32. Mad., 530 (531) *Baba Khan Singh v. Dhunna Singh* 1872) P. R. No. 7.

(9) *Durgosi Row v. Fakeer Sahib*, I.L.R. 30 Mad. 197 (199.)

(10) *Ib.*, p. 199.

(11) *Nanjappa v. Peruma*, I.L.R. 32 Mad., 530 (531).

for the value of the building if it was allowed to remain for the benefit of the owners of the soil; the option of taking the building or allowing the removal of the materials, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess. And this principle is in accord with both the Hindu and Mahomedan laws.⁽¹⁾ But in a later case it has been held that although this rule has been laid down as in accordance with justice, equity and good conscience, it does not apply to Calcutta and the other large towns, but only to the mofussil: "The sort of houses that are generally found there are, for the most part, readily removable, and the *cutch* or semi-*cutch* buildings such as are erected by the poorer native population, have always been considered as in the nature of moveable property."⁽²⁾ What is equitable in the mofussil may not be so in the large towns and Calcutta.⁽³⁾ But where lands were let out more than sixty years before suit apparently for building and not agricultural purposes, and the lessee built thereon substantial buildings, it was presumed that the grant was of a permanent character, and the lessee could not therefore be evicted.⁽⁴⁾ But where the defendant is shown not to have entered on the land for building purposes or to have built "in the hope or encouragement by the plaintiff of an extended term or an allowance for expenditure,"⁽⁵⁾ he will be ejected without being allowed anything for improvement; ⁽⁶⁾ but it is otherwise if the landlord has acquiesced in the buildings being erected on his land.⁽⁷⁾ Where a person lies by under such circumstances as to induce a belief that a voidable lease would be treated as valid, and the lessee makes improvements, he is entitled to compensation in respect of them.⁽⁸⁾ But a tenant building on his landlord's land cannot, of course as such, claim any compensation.⁽⁹⁾ And a co-parcener purchasing such buildings from a stranger is in no better position.⁽¹⁰⁾

805. Protection of Licensee.—Where a person merely grants to another a right to build or remain upon his land, and such right falls short of an easement or an interest in the property, it is designated a license in the Indian Easements Act,⁽¹¹⁾ which provides that a license cannot be revoked where the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.⁽¹²⁾ In other words, a person, though

(1) In re *Thakoor Chunder*, B.L.R., Sup. Vol., 595 F.B.; *Ismail Kanai v. Nazarali*, I.L.R. 27 Mad., 211 (216); *Durgoji Row v. Fakeer Sahib*, I.L.R. 30 Mad. 197 (198, 199).

(2) Per Garth, C. J., in *Juggut Mohinee v. Dwarka Nath*, I.L.R., 8 Cal., 582 (590); but see *Dunia Lal v. Gopinath*, I.L.R., 22 Cal., 820; *Beni Madhab v. Jaikrishna*, 7 B.L.R., 152; *Yeshwada v. Ramchandra*, I.L.R., 18 Bom., 66 (81).

(3) *Juggut Mohinee v. Dwarka Nath*, I.L.R., 8 Cal., 582 (592).

(4) *Gungadhur v. Ajimuddin* I.L.R., 8 Cal. 960.

(5) *Ramsden v. Dyson*, L. R., 1 H. L., 129 (168).

(6) *Onkarappa v. Subaji*, I.L.R., 15 Bom., 71.

(7) *Yeshwadabai v. Ramchandra*, I L. R., 18 Bom. 66; but contra in *Nanaibai v. Rameshar*, I. L. R., 16 All., 328.

(8) *Dattabi v. Kalba*, I. L. R., 21 Bom., 749; *Mt. Bani v. Sheikh Jan Mahomed*, 3 B.

L. R., (A. C.), 18, *Nundo v. Banomali*, I. L. R., 29 Cal., 871; following *Cawdor v. Lewis*, 1 Y. & C., 427; *Wilmott v. Barber*, 15 Ch. D., 96; *Arunchellum v. Olagppah*, 4 M. H. C. R., 312; *Onkarappa v. Subaji*, I. L. R., 15 Bom., 71; *Dattarya v. Shridhar*, I.L.R., 17 Bom., 736; *Kunhamnad v. Narayamen*, I. L. R., 12 Mad., 320; and see notes ante, (9) *Shaik Husain v. Gowardandas*, I. L. R., 20 Bom., 1.

(10) *Muhammed v. Faziz Baksh*, I. L. R., 18 All., 361.

(11) S. 52 Indian Easements Act (V of 1882).

(12) *Ib.* S. 60 (b); The law in England is identical. So *Haughton, J.*, laid down in *Webb v. Paternoster*, 2 Roll. Rep., 143 (152) that a license executed is not countermandable cited per Lord Ellenborough, C., in *Winter v. Riocwell*, 8 East., 308 (310); *Plimmer v. Mayor, &c.*, *Wellington*, 9 App. Cas., 699 (714); *Nazir-ul-Zaman v. Azimullah*, 3 A. L. J. R., 765.

given and acquiring no right over the land, may still have the right to its possession as an incident of the buildings erected thereon to which he has a right if the licensor had only permitted their erection, and if the buildings erected are permanent. And as the licensee is not the lessee, there is nothing in his possession to indicate his subordinate tenure, and he may, therefore, conceivably acquire an indefeasible title to the land if the owner is not sufficiently vigilant to prevent the accrual of a right by adverse possession.⁽¹⁾ Of course, only a licensee executing a work of a permanent character is entitled to the legislative protection. What is a work of a permanent character is, however, a question of fact upon which no general observations are possible. A *katcha* thatched house may be a work of a permanent character, and the fact that the thatch has to be renewed from time to time does not make it otherwise.⁽²⁾

806. Where a party has raised a building upon the land of another, courts of equity have been loth to decree demolition after the building had been once finished, and for this reason unfinished buildings are, ordinarily, allowed to remain in *statu quo*. Indeed, where by so doing no harm need be apprehended the practice is to insist upon it, and so to avoid, as far as possible, placing the person who is raising the structure in a position to say afterwards on the basis of his own act, that circumstances have reached a stage in which on equitable considerations the demolition should not be insisted upon. But where the effect of stoppage of work would be materially detrimental to the interest of the party, as where the effect would be that the work cannot be proceeded with for some time, or where some other substantial injury would be the consequence, the parties may be placed upon terms, and the defendant will only be restrained if the plaintiff undertakes to indemnify him in the event of his failure to make good his title against him.⁽³⁾

Where a mortgagee not entitled to possession makes improvements, he is in no better position than the mortgagor himself who may choose to spend money on his own property.⁽⁴⁾ If in a decree for redemption the mortgagee is allowed compensation for improvement, and afterwards it appears that since the passing of the decree some part of the improvement assessed therein has either increased⁽⁵⁾ or ceased to exist,⁽⁶⁾ the party benefiting by it can claim a re-valuation. The party making improvements is entitled to compensation only in respect of such improvements as are in a reasonably good condition.⁽⁷⁾

807. What are Improvements : The term "improvements"⁽⁸⁾ has not been defined in the Act, but it is obviously used in its popular sense, as meaning ameliorations by making valuable additions and alterations which increase the value of property, or enhance its excellence. It is not necessary that the improvements should be confined to enhancing the value of the property without altering its character. For instance, an agricultural farm, might be converted into a suburban town, a house into a theatre, and, indeed, the rule allows the

(1) *Bhadder v. Khairuddin*, 3 A. L. J. R., 760.

(2) *Nasirul Zaman v. Azimullah*; 3 A.L. J. R., 765.

(3) *Chandra Nath v. Sree Gobind*, 6 C.W. N., 308, cf. *Cork Corporation v. Rooney*, 7 L.R. Ir., 191; *Daniel v. Fergusson* [1891], 2 Ch., 27; *Non Joel v. Hornsey* [1895], 2 Ch. 774; *Zohada Jan v. Muhammad*, I.L.R., 15 All., 8; *Baddam v. Dhanput Singh*, 1 C.W. N. 429.

(4) *Rangaya v. Parthasarathi*, I.L.R. 20 Mad., 120 (123).

(5) *Ramuni v. Sankar*, I.L.R., 10 Mad. 367.

(6) *Krishna v. Shrinivasa*, I. L. R., 20 Mad., 124 (126).

(7) *Gubbins v. Creed*, 2 Sch. Let., 225, approved in *Krishna v. Srinivasa*, I.L.R., 20 Mad. 124 (128).

(8) Cf. its definition, s. 688 ante.

transferee to use his own judgment unfettered by any rules and restrictions, since the transferee is presumed to incur the cost without any thought of reimbursement.

It will be noted that the transferee is not entitled to be repaid all out-of-pocket expenses, nor any enhanced value due to other causes. He is only entitled to the "value of improvements estimated and paid to himself" or charged on the property. Such estimate would, of course, take note of only the existing improvements which will have to be valued at the market rate as on the date of the claim, the transferrer being put upon his election either to pay that sum and take back his property, or sell out to the transferee his own interest therein for which a separate valuation will have to be made at its current market value.

808. Measure of Compensation.—It has been before remarked (§ 796) that the value of the improvements should not be calculated upon their capitalized value, or upon the basis of the return they are likely to fetch, but upon their fair market-value at the time of the surrender. The value must, however, be "estimated," that is, calculated upon some intelligible basis, taking into consideration the prime cost as well as the time, trouble or labour expended thereon. In short, a correct calculation involves solution of the question: "What was the value of the improvements at the time of the institution of the ejectment-suit?" In computing compensation a good deal must, necessarily, be left to conjecture. As their Lordships of the Privy Council observed: "It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Every one who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight, according to experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties, and on which there is little experience, there is more than ordinary room for guess work; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at."⁽¹⁾

809. In estimating the value of improvements made by the transferee regard must be had to their "value" to the person evicted and not to the person evicting him⁽²⁾. Such estimate would take account of the value both present and potential,⁽³⁾ the latter term being usually applied to the value for future purposes which must of necessity enter into all calculations of value. But the future purpose must be one, that will arise at no remote period, and is not a matter of speculation.⁽⁴⁾ Thus where lands were acquired in the island of Mombasa for a railway under the Indian Land Acquisition Act⁽⁵⁾ the Privy Council held the owners entitled to the market value at that date, including such speculative advance therein as had already taken place in consequence of the railway scheme, but excluding any speculative advance from the like cause. Both parties were excluded from "speculations on the effects which the railway may produce on prices, except to the extent to which it is shown that such speculations had actually entered into the market price of this sort of land" by the date of the declaration under

(1) *Secretary of State v. Charlesworth*, I. L.R., 26 Bom., 1 (21) P.C.

(2) *Baley v. Isle of Thanet Light Railways*, [1900] 1 Q.B. 722; 6 Halsbury's Laws of England, p. 38, s. 40.

(3) *R. v. Brown*, L.R., 2 Q.B., 630 (631);

Brown v. Commissioner for Railways, 15 App. Cas. 240; *In re Gough and the Aspatia & Co.. Water Board*, [1904] 1 K.B., 417.

(4) *R. v. Brown*, L.R., 2 Q.B., 630 (631).

(5) Act I of 1894.

s. 6 of the Act. (1) The question of future utility, must necessarily be somewhat conjectural, but it cannot be ignored; "for future utility is a thing that people have an eye to in buying land, and the market price of land is affected by it." (2) But such future utility must be estimated by prudent business calculations and not by a mere speculation and impractical imagination. (3)

Where transfers are not frequent to afford a reliable data for estimating the value of the improvements or the market value of property, valuation may be made by capitalising the rental or annual value. This will vary with the locality and demand for land, the prevailing rate of interest and the nature of the property, but all things considered, it varies from 15 to 25 years' purchase. (4)

§ 810. "Though the improvements apart from the *corpus* may not always be capable of valuation, their approximate value may be deduced by valuing the whole property as on the date of the claim, and deducting therefrom the value of the transferrer's interest. Such value must be "the market value," i.e., the price which a willing vendor might expect to obtain in the open market from a willing purchaser. The recognised modes of ascertaining this market value are: (i) if a part or parts of the land has or have been previously sold, such sales are taken as a fair basis upon which, making all proper allowances for situation, etc., value of that taken is determined: (ii) to ascertain the net annual income of the land, and to deduce its value by allowing a certain number of years' purchase of such income, according to the nature of the property; (iii) to find out the prices at which lands in the vicinity have been sold and purchased and making all due allowance for situation to deduce from such sales, the price which the land in question would probably fetch if offered for sale to the public (5). The market value is not to be estimated by the costs of what may have been done to preserve the land. It is not to be estimated by the money the owner may have spent in improving the land; for a man might spend a great deal of money on improvements, and yet the result might be that the market value was not increased to the amount which he had thought fit to spend. (6) Profit from the most advantageous disposition of land is one test for determining its market price. (7)

§ 811. Crops must be presumed to be grown by the transferee under an expectation, created or encouraged by the landlord that he shall be entitled to reap them. But if it is shown that he had no such expectation, he is not entitled to the usufruct. (8)

Where crops are standing, the decree cannot be subjected to the condition that the defendant should not be evicted till the crops he had shown were cut, but only that the defendant should be allowed free ingress and egress for the purpose of taking them. (9)

(1) *Secretary of State v. Charlesworth Pilling & Co.*, I.L.R., 26 B., 1, (29) (P.C.).

(2) *Rajendra Nath v. Secretary of State*, I. L.R., 32 C., 343 (348).

(3) *Ib.* p. 348.

(4) *Collector of Hooghly v. Rajkristo*, 22 W. R., 234, *Heysham v. Bholanath*, 11 B.L.R., 236; *Carey v. Banu Miya*, B.H.C.R., 34; *Secretary of State v. Shanmugaraya*, I.L.R., 16 Mad., 359 P.C.

(5) *In re Munji Khetsey*, I.L.R., 15 Bom., 279.

(6) *Collector of Hooghly v. Raj Kristo*, 22 W.R., 234; *Fink v. Secretary of State*, I. L. R. 34 Cal.; 599.

(7) *Fink v. Secretary of State*, I.L.R., 34 Cal., 599 (603, 604).

(8) *Land Mortgage Bank v. Vishnu*, I.L. R., 2 Bom., 670.

(9) *Deo Dat v. Ram Autar*, I.L.R., 8 All., 502.

812. This section does not override the provisions of the several Local Acts by which provision is made for compensating out-going tenants. Thus under the Malabar Compensation for Tenants Improvements Act, (1) special provisions are made for compensating tenants. (2)

Compensation under Local Acts.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding, so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property pending suit relating thereto.

813. Analogous Law.—This is the legislative exposition of the common law maxim *pendente lite nihil innovatur*, (3)—the principle of which had long been recognized in India, before the Act. (4) (§§ 142-146). The doctrine has always had a wider application here than in England, (5) where the doctrine has been considerably narrowed down by the Statute, (6) which provides that a *lis pendens* shall not bind a purchaser without express notice thereof, unless the transfer is made after the registration of the *lis pendens* and the registration to be binding must be repeated every five years. And the court before whom the litigation is pending may, if satisfied that the litigation is not prosecuted *bona fide* order the registration to be vacated. (7) There is nothing analogous to this in India where the doctrine applies generally in the form in which it existed prior to the passing of the Victorian Statutes. In both countries it applies only to immoveable property. (8) The Code of Civil Procedure 1853 tacitly recognized the rule in section 233 which provided as follows: "If the decree be for a house, land, or other immoveable property in the occupancy of a defendant or of some person on his behalf, or of some person claiming under a title created by the defendant subsequently to the institution of the suit, the Court shall order delivery thereof to be made by putting the party to whom the house, land, or other immoveable property may have been adjudged, or any person whom he may appoint, to receive delivery on his behalf, in possession thereof, and if need be, by removing any person who may refuse to vacate the same." The words expressive of the doctrine were excluded from the corresponding section, (9) of the later Codes probably because the principle is not one of procedure, but of equitable law, which finds a fitting place in the Act relating to the transfer of property.

(1) Mad., Act, I of 1887.

(2) S. 36.

(3) "During a litigation nothing new should be introduced." Co. Litt., 224b.

(4) *Kassim v. Unnodapershad*, 1 Hyde, 160; *Balaji v. Khusalji*, 11 B.H.C.R., 24; *Gulabchand v. Dhandi*, ib., 64; *Raoi t v. Krishnaji*, ib., 139; *Lakshmandas v. Dasrat*, I.L.R., 6 Bom., 168, F.B.; *Sam v. Apundi*, 6 M.H.C.R., 75; *Manual Prueal v. Sangpallai*, 7 M.H.C.R., 104; *Munisami v. Dakshina-*

murthi, I.L.R., 5 Mad., 371.

(5) *Kassim v. Unnodapershad*, 1 Hyde, 160.

(6) (1839), 2 & 3 Vic., C. 11, S. 7.

(7) 30 & 31 Vic., C 47 S. 2.

(8) See heading over S. 38 ante; *Govind v. Jijibai*; 14 Bom.L.R.9 (13); *Haji v. Sudharan*, 9 C.P.L.R., *Punithavelu v. Bhashyam*, I.L.R., 25 Mad. 406 (422); *Wigram v. Buckley* [1894], 3 Ch., 483.

(9) S. 263.

Lis pendens affecting procedure is dealt with in section 10 of the Code, which prohibits the same matter being agitated in different courts at the same time.

The private alienation of property after its attachment and during its continuance is declared void by the Code as against all claims enforceable under the attachment.⁽¹⁾ Moreover, the section itself has been held to be applicable to involuntary transfers, though it has not been enacted to apply to them.⁽²⁾

814. It has already been stated above that this doctrine is confined only to immoveable property. Both in England and this country

(1) **Change in the English Law.**

the principle was the same till the passing of the Victorian Statute of 1839,⁽³⁾ which has, as regards England considerably modified the previously existing law. This Statute was passed to relieve the hardship sometimes caused to innocent transferees, who may have *bona fide* purchased property without notice of the pending suit. By section 7 of the above Statute it is enacted that *lis pendens* will not affect purchasers or mortgagee without notice, unless it is registered and re-registered every five years. And by an amending Statute⁽⁴⁾ provision is made for the entry and issue of certificates of satisfaction or discharge of *lis pendens* on the filing of acknowledgment or order of Court for vacating registration in case the court is satisfied that litigation is not prosecuted *bona fide*. These registers are open to search by intending purchasers⁽⁵⁾ on payment of a small fee. In England then, the present law may be said to depend upon constructive notice, within the meaning assigned to the term by this Act (§§ 145, 146). In India, however, there is at present no provision for the registration of suits and the doctrine must be construed to apply in the same sense as it was understood in England prior to the passing of the Statute of 1839. Apart from this difference, the principle of the section is entirely borrowed from the English law, and it was always held to be applicable to both Hindus and Mahomedans.⁽⁶⁾ Under section 223 of the Code of 1859,⁽⁷⁾ however, it was held that an alienee *pendente lite* might under certain circumstances be reinstated in possession. In other words, an alienation of property *pendente lite* was considered *prima facie* fraudulent, but if the alienee could show that he was a *bona fide* purchaser for valuable consideration without notice, or that in any other way he had an equity superior to that of the plaintiff in the suit, he might recover the property from which he had been in the first instance summarily removed.⁽⁸⁾ In a later case,⁽⁹⁾ however, it was held that inasmuch as the rule "*pendente lite nihil innovatur*" does not rest upon the equitable doctrine as to notice, it is

(1) S. 276, Code of Civil Procedure, 1882; now S. 64, Civil Procedure Code 1908 (Act V of 1908).

(2) *Rajkishore v. Jadu Nath*, 11 C.W.N., 828; following *Rajkishore v. Radha*, 21 W.R., 349; *Radha v. Manohar*, I.L.R., 15 Cal., 756, P.O.; *Premchand v. Purnima*, ib., p. 546. *Mahomed Tayab v. Hemchandra*, 10 O.L.J. 590 (591); *Mahadeo v. Thakur Prasad*, 11 C.L.J. 528 (530); *Ram Dayal v. Ram Tanu*, 15 C.L.J. 197 (138); *Naba Krishna v. Mohit Kali*, 9 I.C. 840; *Tinoodhan v. Trailokya*, 18 I.O. 177; *Soban Lal v. Jeb Singh*, 16 O.C., 148.

(3) 2 & 3 Vict., C. 11.

(4) (1860), 23 & 24 Vict., C. 115, S. 2.

(5) By 45 & 46 Vict., C. 39, S. 2 (1882 A.D.).

(6) *Lakshmandas v. Dasrat*, I.L.R., 6 Bom., 168; *Gulabchand v. Dhondi*, 11 B.H.C.R., 4; *Ex parte Nilmadhuv*, 2 I.J.N.S. 162; *Krishnappa v. Bahiru*, 8 B.H.C.R. (A, C.), 55; *Sam v. Apdundi*, 6 M.H.C.R., 75. *Fruval v. Sangapalli*, 7 M.H.C.R. 104; *Kassim v. Unnodapersad*, 1 Hyde, 160; *Umamoyee v. Tarins*, 7 W.R., 225.

(7) Act VIII of 1859 (Civil Procedure Code).

(8) *Per Melville, J.*, in *Krishnappa v. Baharu*, 8 B.H.C.R., 55 (60).

(9) *Gulabchand v. Dhondi*, 11 B.H.C.R. 64. *Lakshman Das v. Dasrat*, I.L.R. 6 Bom., 168 (179); *Manual Fruval v. Sangpall*, 7 M.H.C.R. 104 (111).

a matter of indifference whether or not, at the time of his becoming grantee or vendee, the latter had actual notice of the existence of the suit (§ 144). And this view is now in accordance with the section.

815. Principle.—The principle of this section has been thus explained by Turner, L.J., in a leading English case: (1) "It is a doctrine common to the courts, both of law and equity, and rests, I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The plaintiff would be liable to be defeated in every case by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceedings." Story explains the same rule from another standpoint. "Every man," he says, "is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." (2) This doctrine of constructive notice has been, however, condemned by the Indian High Courts (3) (§ 144). There can be no doubt that the principle of *lis pendens* does not rest upon an implied or constructive notice of the proceedings of the law courts, but rather upon necessity—the necessity that neither party to the litigation should alienate the property in dispute so as to affect his opponent. (4) For, if during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass to a third party, unaffected by either the prior proceedings or the subsequent result of the litigation, then all transactions in our courts of justice would, as against men of ordinary forethought, prove mere idle ceremonies. The rule, no doubt, originated in the Roman law which provided, "*Rem de qua controversia prohibemur in ærum dedicare.*"

816. Meaning of Words.—"Active prosecution" means during the pendency for determination of the suit in a court of justice. No suit can be said to be actively prosecuted, which has not been instituted, although the claimant may have used efforts to bring about the suit. From the time of institution, up to its final settlement in execution, a suit must be regarded as being actively prosecuted. (5) The words refer to prosecution by the plaintiff, and defect of jurisdiction in the court does not bar the application of the doctrine. (6) "*Having authority*" means that the suit must be pending in a court of competent jurisdiction in British India, i.e., court must have jurisdiction to grant the relief claimed. The words are used in the same sense as in the Code of Civil Procedure,

(1) *Bellamy v. Sabine*, 1 DeG. & J., 566.

(2) *Eq. Juris.* (2nd Eng. Ed.) § 263.

(3) By Collins, C. J., & Wilkinson, J., in *Abboy v. Annamalai*, I.L.R., 12 Mad., 180; *Krishnappa v. Bahiru*, 8 B. H. C. R. (A. C.), 59; *Kailas Chandra v. Fulchand*, 8 B.L.R., 474.

(4) *Bellamy v. Sabine*, 1 De G. & J. 566; *Baldeo v. Baijnath*, I.L.R., 13 All., 371 (373); *Faiyaz Husain v. Prag Narain*, I. L. R., 29 All., 339 P.C.; *Ram Ratan v. Gokal*, 2 O. O. 330; *Munnalal v. Mohamad*, 6 O. C. 294;

Kailas v. Fulchand, 8 B.L.R. 474 (489); *Ram Kishen v. Deolichand*, 22 W.R. 547; *Gour Sunder v. Hem Chander*, I.L.R. 16 Cal. 355 (363); *Nalliaji v. Nana*, 9 Bom. L. R. 1173 (1177); *Sami Ayyan v. Ammai*, 6 M.H.C.R., 234 (238) *Setta Goundan v. Muthai*, I.L.R., 31 Mad. 268.

(5) *Kunhi Umar v. Amed*, I. L. R., 14 Mad., 491; *Venkatesh v. Maruti*, I. L. R., 12 Bom., 217.

(6) *Tangor v. Jaladhar* 5 I.C. 691 (692).

sections 12 and 13. A decree of a foreign court, as of the supreme court of Singapore, will not operate upon the land in British India⁽¹⁾ "*Established beyond the limits*," e.g., in Burmah. "*Contentious suit or proceeding*;" A suit is contentious if it is contested at the outset though it may not be subsequently, and may even then be compromised.⁽²⁾ It was at one time ruled that a suit becomes contentious only from the service of the summons upon the opposite party,⁽³⁾ unless he can be fixed with earlier notice of the suit.⁽⁴⁾ But this view is no longer tenable. It is the nature of the suit and not notice of it to the defendant that constitutes *lis pendens*.⁽⁵⁾ The words "contentious suit" are used as distinguished from a friendly suit instituted by agreement between parties. Every suit which is not such a friendly suit by its nature and origin, is a contentions suit. (6) "*Contentious*" only excludes such non-contentious proceedings as unopposed applications for probate.⁽⁷⁾ "*Proceeding*" as, e.g., execution proceeding. "*Immoveable property*." The doctrine of *lis pendens* applies only to cases where immoveable property is the subject-matter of the suit. Where moveable property is in dispute, a protecting order from court must be obtained under section 492 of the Code of Civil Procedure. And even in such a case, it would appear that subsequent alienations are not void,⁽⁸⁾ although the party alienating in spite of the injunction may be proceeded against for contempt.⁽⁹⁾ "*Directly and specifically in question*:" That is, the subject-matter must be clearly and pointedly in question. As Bennett in his work on *lis pendens* says: "It may be said in general that a *lis pendens* will be created where the property involved in suit is described either by such definite and technically legal description that its identity can be made out by the description alone, or where there is such a general description of its character, or status, and by such reference that upon enquiry the identity of the property involved in litigation can be ascertained." Therefore, a suit to enforce the general trust of a creditor deed, or a mere general administration-suit, or a suit for partition or maintenance,⁽¹⁰⁾ where a share in specific property is not claimed,⁽¹¹⁾ would not be *lis pendens* within the meaning of this rule. "*Suit or proceeding*." A suit is a proceeding which terminates in a decree, and a proceeding in execution under section 244 is a suit within the meaning of the Civil Procedure Code,⁽¹²⁾ and, therefore, of this section which is auxiliary thereto.

A "*proceeding*" must refer to a civil proceeding, for in a criminal proceeding, the courts are not empowered to determine the *rights* between parties, and Revenue courts are courts of only limited jurisdiction,⁽¹³⁾ although it is possible

(1) *Palani v. Subramanyan*, I. L. R., 19 Mad., 257.

(2) *Upendra Chandra v. Mohri Lal*, I.L.R., 31 Cal., 745; *Annamalai v. Appaya*, 16 M.L.J.R., 272, F.B.

(3) *Radhasyam v. Sibn*, I.L.R., 15 Cal., 647; *Abboy v. Annamalai*, I L.R., 12 Mad., 180; *Parsotam v. Sanchilal*, I L.R., 21 All., 408.

(4) *Karimunissa v. Nilratna*, I.L.R., 8 Cal., 85; *Abboy v. Annamalai*, I.L.R., 12 Mad., 180. See S. 3 under the heading "Notice." Cf. the definition of the term "contention" as defined in S. 253 A, Indian Succession Act (X of 1865) the explanation to which says: "By contention is understood the appearance of any one in person, or by his recognized agent or by a pleader duly appointed to act on his behalf to oppose the proceedings."

(5) *Faiyaz Husain v. Prag Narain*, I.L.

R., 29 All., 339 (345) P.C.; *Jogendra v. Ful-kumari*, I.L.R., 27 Cal. 77.

(6) *Padlak v. Chenagadamoo*, (1913) M.W. N. 672.

(7) *Annamalai v. Malayandi*, I.L.R., 29 Mad., 426 (430) *Dhiraji v. Dinanath*, 6 N.L.R. 140 (142).

(8) *The Delhi and London Bank v. Ram Narain*, I.L.R., 9 All., 497.

(9) S. 493, last paragraph of the Civil Procedure Code.

(10) *Manika v. Ellapa*, I.L.R., 19 Mad., 27.

(11) *Kailas Chandra v. Fulchand*, 8 B.L.R. 476.

(12) *Manjunath v. Venkatesh*, I.L.R., 6 Bom., 54; *Ram Kirpal v. Rup Kuari*, I.L.R. 6 All., 269.

(13) *Hurri Sunker v. Mukhtaram*, 15 B.L.R., 238, 24 W.R., 154.

under certain local Acts, for Revenue courts to wield such jurisdiction as is contemplated by the section.⁽¹⁾ Property which has not been actually claimed, but a suit in respect to which would be barred under section 43 of the Civil Procedure Code would not be subject to the rule.⁽²⁾ A suit after it is compromised by the party, although it is not recorded by the court, comes within the same category, since after compromise, the court was at one time held to perform no judicial function, but only an administrative one in recording the compromise,⁽³⁾ but this view, so far as regards Madras, has since been overruled.⁽⁴⁾ The presentation in court of an award is equivalent to the presentation of a plaint for the specific performance of the contract of mortgage, and the proceedings consequent thereon constitute *lis pendens*.⁽⁵⁾ "*Party to the suit*:" The rule affects only alienations made by one of the parties to the suit and not strangers or persons claiming by a title paramount to the parties to the suit.⁽⁶⁾ "*So as to affect the rights under any decree, &c.*," means that the transfer is not absolutely void, but only inoperative as against the parties to the suit affected by it.

"*Except under the authority of the Court*:" If a transfer is to be made free from defect, this clause authorizes the parties to apply to the Court before whom the suit or proceeding is pending, and any transfer made by permission of the court and in accordance with the terms imposed by it, will not then be subject to the rule.

817. Who cannot transfer.—The incapacity imposed by the rule is personal being restricted to the parties to the suit or proceeding. Not only actual parties but those *pro forma* added are subject to the rule. And not only the defendant but the plaintiff as well is bound by it. These are restrictions of questionable policy, but afford a salutary protection to the litigating parties.

The doctrine applies to all alienations whether made by a party to the suit, or by persons purchasing from those claiming under parties to the suit.⁽⁸⁾ A purchaser from a person in his own right is bound by a decree passed against his vendor in a representative character so as to affect the property.⁽⁹⁾

818. When *Lis Pendens* begins.—The doctrine begins to operate as soon as a suit has begun to be (i) actively prosecuted; (§§. 819-822). (ii) in a British Court; (§. 823). (iii) provided that the litigation is of a contentious character; (§§ 824-826) and (iv) the property is directly and specifically involved therein; (§. 827, 828). These may be regarded as the conditions precedent

(1) See *Gokul Sahu v. Jodu Nundan*, I. L.R., 17, Cal., 721; *Amar Singh v. Nasmali*, I.L.R., 9 All., 398; *Har Charan v. Har Shankar*, I.L.R., 18 All., 59; *Ahmad v. Bostan*, [1894], P.R. No. 118; *Rangayya v. Ratnam*, I.L.R., 20 Mad., 392; *Husain v. Gopal*, I. L.R., 2 All., 428; *Jagal Rai v. Makhna Kuar*, [1898], A.W.N., 246 (*lis pendens* applied to dispute going on in the Settlement Court).

(2) *Brahannayaki v. Krishna*, I. L. R., 9 Mad. 92.

(3) *Vythina-dayyan v. Subramanaya*, I.L.R., 12 Mad., at p. 442; following *Kailas Chunder v. Fulchand*, 8 B.L.R., 474 (489); *Jenkins v. Robinson*, 1 Scotch App., 117; see also *Kishory Mohun v. Mahomed*, I.L.R., 18 Cal., 188.

(4) *Annamalai v. Appaya*, 16 M.L.J.R.,

372, F.B.; following *London v. Morris*, 5 Sim., 247; *Windham v. Windham*, 22 E.R., 1103; *Re South American and Mexican Co.* [1895], 1 Ch. 37 (45, 46); *Naduroonissa v. Aghur Ali*, 7 W.R., 103; *Raj Kishen v. Radha Madhab*, 21 W.R. 349.

(5) *Pranjivan v. Bajju*, I. L. R., 4 Bom., 34.

(6) *Kailas Chandra v. Fulchand*, 8 B.L.R. 474; *Anundo Moyee v. Dhonendro*, 4 M.I.A. 101.

(7) *Tyler v. Thomas*, 25 Beav., 47; *Garth v. Ward*, 2 Atk., 174; *Griskel v. Durdin*, 2 Bal. & B., 170; *Motilal v. Katul-ul din*, I.L.R. 25 Cal., 179 P.C.

(8) *Kasim v. Unnoda*, 2 Hyde., 197.

(9) *Deno Nath v. Shama Bibi*, I.L.R., 26 Cal. 23 (26).

to the creation of the right, and it should be useful to enquire what is intended to be conveyed by them.

819. As regards the initial operation of the doctrine, it was at one time held that a suit must be regarded as becoming actively prosecuted as soon as the filing of the plaint is brought to the notice of the defendant. (1) Ordinarily, such knowledge was held to be brought home to the defendant with the service of summons, (2) but it was held to be by no means essential, for it might have been conveyed by any other means. (3) But these cases were always in conflict with the leading English precedent (4) which approached the doctrine from an altogether different standpoint, and which has since received the *imprimatur* of the Privy Council. (5) According to their Lordships, the doctrine has nothing to do with the question of notice or service of summons upon the defendant. If the suit is pending, it will be regarded as being actively prosecuted until it is stayed, withdrawn or finally disposed of. And therefore, any alienation made after the institution of the suit will be subject to the rule, if it answers its other requirements (6) (§ 144 :—"Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of section 52 of the Act of 1882, until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty." (7) It is thus settled that the prohibition here enacted takes effect with the first institution of the suit, whether in a right or wrong court since the words "active prosecution" refer only to prosecution by the plaintiff, and there are no words in the section making the rule dependent upon the jurisdiction of the Court. (8) So in a pauper suit, as soon as the plaintiff files his application for leave to sue in *forma pauperis*, there is the active prosecution of a contentious suit creating the bar of *lis pendens*. (9) Once the doctrine has begun to apply, no alienation prejudicial to the party in suit can be made pending the termination of the litigation, which is deemed to continue so long as the suit is pending in appeal or execution, since the proceedings in the appeal court and

(1) *Abboy v. Annamalai*, I.L.R., 12 Mad. 180; *Parsotam v. Sanchi Lal*, I.L.R., 21 All. 408; *Jogendra v. Fulkumari*, I.L.R., 27 Cal., 77; *Jogendra v. Ganendra*, 4 C.W.N., 254 (259).

(2) *Radhasam v. Maduni*, I.L.R., 15 Cal. 647; *Parsotam v. Sanchi Lal*, I.L.R., 21 All., 408.

(3) Cf. *Jogendra v. Ganendra*, 4 C.W.N., 254 (260).

(4) *Ballamy v. Sabine*, 1 De G. & J., 566; 44 E.R. 842.

(5) *Faiyaz Husain v. Prag Narain*, I.L.R., 29 All., 339, P.C., following *Ballamy v. Sabine*, 1 De G. & J., 566 (584); 44 E.R., 842 (849).

(6) *Faiyaz Husain v. Prag Narain*, I.L.R., 29 All., 339 (345) P.C., in which the alienation was made only two days after the institution of the suit (See *ib.* p. 344). This case then has the effect of overruling the following cases: *Kailas v. Fulchand*, 8 B.L.R., 474; *Radhasyam v. Siblu Panda*, I.L.R., 8 Cal., 647; *Jogendra v. Ganendra*, 4 C.W.N., 254 (259); *Krishna v. Dino Mony*,

I.L.R., 31 Cal., 658; *Abboy v. Annamalai*, I.L.R., 12 Mad., 180, *Parsotam v. Sanchi Lal*, I.L.R., 21 All., 408; *Chaturbhuj v. Lachmani*, I.L.R., 28 All. 196; *Ramchand v. Abdul* (1899) P.R. No. 32. On the other hand, the view of the Privy Council is in conformity with that taken in the following cases: *Jogendra v. Fulkumari*, I.L.R., 27 Cal., 77; *Krishnappa v. Shiwappa*, 9 Bom.L.R., 530. A summary of the English leading precedent following by the Privy Council will be found given on p. 83, footnote (4) *ante*. In this case it should however be noted, Turner, L.J., remarked: "The service of the *subpana* constitutes a *lis pendens* between the plaintiff and defendant." (*Bellamy v. Sabine*, 1 De G. & J., 566 (586); 44 E.R., 842 (850)).

(7) *Faiyaz Husain v. Prag Narain* I.L.R., 29 All., 339 (345), P.C.

(8) *Tangor v. Jaladhar*, 14 C.W.N., 322; I.C. 691 (692).

(9) *Ambikaprataap v. Dwarka*, I.L.R. 30 All., 95 (102).

execution, are merely a continuation of those in the suit.⁽¹⁾ But an alienation made after the decree, but before the appeal is filed, has been in one case held to be not opposed to this rule, as there was then no suit pending before any court, but Mitter, J., dissented and held that the purchaser was bound to wait until the term of appeal had expired.⁽²⁾ But although this view has not been followed in subsequent cases,⁽³⁾ having regard to the nature of the doctrine and the mischief it is intended to avert, it is difficult to hold that a purchaser is not bound to wait for the possibility of an appeal.⁽⁴⁾ For as the Calcutta court in one case said: "The proceedings of the appellate court were but a continuation of the proceedings in the suit, and although for a time there was a decree in favour of the present plaintiff's predecessor in title, yet that was a decree which was open to appeal, and the decree having been appealed against, we ought to take it that the decree of the appellate court was the decree in the suit and the sale at which the plaintiffs purchased having taken place pending the suit in which the decree was pronounced, we think the doctrine of *lis pendens* does apply to the case."⁽⁵⁾ The contrary view has no doubt found favour with certain judges in England who have regarded the question from the standpoint of notice, but even on this ground Lord Redesdale has laid down that since in all appeals it was still a question whether the suit was rightly dismissed, and the parties thus having notice, must take subject to all the legal and equitable consequences.⁽⁶⁾ So where the plaintiffs purchased a certain property after the decision but before the drawing up of the decree of the lower court which declared the seller's title to the property, and the decree was subsequently appealed against and reserved by the appellate court, it was held that the doctrine of *lis pendens* applied, as the plaintiffs purchased during the active prosecution of a suit within the meaning of the section, although no appeal was actually pending at the time when the purchase was made.⁽⁷⁾ In this case the decision turned upon the point that the "inevitable appeal" was delayed only because the decree had not been drawn up, and that, therefore, the purchase must be regarded as having been made during the "active prosecution" of the suit.⁽⁸⁾ A obtained a decree against B, and in execution thereof attached certain property; C objected under section 278 of the Code of Civil Procedure, 1882, but his objection was disallowed. He brought a regular suit, but it was dismissed. He then appealed against the decree, and during the pendency of the appeal the property was put to auction and purchased by D, who subsequently sold it to E. The appeal was declared in favour of C, who thereupon sued both D and E for the recovery of the property on the ground that the purchase by D being *pendente lite* did not affect his right, and it was so held by the Allahabad High Court.⁽⁹⁾ And since the decree-holder is as much bound by the rule as the judgment-debtor, he cannot, pending an appeal, grant a perpetual lease of the land decreed to him so as to bind his opponent in the event of the decree being reversed.⁽¹⁰⁾ The proceedings in execution taken

(1) *Govind v. Guru Churn*, I. L. R., 15 Cal., 91; *Gajapati v. Sri Gajapati*, I. L. R., 7 Mad., 56; *Sadsivayyar v. Mutlu Sabapathi*, I. L. R., 9 Mad., 106; *Lalit Koer v. Sobadra*, I. L. R. 3 Cal., 724.

(2) *Chunder Koomar v. Gopee*, 20 W. R., 204; *Danmal v. Daulat*, 1 C. P. L. R., 19.

(3) *Kishory Mohun v. Mahomed*, I. L. R., 18 Cal., 188; *Radhuca v. Radhamoni*, I. L. R., 7 Mad., 96.

(4) *Deno Nath v. Shama Bibee*, 4 C. W. N., 749.

(5) *Gobind v. Guru Churn*, I. L. R., 15 Cal., 94 (99); *Deno Nath v. Shama Bibee*, 4 C. W.

N., 840 (742); *Deno Nath v. Shama Bibee*, I. L. R., 28 Cal., 23 (26).

(6) *Sugd. V. & P.* (14th Ed.), 758.

(7) *Deno Nath v. Shama Bibee*, 4 C. W. N., 740; *Gobind v. Guru Churn*, I. L. R., 15 Cal., 94 (99).

(8) Cf. *Kaseemunnissa Bibee v. Nitratna Bose*, I. L. R., 8 Cal., 79 (85).

(9) *Sukdeo v. Jumna*, I. L. R., 23 All., 60.

(10) *Gajapati v. Gajapati*, I. L. R., Mad., 96; *Mathewson v. Gobardhan*, I. L. R., 28 Cal. 492 (497).

for the purpose of effecting a sale are in a sense proceedings in the suit against property, and all persons who purchase from the judgment-debtor pending those proceedings, come into the position of purchasers *pendente lite*.⁽¹⁾ But an execution long neglected ⁽²⁾ and finally struck off, may be presumed to have ceased to be operative, and in that case a judgment-creditor's title will only date from any subsequent attachment which he may obtain.⁽³⁾ In the case of a property not "directly and specifically in question" in suit, *lis pendens* would begin from the date of its attachment in execution made in the manner provided for by section 64, and o. 21; rules, 54 and 55 of the Code of Civil Procedure, which must be strictly adhered to.⁽⁴⁾ (§ 849).

820. The same considerations which extended the doctrine to appeals and executions, would appear to apply with equal force to the revival of a suit after its dismissal in default, or its withdrawal, provided that the restoration is applied for within a reasonable time. But where a fresh suit has become necessary on the dismissal of the former suit, the doctrine would then appear to be inapplicable. And so again, if the propriety of the decree is contested on review, which are proceedings of an extraordinary character, it cannot be contended that the doctrine should still continue to apply. Proceedings on review are not a continuation of the suit but partake of the character of a new and original suit. No doubt a new *lis pendens* would be created by the notice on review but it would not relate back to the original suit which must be considered to have ended with the decree. And so the Privy Council remarked: "It is clear that when a sale of land is made between the date of final judgment affecting the land and the date when the proceeding in error is commenced, to reverse that judgment, it is not subject to a *lis pendens*, and the purchaser will get a good title by the purchase, notwithstanding the circumstance that the judgment is afterwards reversed in the proceeding under the writ of error."⁽⁵⁾

821. From what has been said above, it is clear that in a suit on a mortgage in which a preliminary decree precedes the final decree, *lis pendens* continues till the decree absolute is made, and mortgagee or the auction-purchaser, as the case may be, is placed in possession.⁽⁶⁾ In a case of a simple mortgage, it is evident that the mere making of an order absolute for sale does not give the mortgagee satisfaction, for after that order the property must be sold, and till this is done, the mortgagor can dispose of the property so as to confer upon the alienee a title which could compete with that of the mortgagee. For if it were so, the mortgagor might at any moment thwart the mortgagee. So far as regards the simple mortgagee, the question appears then to be simple, but the same cannot be said of a suit on a mortgage by conditional sale. Here there can be no doubt but that *lis pendens* continues after the decree *nisi* and up to the passing of the decree absolute,⁽⁷⁾ and even up to the time the mortgagee is put in possession by an order made under o. 34 r. 3 of the Code of Civil Procedure. But if instead of the court placing the mortgagee in possession it orders that possession be recorded in a separate suit, is *lis pendens* to continue till

(1) *Bhuggobutty v. Shama Churn*, I. L. R., 1 Cal., at p. 341; *Shivairam v. Waman*, I. L. R., 22 Bom., 939.

(2) *Bhoje Mahadeo v. Gangabani*, 15 Bom., L. R., 809.

(3) *Puddomones v. Roy Muthooranath*, 12 B. L. R., 411, P. C.

(4) Ss. 274-276, Code of Civil Procedure, 1882 (Act XIV of 1882) *Dinendronath v. Ram Kumar*, I. L. R., 10 Cal., 107; *Gangadin v.*

Khusal, I. L. R. 7 All., 702.

(5) *Pierce v. Stnder*, 11 Moo. P. C., 364 (F. B.).

(6) *Chunmlal v. Abdul Ali*, I. L. R., 23 All., 331; *Parsotam v. Chhedda Lal*, I. L. R., 29 All., 76; *Lokenath v. Achutanand*, 2 I. C., 85 (87).

(7) *Parsotam v. Chhedda Lal*, I. L. R., 29 All., 76.

the other suit is disposed of? There appears to be no reason why it should, and indeed if it were so, one would never know when *lis pendens* would cease.

A person acquiring an interest in the mortgaged property *pendente lite* has, of course, no right to redeem it, and this is the only valuable right in respect of which the operation of the doctrine comes into play in a suit on mortgage.

822. The party relying upon this rule must not be guilty of laches in pursuing his remedy, otherwise this section will not avail him. Lord Lyndhurst says: "Without going so far as to say with Lord Bacon that there must be a constant and vigorous prosecution of the suit, still something must be done to keep it alive and in activity."⁽¹⁾ Hence where the decree-holder obtained a decree on certain houses on the 29th November, 1869, and failed to execute it for seven years, in the meantime the judgment-debtor mortgaged them in 1876, the Bombay High Court held that the mortgagee took unaffected by the decree-holder's equitable lien created by the decree.⁽²⁾

823. Again, the suit, must be pending "in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, from which it follows that the pendency of a suit in a foreign court does not create a bar to an alienation in British India. This clause, however, is not free from defect, for it takes no account of the final appeal before the Privy Council. The language of section 12 of the Code,⁽³⁾ is on this point more accurate. The reason of the rule which restricts the application of the doctrine only to suits pending in British Courts is obviously founded upon the fact that in foreign courts, not only the procedure but the remedy may be different and governed by different considerations and laws.⁽⁴⁾ Taken along with section 12 of the Code, the effect of the law is thus to prevent not only an alienation of, but any agitation regarding the same property when it is the subject-matter of any suit in a British Court in India.

The court, again, must not be wholly without authority, or jurisdiction, for a court wholly devoid of jurisdiction cannot pass a valid decree so as to affect any alienations made *pendente lite*. For this reason a *patni* lease of lands granted by a Hindu widow in possession, pending an equity suit brought against her husband's executors was upheld, the property being situate beyond the jurisdiction of the Supreme Court in which the suit was pending.⁽⁵⁾ So in an old case the Privy Council appear to have held that the Supreme Court at Calcutta could not pass a decree so as to affect land in the *mofussil* and in the possession of persons other than the parties to the suit.⁽⁶⁾ So a purchaser of property in respect of which a suit for foreclosure was pending in the Supreme Court was held to have been unaffected by the decree passed by that Court.⁽⁷⁾ But where a decree was passed on a compromise not properly sanctioned by the Court, against a minor not properly represented, and whereupon, he sued for its cancellation in the Court of a Munsiff who entertained it, but afterwards finding

(1) *Kinsman v. Kinsman*, 1 Russ., and M. 622.

(2) *Venkatesh v. Maruti*, I. L. R., 12 Bom., 127; distinguishing *Bazayet Hossein v. Dooki Chund*, I. L. R., 4 Cal., 409, P. O. *Narayan v. Krishnaji*, 11 B. H. C. R., 139 see also *Varden Seth v. Appundi*, 6 M. H. C. R., 75; *Annoda v. Chatterji*, 1 Hyde, 160

(3) Act XIV of 1872.

(4) *Cox v. Mitchell* 7 C. B. (N. S.), 55; *Mc-enry v. Lewis*, 21 Ch. D., 202, O.A., 22 Ch. D., 397.

(5) *Bissonath v. Radha*, 11 W. R., 554 (554).

(6) *Auundo Moyee v. Dhonendro*, 14 M. I. A., 102 (109); explained in *Gobind v. Guru Churn*, I. L. R., 12 Cal., 94 (97); *Venkatesh v. Maruti*, I. L. R., 12 Bom., 220.

(7) *Ibid.*

himself to possess no jurisdiction returned it for presentation to the court of a Subordinate Judge, in whose court the plaint was presented, after which the alienation complained of was made. The Subordinate Judge later on discovered that the Munsiff had jurisdiction to try the suit and so returned the plaint for re-presentation in his court, which was done; the suit being afterwards compromised, the plaintiff obtaining a decree and the question then arose whether the alienation made *pendente lite* was affected by this rule, and the court rightly held that the fact that the suit should have been filed in the lowest court of competent jurisdiction did not divest the superior courts of their pecuniary jurisdiction and that therefore while the suit was pending in the court of the Subordinate Judge he had jurisdiction to try it, though under section 15 of the Procedure Code, his was not the court of the lowest grade competent to try it. (1)

824. Thirdly, the suit or proceeding must be of a contentious character,

Suit must be contentious. which excludes collusive and covinous suits and proceedings to which the rule does not afford its protection. But the term "contentious suit at proceeding" has been the subject

of a variety of interpretations. (i) "A contentious suit," observed Maclean, C.J., "is a suit involving contention, and it is perhaps difficult to predicate of any suit at the moment of its inception, whether or not it is likely to be contentious; but if in point of fact, it turns out to be a suit which was contested, then to my mind, the suit is a contentious one and the section applies." (2) In other words, according to this view no suit is contentious, unless it is contested. And since this can only be ascertained when the defendant has entered his defence, it has even been held that no suit becomes contentious until the defendant has put in his written statement. (3) Where the right of a defendant to alien certain property is admitted, the mere institution of a suit against him would not, it is said, prevent him from alienating it, but if afterwards some more defendants are added who dispute that right, it would make the suit contentious as from the date the disputing defendants filed their statements. (4) The same idea seems to find expression in the view now no longer tenable (5) that there can be no *lis pendens* unless the defendant has been served, (6) or has at least notice that the plaint has been filed. (7) This view is not opposed to the cases decided in England (8) and America (9) though in the latter country there is the same want of unanimity, since there are cases in which the doctrine is held to take effect immediately on the institution of the suit, a view which may, so far as regards this country, be taken to be settled by the decision of the Privy Council. (10) And the same tribunal appears to have foreshadowed their view of what they understand by the expression contentious suit, for they say: "The mortgage of Mirza Muzaffar Beg was made during the pendency of Nawal Kishore's suit, which was in its origin and nature a contentious suit. . ." (11) It is then the origin and nature of a suit that determines its contentious or non-contentious character. The

(1) In *Tanger Majbi v. Jaladhar*, 14 C.W. N. 322.

(2) *Jogendra v. Fulkumari*, I. L. R., 27 Cal., 77 (84).

(3) *Krishna v. Dinomony*, I.L.R., 34 Cal., 658.

(4) *Krishna v. Dinomony*, I.L.R., 31 Cal., 658 (662).

(5) *Faisary Husain v. Prag Narain*, I. L. R., 29 All., 399 P.C.

(6) *Radhasham v. Shibu Panda*, I. L.R.,

15 Cal. 647; *Parsotam v. Sauchilal*, I.L.R., 21 All. 408.

(7) *Kailash v. Fulchand*, 8 B.L.R., 474; *Abboy v. Annamalai*, I.L.R., 12 Mad., 180.

(8) *Piggot v. Nower*, 3 Swan., 535.

(9) *Leitch v. Wells*, 48 N. Y., 611; *Dowson v. Mead*, 71 Wis., 295; *Roberts v. Jackson*, 1 Wend., 486.

(10) *Faiyaz Husain v. Prag Narain*, I.L. R., 29 All., 399, (344, 345), P.C.

(11) *Ib.* p. 345.

expression "contentious suit" must then be held to be used in contradistinction to a friendly or collusive suit in which there is no contest, and the parties bring the suit only to obtain the decree of a court declaring their rights as to which they are themselves in perfect agreement. (1) "I am clearly of opinion," remarked Beaman, J. "that from the moment a suit of any sort whatever except only collusive suits, is filed, it is potentially contentious. So called friendly suits, I think certainly are. For the purpose then of conditioning the rule of *lis pendens* I would say that the filing of any but a collusive suit is enough. (2) In India, it may be added, a suit is deemed to commence from the date of the filing of the plaint. (3) Similarly, the contentious jurisdiction here spoken of, is obviously, that, by invoking which a party having a difference with another puts the law in motion as against that other, in contradistinction to jurisdiction to be resorted to in matters which *ex hypothesi* admit of no opposition. It is sometimes said that, if a suit, though originally contentious, is subsequently compromised by the act of the parties, ceases to be contentious, and the court thenceforward performs no judicial function, but only an administrative one in recording the compromise. (4) But this view is obviously unsound and leads to a *reductio ad absurdum*. For it involves the proposition that there can be no *lis pendens* in a case culminating in a decree passed *ex parte*, or on confession, or as the result of the defendant abandoning a defence originally set up. The essence of the doctrine is that where a proceeding before a court exercising contentious jurisdiction is honestly brought to a termination in one of the modes which the law permits it to be determined by, and a decision of the court is obtained, such decision is binding upon all persons who claim title by virtue of a transfer pending the litigation and there is no reason therefore, for attaching greater efficacy to a decision arrived at after actual contest than to decisions arrived at otherwise. Moreover, it would be setting an embargo on all compromises if they were excluded from the salutary protection of the rule for no plaintiff would be willing to risk a compromise, if by so doing he would set the other party at liberty to place the property beyond his reach. (5) But there are cases in which this has not been conceded. Their view appears to be that in order that a suit may be contentious, it must continue to be so in all its stages till its final determination. So if, pending a suit for partition of immoveable property, a party to the suit sold a part of the property in question to a stranger who was not brought on the record and after the execution of the sale-deed, the parties to the suit entered into a compromise in accordance with which a consent-decree was passed, it was held that the purchaser was not bound by the decree passed by consent and that his suit for possession of the land could not be on that ground resisted. (6) So where a co-sharer instituted a suit against the other co-sharers for partition, admitting that a co-sharer defendant B had a share in the property, who, however, did not appear, and his right to a share was denied by the other contending defendants, and it was so held by the court. Before, however, the cosharers'

(1) *Krishnappa v. Shiwappa*, 9 Bom. L.R., 535 (539); *Jogendra v. Fulkumari*, 1 L.R., 27 Cal., 77 (92); *Poolak v. Chennagdam* (1918) M. W. N. 672; *Dhiraj v. Dyanath*, 6 N.L.R. 140 (142). The contrary held in *Ramechand v. Abdul* (1899) P.R. No. 32 (if no issues fixed, the suit is not contentious), is no longer tenable. *Brojo Kishore v. Mejan Biswas*, 19 C.W.N. 138; *Tangore v. Jaladhar*, 14 C.W.N. 322; 5 I.C. 691; *Tinoodhan v. Trailokhya*, 7 C.W.N. 413.

(2) *Krishnappa v. Shiwappa*, I.L.R. 31 Bom. 393.

(3) *Srinivasamorthy v. Venkatah*, I.L.R., 29 Mad., 239. (255).

(4) *Vythnadayyan v. Subramanaya*, I.L.R., 12 Mad., 439; overruled in *Annamalai v. Malayandi*, I.L.R., 39 Mad., 426, F.B.

(5) *Annamalai v. Malayandi*, I.L.R., 29 Mad., 326 F.B.; overruling *contra* in *Vythnadayyan v. Subramanaya*, I.L.R., 12 Mad., 439.

(6) *Kailas v. Fulechand*, 8 B.L.R., 474, (489); *Jenkins v. Robinson*, L.R., 1 So. A. 117; cf. *Krishna v. Dinomony*, I.L.R., 31 Cal., 658 (662).

denial and the decree of the court, *B*'s share was brought to sale in execution of a money-decree against him, and the purchaser being put in possession unsuccessfully applied to be made, a party to the partition-proceedings, and eventually sued the co-sharers for possession, who assailed his suit on the ground of *lis pendens*, but the court held that inasmuch as the share had passed to the plaintiff before the right of *B* to the share was denied, that doctrine was inapplicable, and that inasmuch as the plaintiff was not permitted to become a party to the partition-suit, he could not be prejudiced by the result of that suit. ⁽¹⁾

825. But where the plaint itself indicates that the suit would be contentious, the case was said to be otherwise. ⁽²⁾ So it was held that a suit brought for the purpose of recovering moneys due on mortgage-bonds by sale of the immoveable properties mortgaged therein would not be contentious, "if no question as to the right to those properties is involved and the defendant does not appear to contest the claim." ⁽³⁾ In such a case, then, if the mortgagor executes another mortgage during the pendency of the suit, the puisne mortgagee would not be bound by the result of that suit or the sale that may take place consequent thereupon, so as to affect his right of redemption. ⁽⁴⁾ But this view was regarded in Bombay as the outcome of this section, and in cases decided independently of it, the court laid down the contrary. ⁽⁵⁾ And there appears to be nothing in the section to support it, and the recent view of the Privy Council is clearly opposed to it. ⁽⁶⁾ In the case before that high tribunal the facts were similar. A certain village was mortgaged to *A* who instituted a suit thereon. Two days after the institution of this suit the mortgagor executed another mortgage in favour of *B*. *A* obtained a decree for sale and in execution, himself purchased the property. He was resisted by *B* who had been previously put in possession in execution of his own mortgage, and the Privy Council held that *B*'s mortgage was affected by *A*'s *lis* and that he had not even the right to redeem *A*'s mortgage after the decree absolute in his favour. ⁽⁶⁾ It may then be taken as settled that a contentious suit would comprise any suit in which a party having difference with another puts the law in motion as against the other, and as such, a suit on foot of mortgage whether for foreclosure, sale ⁽⁷⁾ or redemption ⁽⁸⁾ would be a contentious suit. But it has been held that a partition suit in which the rights of the parties are not disputed, but has for its object only an alteration in the mode of their enjoyment is not a contentious suit, so that an alienation made by a party pending such suit would be unaffected by the rule. (§§ 827, 832—833). But the case would be otherwise if in the suit the shares of the parties and their rights thereto are disputed. ⁽⁹⁾

826. Before a suit becomes contentious, the plaint must be filed and made a permanent record, with the *bona fide* intention of prosecuting it. If the plaint is merely deposited with the clerk, it is not instituted, and no suit can be deemed to be pending unless it is presented and proceeded with as required by law. But in order

(1) *Krishna v. Dinomony*, I.L.R., 31 Cal., 658.

(2) *Jogendra Chander v. Fulkumari*, I.L.R., 27 Cal., 77; explained in *Krishna v. Dinomony*, I.L.R., 31 Cal., 658 (662).

(3) *Upendra Chandra v. Mohri Lal*, I.L.R., 31 Cal., 745.

(4) *Upendra Chandra v. Mohri Lal*, I.L.R., 31 Cal., 745 (753); *Fataya Husain v. Prag Narain*, I.L.R., 29 All., 389 (346), P.O.

(5) *Shivjiram v. Waman*, I.L.R., 22 Bom.

939; *Samal v. Babaji*, I.L.R., 31 Cal., 361; *Lope v. Varve* (1898) B.P.J., 39; *Rachappa v. Mangesh* (1898), B.P.J., 386.

(6) *Faiyaz Husain v. Prag Narain*, I.L.R. 29 All., 389 (346), P.O.

(7) *Durga Prasad v. Madho*, 8 O.L.J., 158 (156); *Tinoodhan v. Trailokya*, 18 I.C. 177.

(8) *Zabid Ali v. Rudra Singh*, 5 I.C. 800 (801).

(9) *Tatachand v. Bachmun*, 18 I.C., 492.

to make a suit contentious, it is not necessary that the defendant should have disclosed his defence, for if this were the case, the very object of the rule would be frustrated if the defendant could evade service, and transfer his property in the meantime. (1) So, the mere filing of a petition for leave to sue *in forma pauperis* marks the commencement of contention for the purpose of the rule, and it is not necessary that the application should have been granted. (2) (§ 819.) If the original suit did not involve the property, but pending the suit an amendment is filed alleging new matter, and involving property not before in litigation, the *lis pendens* created by the amendment will then commence from the filing of the amended pleadings, and will not relate back to the commencement of the action, so as to affect intervening rights. So, where the claim was set upon a ground, and that ground becoming untenable, the plaint was allowed to be amended to disclose another equity, upon which the suit prevailed, a purchaser preceding the amendment was held not to be bound by the decree. (3) Where an award properly made directs that certain property be sold to the plaintiff in satisfaction of his debt, and it is filed in court, its presentation in court is equivalent to the presentation of the plaint for the specific performance of the contract to which the award gives rise, and proceedings consequent thereon would constitute a *lis pendens*, during which a holder of a mere money-decree could not by any proceeding which he might take, defeat the object of the plaintiff's application to file his award. (4) So where the plaintiff sued the defendant for the specific performance of his contract of sale of land, and the parties then compromised the suit whereby the defendant became liable to refund the earnest money within three months, failing which he agreed to execute a conveyance, it was held that the auction-purchaser of the property after the institution of the plaintiff's suit was bound by *lis pendens* and that the plaintiff's conveyance had therefore priority over the auction-purchaser. (5)

827. Alienation of What Property Prohibited.—Fourthly, in

Property must be specifically in suit.

order to affect an alienation made *pendente lite*, it is further essential that the property must be directly and specifically involved in the suit. In one sense, the defendant's whole property is more or less in every suit, involved in the sense that the decree would have to be ultimately satisfied out of it, but this is by no means sufficient to put a stop to all alienations of his property. The doctrine affects only such property as is directly and specifically in contest, or is the subject-matter of the suit. This provision of law is made in view of the object which the doctrine has in view, namely, to prevent the acquisition *pendente lite* of an interest in the *subject-matter* of the suit, to the prejudice of the plaintiff. Thus, where a suit is on a debt, trespass, or for damages of any kind, the claim is limited to a money demand, and does not specifically affect any particular property of the defendant for at least only a decree can be passed against the defendant, which may have to be satisfied out of his property generally or from him personally. (6) If the rule was pushed to the extreme of an application to actions *in personam*, whether arising *ex contractu*, or *ex delicto*, defendants would have to submit to any exactions which claimants, upon unfounded and unjust claims, might make against them, or quit doing business altogether. And

(1) Bennett's *Lis Pendens*, 168, 109; *Chaturbhuj v. Lachman Singh*, I. L. R., 28 All., 196.

(2) *Ambika Pratap v. Dwarka Prasad*, I. L. R., 30 All., 95 (102).

(3) *Hukum Chand's Res Judicata*, 696.

(4) *Franjivan v. Bajju*, I. L. R., 4 Bom.,

34; *Sorabji v. Ishvardas* (1892), B. P. J., 5.

(5) *Maung Ta v. Maung Po*, 8 I. C., 1208 (1209); *Baghumal v. Pat Ram*, (1908), P. L. R., No. 52.

(6) *Matil Lal Pat v. Prem Lal Mitra*, 13 C.W.N., 226.

it is conceivable that by suits and counter-suits, there would be a practical prohibition against dealing with the parties pending the litigation, thereby creating a greater mischief than any benefit which the doctrine could have possibly conferred upon the parties. And so, in one case the court remarked : " No case has gone so far, as it would be very inconvenient if where money is secured upon an estate, and there is a question depending in this court upon the right of, or about that money, but no question relating to the estate upon which it is secured, that a purchaser of the estate pending the suit, should be affected with notice by such implication as the law creates by the pendency of a suit." (1) Eliminating, then, from consideration all personal actions, the doctrine must be limited to apply only to suits in which the relief sought includes the recovery of possession or the enforcement of a lien, or the cancellation or creation of muniment of title, possession of, or right of possession over a specific property. Thus, if a person sues to set aside a transfer as fraudulent, or for declaration that certain property is liable to attachment in execution of the plaintiff's decree, or that he has some specific claim over the property, in all such cases there is scope for the application of the rule. So again, if a suit is brought for specific performance of the contract of sale (2) or for pre-emption (3) or to set aside alienations made by a widow, (4) or for a partition of the family property in which there was a dispute as to shares, the doctrine was held to be equally applicable. (5) But a partition-suit in which the rights and shares of the parties are not disputed would appear to stand on a different footing, (6) for such a suit could hardly be regarded as contentious. (7) (§§ 818, 824). The primary object for which the suit is brought is not material, provided the court has to adjudicate upon the property for secondary purposes. Thus if a specific property is sought to be charged for maintenance, the defendant cannot, pending the suit, alienate the property, but unless some specific property is mentioned, the doctrine will not apply. (8) Of course, a charge could only be asked for in cases in which the personal law of the claimant entitles him to it. The example of a Hindu widow furnishes an apt illustration of where a charge may be claimed. (9) Therefore a suit in which a widow claims to get her maintenance made a charge on the immoveable property in the hands of the heir is one in which a right to the immoveable property is directly and specifically in question, and a mortgagee who takes a mortgage of the property during the pendency of the litigation takes it subject to the rights of the widow if she succeeds in the suit. (10) But a mere prayer to the effect that all the real and personal property of the defendant be set apart to her for her support and maintenance is too general to designate any property so as to make it the subject-matter of the litigation. The transferrer pending such a suit has no reason to anticipate that the decree would affect

(1) *Worsley v. The Earl of Scarborough*, Atk., 392.

(2) *Moti Lal v. Prem Lal*, 19 O.W.N. 226; *Turner v. Wright*, 4 Beav. 40.

(3) *Ghasitay v. Gobind Das*, 5 A.L.J. 477; *Distinguishing Manpal v. Sahib Ram*, I.L.R., 27 All., 544.

(4) *Ex-parte Nilmadhub*, 2 I. J. (N. S.) 169.

(5) *Jogendra v. Fulkumari*, I. L. R., 27 Cal., 77.

(6) *Khan Ali v. Pestonji*, 1 O.W.N., 62; explained in *Jogendra v. Fulkumari*, I. L. R., 27 Cal., 77 (84).

(7) *Khan Ali v. Pestonji*, 1 O.W.N., 62; explained per Maclean, C.J., and Banerjee, J., in *Jogendra v. Fulkumari*, I.L.R., 27 Cal.,

77 (84, 92); *Vythindayyan v. Subramanya* I. L. R. 12 Mad., 439; *Narain v. Abdu Majid*, 15 C P L R. 1 (8).

(8) *Manika v. Ellappa*, I.L.R., 19 Mad., 271; *Dosethimanna v. Krishna*, I. L. R., 29 Mad., 508 (510); *Sunhdial v. Mt. Ramditti*, (1874) P.R. No. 91; in which the property sought to be charged was specified, see *id.* p. 508, and with reference to which the judgment should be read.

(9) See e.g., S. 39 and Comm.

(10) *Bazayet Hossein v. Dooli Chund*, I. L. R., 4 Cal., 402 (409, 410) P. C.; *Yasin Khan v. Mhd. Yar Khan*, I. L. R., 19 All., 504, *Dosethimanna v. Krishna*, I. L. R., 29 Mad. 508 (510).

the property he was alienating.⁽¹⁾ The decree which may be obtained in such a case may constitute a charge on certain property, but it cannot constitute *lis pendens*. So in divorce and desertion cases where alimony is claimed but not sought to be charged upon certain property specifically designated, the rule creates no disability as regards alienation, since the property is then only incidentally involved in the suit. A suit to establish a will would appear to constitute,⁽²⁾ but caveat proceedings do not constitute a *lis pendens*.⁽³⁾

828. It is of the essence of the rule that in order to obtain protection of the rule the property must be "directly and specifically in question." Property may be directly without being specifically in question. For this purpose, the property must be described in the pleadings with sufficient accuracy, that is, it must be described by such definite and technically legal description alone, as there must be such a general description of its character or status that upon enquiry the identity of the property can be ascertained.⁽⁴⁾ If therefore the property is misdescribed by a wrong name or number so that its identity becomes a matter of doubt, then the rule would be inapplicable.⁽⁵⁾ In a suit for specific performance of the contract of sale or lease, the property to be sold or leased is both directly and specifically in question, so that any alienation of it during the pendency of the suit would be subject to the rule.⁽⁶⁾

829. To What Suits is the Doctrine Inapplicable.—Again, the doctrine is inapplicable to a suit for accounts. Thus in a case, a decree for an account was passed in 1855 against an executor who died in 1856, whereupon the suit was continued against his representatives who were ordered to pay a certain sum into court. The representatives having failed to pay the amount, the Court ordered execution against their property which was sold to A in 1877. It appeared that the representatives had already soon after the death of the executor mortgaged the property thus sold "for the purpose of paying the Government revenue of certain taluqs" belonging to the deceased executor. The mortgagee sued and obtained a decree on his mortgage, in execution of which the property was knocked down to B, who then sued A for possession, on the strength of his purchase but was met with the plea of *lis pendens*. The Court, however, held that the nature of the suit in which the decree and sale were made, precluded application of the doctrine. In so deciding, the Court observed that there was nothing in the decree for money to lead B to anticipate that the particular property he was taking in mortgage would be sold.⁽⁷⁾

On a similar principle, a petition for winding up a company does not constitute a *lis pendens* against the contributories for unpaid calls, on the ground that possibly real estate of the company in the hands of the contributories may be affected. Of course, in such a case, it is quite possible for the official or *ad interim* liquidator to sue the contributory in respect of the property claimed against him and to attach it, if need be, to prevent the possibility of a colourable alienation.⁽⁸⁾ The case is similar to a suit against a partnership, where the whole accounts of the partnership are to be taken, and a decree is passed against

(1) *Kaseemunnissa v. Nilratna*, I.L.R. 8 Cal., 79 (86).

(2) *Garth v. Ward*, 2 Atk., 174.

(3) *Salter v. Salter*, [1896] P. 291.

(4) *Loke Nath v. Achutananda*, 2 I.O. 85; *Haji Sayed Naimuddin v. Sidkaran*, 9 O.P. L.R., 22 (26).

(5) *Ib.* p. 87.

(6) *Munni Begum v. Dooli Chand*, 2 I.C. 266 (268).

(7) *Kaseemunnissa v. Nilratna*, I.L.R., 8 Cal., 79 (86); followed in *Chunder Nath v. Nilkant*, *ib.*, 690 (699).

(8) *In re Barnard's Banking Co.*, I.L.R. 2 Ch., 171 (176).

a defendant, which, if unsatisfied, may be enforced against his property, but a mere partnership-suit could not in equity tie up the hands of all partners as regards the alienation of their own property. (1)

830. The same rule holds good as regards administration-suits, in which to affect debtors to the estate separate suits would have to be instituted. But, even in an administration-suit if a particular estate is charged with a particular trust, *lis pendens* may be created. (2) But in such a case a person to be touched by the rule must be impleaded in the suit. Where debts are charged by a testator upon his immoveable property, an administration-suit by a creditor will be a *lis pendens*. Even were they not so charged but are sufficiently specified, the suit is still subject to the rule, but in either case subject to the exception that the transfer cannot be impeached if the transferee had reason to believe that it was made to pay off the testator's debts. (3) So it has been held by the Privy Council that when the estate of a deceased person is under administration by the court or out of court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration; the right of the residuary legatee or heir being only to share the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. As between the appellant and respondent, who were rival mortgagees of the property of a Muhammadan family, the Judicial Committee upheld the title of the appellant, who represented a purchaser at sales by the Receiver of the High Court in a suit for administration of the estate of one of the mortgagors, as entitled to priority over that of the respondent, who claimed through a purchaser in execution of the mortgage-deed at sales which took place pending the administration-suit, in one case after the order for sale by the court and in another after the actual sale by the Receiver in that suit. The shares of all the heirs to the mortgagor's estate were, pending the suit for administration, purchased at private sales by the appellant in the name of, and were transferred to, a benamidar, who was made a party defendant in the appellant's mortgage-suit and a party plaintiff in the administration-suit. It was held that the appellant being, in execution of decree in the mortgage-suit, alone represented in each side of the record could not rely on the sales effected in such circumstances in support of his title or derive any advantage therefrom, it being moreover held without deciding whether such transfers could be avoided under this or the next section in a properly constituted suit, that the appellant must be treated as the transferee for value of the entire equity of redemption, and that the respondent, therefore, had not made out any title to redeem the appellant's mortgage, notwithstanding the subsequent sales in his mortgage-suit under which he claimed. (4)

831. Now, since a creditor's suit against the estate of a deceased person is treated as an administration-suit, (5) it follows that the same principle should govern such suits also. But the

Money suit.

(1) *Per Turner, L.J.*, in *re Barned's Banking Co.*, L.R., 2 Ch., 171 (176); following *Benkinsopp v. Benkinsopp*, 1 De M. & G. 495.

(2) *Walker v. Flamstead*, 2 Keno. Pt. 2, 57; cited *per Kay, J.*, in *Price v. Price*, 35 Ch. 297 (302).

(3) *Price v. Price*, 35 Ch. D., 297 (304); *Walker v. Flamstead*, 2 Keny., Pt. 2, 57;

Neeves v. Burragee, 14 Q.B., 504; *Bery v. Gibsons*, L.R., 8 Ch., 747. Cf. *Chatterput v. Mahara*: I.L.R., 32 Cal., 198, P.C.

(4) *Chatterput v. Mahara*, I.L.R., 32 Cal., 198 (217, 218), P.C.

(5) *Bai Mesharbai v. Mayan Chand*, I.L.R., 29 Bom. 96.

purchaser is not bound to see to the application of the purchase-money.⁽¹⁾ And while it is generally true that the creditor of a deceased person cannot follow his estate in the hands of a *bona fide* purchaser for value, to whom it has been alienated by the heir-at-law whether the alienation has been by absolute sale or by mortgage, still where the alienation has been made during the pendency of a suit by claimants, *e.g.*, Muhammadan widows, suing for possession of the estate, and for the dower which they claimed to be paid out of the estate, an *alienee pendente lite* could not take in derogation of their rights, and was held to be bound by the decree.⁽²⁾ So in another case where a Muhammadan widow claimed her dower without specifying the property out of which it was to be recovered, and a decree was passed which could only be executed against the assets of the husband which had been mortgaged *pendente lite*, it was held that the widow's decree had priority over the mortgagee's decree passed on the basis of his mortgage.⁽³⁾ In such cases the actual notice or knowledge of the suit is deemed to be immaterial. ⁽⁴⁾

832. Partition Suits.—The words "transferred or otherwise dealt with" are sufficiently wide to embrace a case of a partition *pendente lite* prejudicing the rights of a litigant. So where the defendants in a suit for redemption had effected a partition allotting the subject-matter of the suit to one of them who died during the pendency of the suit, and whereupon the fact was intimated to the Court by the plaintiff, but the Court proceeded with the suit holding that the other defendants sufficiently represented their deceased co-mortgagee, which in view of the partition they could not, and the plaintiff having obtained a decree for redemption, and being obstructed in obtaining possession by the legal representative of the deceased co-mortgagee, sued him in ejectment: it was held that the partition effected *pendente lite* could not affect the suit, and that the defendant could not successfully defend his possession on the mere ground of his misjoinder in the redemption suit by the result of which he was bound. ⁽⁵⁾

833. It has been held by a Bench of the Calcutta High Court that the doctrine is inapplicable to a suit for partition in which neither the shares nor the rights of the parties to them is in dispute. In that case, the plaintiff purchased a third share in an undivided estate and sued his two other co-sharers for a partition. He also applied for an injunction but before it was issued, the two co-sharer defendants leased out a plot of joint land to the defendant for seven years who was placed in possession. The plaintiff sued for avoiding the lease as made *pendente lite* but his suit was dismissed on the ground that the mode in which the lands should be allotted between the ascertained sharers did not affect the right to any property specifically, and that the shares being ascertained shares the only office the court had to perform, was to divide the property which belonged to them all, in such plots of land as were most convenient for the enjoyment of each. ⁽⁶⁾ This case was sought to be distinguished in two later cases—in the one case on the ground

(1) *Kinderley v. Jervis*, 22 Beav., 1; *Halmer's Devisees' case*, 2 De M. & G., 366 (872); *Price v. Price*, 35 Ch.D., 297 (305); *Edgar v. Plomley* [1900], A.C., 431.

(2) *Bazayet Hossein v. Dooli Chand*, I.L.R. 4 Cal., 402, P.O.

(3) *Yasin Khan v. Muhammad*, I.L.R., 19 All., 505; following *Bazayet Hossein v. Dooli Chand*, I.L.R., 4 Cal., 402, P.O., in which, however, possession of the property

was also claimed. See this case commented on in *Maung Ta v. Maung*, P.O. 8 I.O. 1208 (1909).

(4) *Digamburee v. Eshan Chunder*, 15 W. R., 372.

(5) *Ishwar Lingo v. Dattu Gopal*, I. L. R., 37 Bom., 427.

(6) *Shaik Khan Ali v. Pestonji*, 1. C.W.N. 62.

that the partition suit there was before the Civil Court ⁽¹⁾ and in the second case on the grounds that there was no dispute about the shares. ⁽²⁾ It appears that the question whether an alienation made during the pendency of a partition suit is invalid under this section mainly depends upon the nature of the property and the claim involved and while in a suit where the dispute relates merely to the *quantum* of interest say, in a zemindari or Malguzari village, any alienation of a portion of the land whether by way of lease, mortgage or sale could not be without reference to the scope and nature of the suit, and the property sought to be partitioned condemned as invalid; on the other hand, where the property alienated was specifically mentioned and made the bone of contention, then there can be no doubt but that the alienation would necessarily be subject to the result of the suit. ⁽³⁾ (§ 825, 827.)

834. What Transfers Allowed.—The question how far transfers are prohibited by the rule is one which cannot be answered without reference to the nature of the suit and the extent of the right therein involved and sought to be protected by the doctrine which, as remarked before, applies only to alienations which are inconsistent with the rights which may be established by the decree in the suit. ⁽⁴⁾ If, therefore, the right involved in the suit is a right paramount to that of the parties, it cannot clash with the interest transferred, and the transfer cannot then be impeached merely on the ground that it was made *pendente lite*. Therefore a purchaser of property sold for default in payment of rent under the Madras Rent Act, ⁽⁵⁾ is not affected by a suit pending between the *pattadar* and his mortgage, for as the tenancy of an ordinary *pattadar* only confers on him a right of occupancy until default in payment of rent and the determination of the tenancy under the provisions of the Rent Act, any incumbrance created by such *pattadar* on the land cannot affect the landlord's statutory power of sale under the Act or the rights of the purchaser at such sale. ⁽⁶⁾ So again, it has been laid down in an English case that the right of the landholder to sell and get paid his rent is not inconsistent with the right of the mortgagor or mortgagee, as both take subject to payment of the rent and to the legal incidents attached by law for non-payment of the rent. ⁽⁷⁾ A decree-holder, who has obtained possession of land in suit pending an appeal, cannot grant a perpetual lease thereof which will be binding on his opponent in the event of the decree being reversed. ⁽⁸⁾ (§ 820). But the grant of yearly leases and the performance of such other acts as are either the necessary or the ordinary and reasonable incidents of an *interim* beneficial enjoyment would be unobjectionable. ⁽⁹⁾ No judgment-debtor can grant a lease to a stranger during the pendency of an attachment, but the lessee being a representative of the judgment-debtor a declaration as to the invalidity of the lease must be sought for under section 244 of the Code, and not by a separate suit. ⁽¹⁰⁾ A lease for agricultural purposes before a transfer of property

(1) *Joy Sankari v. Bharat Chandra*, I.L.R. R., 26 Cal., 434 (440).

(2) *Jogendra v. Fulkumari*, I.L.R. 27 Cal., 77 (84, 85).

(3) In *Tarachand v. Bachnun Singh*, 18 I.C., 492, the assignment of a mortgage-deed by a defendant suing the pendency of a partition suit was set aside as void under this section probably because the mortgage deed was specifically mentioned as a subject-matter of partition.

(4) *Munisami v. Dakshanamurthi*, I.L.R., 5 Mad., 371.

(5) Mad., Act VIII of 1865.

(6) *Munisami v. Dakshanamurthi*, I.L.R., 5 Mad., 371.

(7) *Moore v. McNamara*, 3 B. & B., 187.

(8) *Gajapati v. Gajapati*, I. L. R., 7 Mad., 93; *Thakur Prasad v. Gaya Sahu*, I. L. R., 20 All., 349.

(9) *Radhika v. Radhamani*, I. L. R., 7 Mad., 96 (99).

(10) *Mathewson v. Gobardhan*, I. L. R., 28 Cal., 492 (474); following *Madhadas v. Ramji*, I. L. R., 16 All., 286; *Lalji v. Nand Kishore*, I. L. R., 19 All., 392; *Gur Prasad v. Ramlal*, I. L. R., 21 All., 20; *Ishan Chunder v. Beni Madhub*, I. L. R., 24 Cal., 64, F.B.

is within the purview of the section, and a person taking such a lease labours under the same disability.⁽¹⁾

835. A right acquired before the commencement of the suit is not affected by the rule, and a person, may, failing his purchase fall back upon his mortgage in satisfaction of which the invalid sale took place. Thus where the proprietor of certain immovable property mortgaged it in 1875 to *A*, and in September of the same year to *B* and then sold it to *A* in October 1878, in lieu of his mortgage, when *B*'s suit on his mortgage was pending, *B* brought the property to sale in execution of his mortgage-decree, but he was resisted by *A* on the strength of his sale *pendente lite*. And the court held that, though *A* could not support his claim on the title acquired during the pendency of *B*'s suit, still contest the invalidity of his purchase, did not extinguish his right as a mortgagee, and that, as such, his suit could not fail.⁽²⁾ So again where an interest has arisen before the suit, there is nothing against its being confirmed after the suit. So a purchase made before the institution of the suit may be registered *pendente lite*.⁽³⁾ So Lord Selbourne, L. C., speaking of the rule said : " There is, nothing more familiar than the doctrine of equity that a man, who has *bona fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it ; though during the interval between the payment and getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself."⁽⁴⁾ A certain property subject to pre-emption was sold to *A*. After the sale, two persons claiming the right of pre-emption separately sued to enforce their rights. During the pendency of those suits, another person *B* having a right of pre-emption superior to the two former pre-emptors, also sued for pre-emption. His claim was admitted by *A*, who also executed a registered sale deed in his favour whereupon *B* allowed his suit to be dismissed in default, and applied to be, and was made a defendant in the two former suits. The plaintiffs in these suits now attacked *B*'s sale deed as made *pendente lite*. But the court overruled their contention holding that *B* having had apart from the sale deed and before institution of the two suits the right of pre-emption, his taking of the sale deed *pendente lite* could not annihilate his pre-existing right upon which he could rely independently of his sale deed, that the doctrine of *lis pendens* forbade the creation of new rights over property already the subject of suit *pendente lite* which are calculated to injure the rights of the claimant. It does not, and could not apply to the assertion of rights which existed prior to the institution of the pending suit.⁽⁵⁾

836. Involuntary Transfers.—In this connection, another question arises, whether the section is wide enough to embrace a case of an involuntary alienation, as in execution of a decree. Reading this section along with section 2(d) it would appear to be evident that *prima facie* the section does not extend to a transfer by operation of law or by, or in execution of a decree or order of a court of competent jurisdiction. On the other hand, if the doctrine applied to involuntary,

(1) *Narain v. Abdul Majid*, 15 C. P. L. R., 6 ; *Dhiraj v. Dina Nath*, 6 N. L. R., 140 (143, 144) ; *Devi Prasad v. Baldeo*, I. L. R., 18 All., 123 ; *Thakur Prosad v. Gaya*, I. L. R., 20 All., 349 ; (351) *Gaskell v. Durdin*, B. & B., 167 ; explained in *Moore v. McNamara*, 2 B. & B., 186 (187).

(2) *Lachmin v. Koteswar*, I. L. R., 2 All., 826.

(3) *Bapuji v. Icharam* [1877], B. B. J., 51.

(4) *Blickwood v. London Chartered Bank of Australia*, L. R., 5 I. C., 92 (1119).

(5) *Mahmud Khan v. Khuda Baksh* (1908) P. R. No. 26 ; *Pendente lite nihil innovetur* " During the litigation nothing (new) should be introduced."

transfers, there can be no doubt but that an easy means would be within a party's power to circumvent the rule, as by suffering to pass a consent or collusive decree and thus effect the desired transfer circuitously what he could not be permitted to do directly. It was at one time held (1) that the doctrine was confined only to voluntary transfers and did not affect those made by or under the direction of the court. In support of this view reliance was placed on a precedent determined by the Privy Council in which the character of the two species of transfer was contrasted. (2). But this view if ever taken has been since abandoned by the same tribunal as untenable, and the doctrine has by the consensus of the courts been held to apply equally to all involuntary sales. (3) Thus where a person purchased at an auction held under sections 13 and 54 of the Revenue Sale Law, the share of an estate sold for non-payment of the arrears of assessment, and at the time of such purchase a suit to enforce an existing mortgage on the property was pending, it was held that the auction-purchaser took the property subject to the decree subsequently passed : and in execution of which the mortgagee was competent to bring the property to sale, but that the sale made to the auction-purchaser was so far valid as it was not inconsistent with the rights of the mortgagee in that suit, and that therefore he was competent to redeem the mortgage, but only, of course, before the confirmation of the sale held in execution of the mortgage-decree. In other words, in such a case the purchaser acquires no more than the equity of redemption of the mortgagor and no right inconsistent with those of the litigating parties during the pendency of whose suit the transfer was effected. (4)

837. A purchaser of mortgaged property pending a suit on the mortgage would according to the principle of *lis pendens* take subject to such decree as may be made in that suit, and subject also to the execution of the decree. A purchaser at a sale in execution of such decree would therefore acquire a better title than the purchaser *pendente lite*. (5) Where in a suit the decree awards a plaintiff possession of mortgaged property until the mortgage is paid off, a subsequent purchaser of the property cannot resist the plaintiff's right to possession the property being protected from alienation from the date of the institution of the suit. (6) And so in a suit on a mortgage by conditional sale, since *lis*

(1) *Gourmoney v. Reid*, 2 Tay & B. 83 (121); *Anand Moyi v. Dhurundro*, 14 M.I.A. 101; *Naffar Mirdha v. Ramlal*, 15 W. R., 309; *Chunder Nath v. Nilakant*, I. L. R., 8 Cal., 690; *Kristo v. Kaliprosano*, ib., 402 (412); *Ali Shah v. Husain*, I.L.R. 1 All., 588 (590); *Lalu v. Kashibai*, I. L. R., 10 Bom., 400 (405).

(2) *Ananda Mayi v. Dharendro*, 1 W. R., 103, O.A., 14 M.I.A. 101; see also *Dinendronath v. Ramcoomar*, I.L.R., 7 Cal., 107 (111), P.O. which is to the same effect, but which was cited by Birdwood, J., in support of his view in *Lalu v. Kashibai*, I. L. R., 10 Bom., 400 (405).

(3) *Robin Khanum v. Wise*, 23 W. R., 329; *Gobind Chunder v. Guru Churn*, I. L. R., 15 Cal., 94; *Radha v. Monohur*, ib., 756, P.O.; *Motial v. Karabuldin*, I.L.R., 25 Cal., 179, P.C.; *Har Shankar v. Shew Gobind*, I. L.R., 26 Cal., 966; *Dinonath v. Shama Bibi*, I.L.R. 28 Cal., 28; *Kadir v. Muthukrishna*,

12 M.L.J.R., 368; *Ravji v. Krishnaji*, 11 B. H.C.R. 139; *Byramji v. Chunilal*, I.L.R., 27 Bom., 266 (270); *Shivjiram v. Waman*, I.L.R., 22 Bom., 939; *Pranjivan v. Raju*, I. L.R., 4 Bom., 34; *Parvati v. Kisan Singh*, I.L.R., 6 Bom. L. R., 567; *Pandurang v. Sakharchand*, 8 Bom. L. R., 861 (868); *Kunhi v. Ahmed*, I. L. R., 14 Mad., 491; *Vythinadayyan v. Subramanaya*, I.L.R., 12 Mad., 439; *Sukdeo v. Jamna*, I. L. R., 23 All., 60 (162).

(4) *Har Sankar v. Sheo Gobind*, I. L. R., 26 Cal., 996.

(5) *Ganesh Bhat v. Chinmujirav* (1874), B. P.J., 189; *Shtvajiram v. Waman*, I. L. R. 22 Bom., 939; *Samal v. Babaji*, I. L. R., 28 Bom., 361; but see *contra* in *Upendra Chandra v. Mohr Lal*, I. L. R., 31 Cal., 745; *Kamala v. Abul Barkat*, I. L. R. 29 Cal. 180.

(6) *Tookaram v. Gopala* (Bom., Unrep., No. 50 of 1872).

pendens does not terminate with the decree *nisi* under section 86, it follows that no valid alienation can be made till the decree is made absolute. (1)

838. A purchaser in a sale for arrears of income-tax of the interest of a defaulter's representative is affected by the rule. Where, therefore, a mortgagee brought his suit to enforce the mortgage as against the mortgagor, and pending the suit, the latter died leaving five persons as his legal representatives but only one of them was brought on the record as his legal representative and a decree was obtained against him. In the meantime the interest of one of the representatives not so brought on the record was sold by the Collector for arrears of income-tax. The mortgage-decree being unsatisfied, was executed, and the plaintiff became the purchaser; it was *inter alia* held that the purchaser in the revenue sale was affected by the doctrine of *lis pendens*. (2)

A sale made by the court in execution of its decree is not voidable on the ground of *lis pendens* because the decree has been appealed from and finally reversed, for at the stage of the proceedings where the sale was made, the decree was a valid decree and the court had authority at law to sell the judgment-debtor's property in execution of that decree. (3) Indeed, the doctrine has no application when the *lis pendens* in the very suit in which the order for sale is passed. (4)

839. An adoption *pendente lite* is not to be regarded in the same light as an alienation *pendente lite*. If a legitimate son had been born to C during the suit, such son, to be bound by a pending suit affecting his father's ancestral property, must have been made a party, and a son adopted during a suit is in the same position. The one at his birth and the other at his adoption would take a vested interest in his father's property according to Hindu law. The circumstance that C might have adopted the plaintiff for the purpose of endeavouring to defeat the *bakshish patra*, did not alter the case. As a sonless Hindu, he had a right to adopt a son and he was not under any obligation to anyone not to adopt; and even if he had so contracted, it may be a question whether such a contract could affect the validity of the adoption. (5)

840. The fact that the purchaser holds under a registered instrument does not confer on him any right of priority, and a purchaser under a decree for sale would take unaffected by the registered conveyance executed *pendente lite*, although such purchaser may be plaintiff in the suit. (6)

841. Lis pendens creates no lien.—*Lis pendens* does not create any lien or equitable incumbrance on the property so as to bar other suits respecting it. As observed by Holloway, J. : "The doctrine of *lis pendens* is, simply, that parties bound by the litigation cannot alter the object of it, so as to withdraw it from the decree made in the suit. It by no means implies that, upon the instant

(1) *Shivlal v. Shambuprasad*, I. L. R., 29 Bom., 434 (447) F. B.; *Parsotam v. Chidatalal* I. L. R., 29 All., 76.

(2) *Kadir v. Muthukrishna*, 12 M. L. J. R., 368.

(3) *Indurjeet v. Mt. Pootee*, 19 W. R., 197; *Zamuladdin v. Mhd. Asghar*, I. L. R., 10 All., 166 P. C.; *Shivlal v. Shambuprasad*, I. L. R., 29 Bom., 435 (447) F. B.

(4) *Parsotam v. Chedda Lal*, 3 A. L. J. R.,

675.

(5) *Ram Bhat v. Lakshman*, I. L. R., 5 Bom., 630 (635).

(6) *Nirunjan Rai v. Rujjoo Rai*, 5 N. W. P. (All.), 166; *Bhagwan Dasi v. Nathu Singh*, 4 A. W. N., 158; *Lachmi Narain v. Koteswar*, T. L. R., 2 All., 826; *Gulabchand v. Dhondai*, 11 B. H. C. R., 64; *Pranjivan v. Baju*, I. L. R., 4 Bom., 34.

of the question being raised, the parties are compelled to quiescence until its determination. So far is this from being the case, that, unless the question involved in the litigation will, when decided in a particular manner, render a title insecure, *lis pendens* is not even an answer to a bill for specific performance."⁽¹⁾ If two out of three owners transfer the property *pendente lite* the effect is the same.⁽²⁾ Prior attachment of a house in execution of a money-decree will not avail against the claim of a Hindu widow to charge it for her maintenance, although the latter suit may be instituted after attachment.⁽³⁾

842 Two properties *A* and *B*, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit and having obtained a decree, caused property *A* to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage-debt. Before such sale, however, *X* had, in execution of a simple money-decree, acquired a share in property *A*. *X* accordingly sued for contribution from property *B*, in that so far as his share in property *A* went, he had satisfied the mortgage-debt, and ultimately obtained a decree in his favour; but, during the pendency of that litigation, property *B* had been transferred to *Y*: it was held that *Y* must take the property subject to *X*'s right to contribution from it in respect of the loss of his share in property *A*.⁽⁴⁾ If the transfer take place, *pendente lite*, the transferee must take his interest subject to the incidence of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.⁽⁵⁾ But persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties.⁽⁶⁾

843. Position of Alienee pendente lite.—An alienee *pendente lite* cannot be allowed to plead that he is not bound by the terms of the decree as he was not a party thereto.⁽⁷⁾ And he cannot therefore be allowed to re-open the questions already decided in the suit, nor can he sue for the establishment of his title. Such a suit would be *res judicata* against the purchaser, who being the representative in interest of the vendor would be likewise affected by the decision, although he may have been no party to it.⁽⁸⁾ As a matter of fact he is not a necessary party to the suit⁽⁹⁾ even in a case where the plaintiffs knows of his transfer:⁽¹⁰⁾ "Otherwise," as Grant, M. R., remarked, "suit would be indeterminable or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined."⁽¹¹⁾ But

(1) *Bull v. Hutchins*, 32 Beav., 615.

(2) *Kunhi v. Ahmed*, I. L. R., 14 Mad., 491.

(3) *Parwati v. Kisan Singh*, I. L. R., 6 Bom., 567; see *ante*.

(4) *Baldeo v. Baij Nath*, I. L. R., 13 All., 371.

(5) Lord Hobhouse in *Umes Chunder v. Zahur Fatima*, I. L. R., 18 Cal., at p. 178, P. C.

(6) *Ibid.*, p. 179.

(7) *Denonath v. Shamabibi*, I. L. R., 28 Cal., 23; *Kaseemunnissa v. Nilratna*, I. L. R., 8 Cal., 79; *Kishory Mohun v. Mahammad*, I. L. R., 8 Cal., 188; *Radha Madhab v. Monohar*, I. L. R., 15 Cal., 756 F. B.; *Ishan Chunder v. Beni Madhub*, I. L. R., 24 Cal., 62; *Gulsari*

Lal v. Madho Ram, I. L. R., 26 All., 447 (463) F. B.

(8) *Denonath v. Shamabibi*, I. L. R., 28 Cal., 23 (26); *Kaseemunnissa v. Nilratna*, I. L. R., 8 Cal., 79 (85); *Kailas Chandra v. Kulchand*, 8 B. L. R., 494; *Zahid Ali v. Rudra Singh*, 5 I. C. 800 (801); *Shyama Charan v. Mokshoda*, 13 C. L. J. 451 (454); following *Azenudin v. Srish Chunder*, 11 C. W. N. 76.

(9) *Gulab Chand v. Dhondai*, I. L. R., 11 Bom., 64.

(10) *Dammatt Singh v. Naziruddin*, (1889), A. W. N., 91; distinguishing *Gajadhar v. Mulchand*, I. L. R., 10 All., 520.

(11) *Bishop of Winchester v. Paine*, 11 Ves., 194 (197, 198).

where the interest in the suit is assigned under order 22, rule 10 of the Code, the assignee would then, ordinarily, be substituted for the plaintiff. (1)

844. In Bombay, in cases decided before the Act, it appears to have been the usual practice to implead all persons whose interest might in any way be affected including even assignees *pendente lite*. (4) But the trend of modern decisions, both English and Indian, is opposed to the rule, (9) and indeed if the contrary were the rule, it is conceivable how the object of the suit may be easily defeated by the defendant making alienations *pendente lite* and thereby ever creating the necessity for introducing new parties. Of course, if the consequential relief prayed for, requires something to be done by the assignee, it is open to the plaintiff or the court to join him, but it is not his privilege but the plaintiff's right which he need exercise only in special cases.

845. A transferee *pendente lite* is so far bound by the decree passed against his transferor that he is not permitted even to show an obvious error in the total of the extent of the property decreed in the suit. (4) Nor can he wipe off the effects of the decree by being permitted to show that his purchase was known to the plaintiff suing his vendor and that he suffered him to complete his purchase. (5) But at the same time, the doctrine has to be applied with great caution in this country because there is much danger of secret collusion, (6) and a doctrine calculated to suppress fraud should not be used to perpetuate it. (7)

846. Effect of Attachment.—From the wording of the section it is clear that property attached, whether before or after the decision of a suit, is not to be regarded as “directly and specifically in question,” nor is any right thereto the subject-matter of adjudication in the suit. But the alienation of such property is prohibited by the Code of Civil Procedure (3) which also prescribes the limits within which the prohibition operates. An attachment, it has been held over again, does not confer any lien on the property. It only prevents its alienations, (9) not only so far as it is in defeasance of the attaching creditor's claim but also according to Telang, J., of other claims coming in for rateable distribution. (10) But as regards the other claimants the view taken in Bombay has been controverted in several cases. (11) An attachment once duly made does not cease to subsist merely because another attachment was subsequently applied for and granted, unless the decree-holder had waived or abandoned it. The law on

(1) O. 22, r., 10, Civil Procedure Code, 1908 (Act V of 1908) S. 372, Civil Procedure Code (Act XIV of 1882). *The Arbuthnot Industrials v. Muthu Chettiar*, 4 M.L.T. 190.

(2) *Lakmidas v. The Advocate-General*, 8 B. H. C. R., 96; *Ashabai v. Limji*, Bom. unrep., No. 877 of 1870; cited and followed in *Aimadbhoy v. Vuleebhoy*, I.L.R., 8 Bom., 323 (336); following *Kino v. Rudkin*, 6 Ch. D., 160; *Campbell v. Holy land*, 1 Ch. D., 166 (which are said to establish the practice in favour of admitting assignees *pendente lite* as parties to the suit, but the English law is different, see Robbin's Mortgage (631). Cf. S. 372. Code of Civil Procedure.

(3) *Golab Chand v. Dhondi*, 11 B.H.C. R., 64; *Manual v. Sanagapalli*, 7 M.H.C. R., 105; *Umamoyi v. Tarini*, 7 W.R., 225; *Umeshchunder v. Zahur Fatima*, I.L.R., 18 Cal., 164 (178), P.C.; *Motilal v. Karrabuldin*, I.L.R., 29 Cal., 179, P.C.; Robb. Mort. 631, 632, 724.

(4) *Hukm Singh v. Zanki Lal*, I.L.R., 6 All., 506 (509); *Tabid Ali v. Rudra Singh*, 5

I.C. 800 (801).

(5) *Laudon v. Morris*, 5 Sim. 247.

(6) *Tarakant v. Puddomoney*, 10 M.I.A., 476 (488).

(7) *McArthur v. Kelsall*, 1 Tay & B., 148 (167).

(8) S. 64, (S. 276, Civil Procedure Code, 1882).

(9) *Sarkies v. Bandho*, 1 N.W.P.H.C.R., 172 (184); *Soobul v. Russick Lal*, I.L.R., 15 Cal., 202; *Moti Lal v. Karrabuldin*, I.L.R., 25 Cal., 179, P.C.; *Peacock v. Madan Gopal*, I.L.R., 29 Cal., 428, F.B.; *Herumbo v. Satish Chandra*, I.L.R., 33 Cal., 1175; *Kristnasawmy v. Official Assignee*, I.L.R., 26 Mad., 673; *Jitmal v. Ramchand*, 7 Bom. L.R., 489; *Anantharazu v. Narayanarasu*, 2 M.W.N. 531; *Gopinath v. Guruprasad*, 15 I. C. 860 (861).

(10) *Sorabji v. Govind*, I.L.R., 16 Bom., 91.

(11) *Durga Churn v. Monmohini*, I.L.R., 10 Cal., 771; *Ganga Din v. Khusali*, I.L.R., 7 All., 702; *Manohar v. Ram Autar*, I.L.R., 25 All., 431 (434).

the subject has been thus recapitulated by the Privy Council: "Generally, when the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not wish to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that, in India, the striking an execution proceeding off the file, is an act which may admit of different interpretations according to the circumstances under which it is done, and their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative unless the circumstances are otherwise explained." (1) The true object of attachment is to place the property in the custody of the court so as to make it available for the realization of the fruits of the decree. If the attachment is dissolved, the property is no more in the custody of the court and an alienation made thereafter confers a valid title which cannot be prejudiced if the attachment is revived. (2) A party submitting to a re-attachment erroneously ordered by the court is presumed to have abandoned the prior attachment, (3) unless the re-attachment had been applied for by way of caution, it being mentioned in the petition that the property had been already attached and might be re-attached if necessary." (4) In the case of the abandonment of an attachment an alienation made while it subsisted would not, it would seem, be void, because in accordance with section 64 of the Code, an alienation made during the continuance of the attachment is only void "as against all claims enforceable under the attachment." So that it may be contended that unless there are claims enforceable under an attachment, no alienation made during its subsistence is void—a position which it is conceivable might occasion grave injustice. But if the term "enforceable" be understood to imply a claim which was capable of being enforced or could have been enforced under the attachment, the alienation made during its continuance would be void, though the claim was in fact enforced in the subsequent attachment. (5) In any view, the alienation is only void as against the claim enforceable or enforced under the attachment. It is neither void absolutely, nor even against the attaching creditor's other claims. Where, therefore the private alienation in no way interferes with the rights secured by his decree to the attaching creditor, it is not void. (6) If, therefore, the decree is satisfied, the attachment ceases to be operative, (7) and the alienation becomes valid.

847. The attachment does not end with the dismissal of the execution, unless the dismissal had the effect of terminating the execution-proceedings. (8)

(1) *Puddomonee v. Roy Muthooranath*, 12 B. L. R., 411, P. C., *Gobinda v. Dwarka Nath*, 1 L. R., 38 Cal., 666; *Peary Lal v. Chandi*, 11 C.W.N., 163.

(2) *Patringa v. Madhawanand*, 14 C.L.J. 477 (479); *Juggat Narain v. Toolsee Ram*, 10 W.R. 99.

(3) *Matonginy v. Chowdhry*, 25 W.R. 513.

(4) *Mohamed Sha v. Srinivasulu*, 13 M.L.J. R., 221.

(5) Cf., per Telang, J., in *Sorabji v. Govind* 1 L.R., 16 Bom., 91 (100).

(6) *Abdul Rahid v. Gappo Lall*, 1 L.R., 29 All. 421; *Kamal v. Saturain* 2 A.L.J. 265 (267); *Kushal Chand v. Nand Ram*, 13

Bom. L.R. 977 (987).

(7) O.21, r. 55 Civil Procedure Code 1908; *Vibudhapriya v. Yusuf*, 8 I.L.R. 25 Mad. 380 (385); *Umesh Chandra v. Raj Bullub*, 1 L.R. 8 Cal. 278. An attachment wrongly continued to secure payment of instalments other than those for which it was made would be invalid, *Ramadhan v. Kaylash*, 12 W.R. 457. Alienation good if consented to by the attaching creditor. *Fakir Sahu v. Ganesh Prashad* (1886) A.W.N. 176, *Dhurrumdas v. Mussourie Bank*, 6 N. W. P. H. C. R., 296 (300).

(8) *Chumun Lall v. Domun Lall*, 9 W.R. 205; *Binda v. Gopseanath*, 14 B. L. R. 328.

Certain it is, that no such result ensues when the proceedings are struck off by the court of its own motion and without notice to the parties, on any legal ground whatever. (1) So, if the case has been struck off to enable the judgment-debtor to pay up, the attachment remains if that had been the intention. (2) Indeed no general rule can be laid down as to the effect of striking an execution case off the file, (3) for the question depends upon the intention of the decree-holder and of the court as expressed in the order. But an execution arbitrarily struck off has not the effect of terminating the attachment, (4) *a fortiori* if the same execution is afterwards restored. (5) Where a sale held in execution of a decree is set aside under section 310-A by payment to the decree-holder who brought the property to sale, the attachment made at the instance of the other decree-holders is not thereby cancelled. (6) If property is improperly released from attachment, the right to which is subsequently established in a suit brought for the purpose, the decree so passed has the effect of setting aside the order of release, and restore the attachment as if it had continued undisturbed by the order, (7) so that an alienation made in the meantime would be *pendente lite*. (8) In this respect the rule may be regarded as of a piece with that which makes an alienation *pendente lite* subject to the result of the appeal (§ 819—820). It has been held in Calcutta that an order for sale of a judgment-debtor's goods made to enforce execution of a decree, whatever its shape, and whether preceded by actual attachment or not, has the effect of binding the debtor's property as against any alienation which the debtor himself may make after its date. "The proceedings in execution taken for the purpose of effecting a sale are in a sense proceedings in the suit against property, and all persons who purchase from the judgment-debtor pending these proceedings, come into the position of purchasers *pendente lite*." (9) There can be no doubt that in England the disability commences from the date of the *teste*, which, under the old practice, might have been a date long antecedent to the actual issue. (10) But at the same time the section here enacted has clearly enunciated a different rule and the Code of Civil Procedure does not encourage the artificiality of the English practice.

848. An alienation made pending a temporary injunction under the

Alienation pending injunction.

Code (11) is not void, the only result of such an alienation being that the party disobeying the order is guilty of contempt and may be proceeded against as directed in section 493

of the Code. (12)

849. Alienation before and after Attachment.—An alienation made in anticipation of attachment is good, if made *bona fide*, and for consideration, otherwise it may be exposed to the attack of a fraudulent transfer

(1) *Jhata v. Ram Churn*, 11 W. R., 517.; *Gom v. Sham Soondures*, 12 W. R., 142.; *Baroda Sundari v. Ferguson*, 11 C.L.R. 17; *Biswa v. Binanda*, I.L.R., 10 Cal., 416; *Mookhesur v. Ramphul*, I.L.R., 5 All., 70; *Ram Kripal v. Rup Kuari*, I.L.R., 6 All., 269 (275), P. C.

(2) *Mungul v. Girija*, I. L. R., 8 Cal., 51, P.C.

(3) *Bhagwan v. Khettra Moni*, 1 C. W. N., 617.

(4) Cf. *Muhesh v. Krishanund*, 9 M. I. A., 328 (341); *Surdharee v. Girindur*, 1 C.L.R., 475.

(5) *Zohurun v. Tayler*, 2 B. L. R., 86; *Biswa v. Binanda*, I. L. R., 10 Cal., 416.

(6) *Mahomed Sha v. Srinivasulu*, 13 M. L. J. R., 231.

(7) *Wooma Churn v. Kadambini*, 3 C.L. R., 146; *Mohamed v. Pitamber*, 21 W. R., 435; *Bonomali v. Prsanna*, I. L. R., 23 Cal. 829.

(8) *Dinendranath v. Ramkumar*, I.L.R., 7 Cal., 107, P. C.

(9) *Buggobutty v. Shamachurn*, I. L. R., 1 Cal., 337 (341).

(10) See *per* Phear, J., in *Bhuggobutty v. Shamachurn*, I.L.R., 1 Cal., 337 (342, 343).

(11) S. 492.

(12) *Delhi and London Bank v. Ram Narain*, I. L. R., 9 All., 497; *Manohar v. Ram Autar*, I.L.R., 25 All., 481.

within the meaning of the next section. (1) And hence it follows that the rule would not prevent a person, who has purchased before the institution of the suit, from improving his title already acquired so far as he can do so without the assistance of the defendant to the suit, *e.g.*, by registering *pendente lite* a purchase effected beforehand. (2) An alienation which does not conflict with the rights of the parties to the suit would not, it would appear, be *ipso facto* void. (§. 843.) But in a case it has been held by the Allahabad High Court that a lease of the property by the judgment-debtor against whom a decree for sale of the property had been made was void, whatever be its object, as it cannot but have the effect of, to some extent, defeating the auction-purchaser of that property. (3) An execution struck off for default, or otherwise, does not *per se* raise the attachment made thereunder. As the Privy Council observed: "It would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when for any reason, satisfactory or not, before the execution of a final decree, a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered in a new suit." (4) Indeed, it has been held that where property has been released from attachment, and in a subsequent suit a decree is obtained declaring the property to be liable to attachment, the effect of the decree is to restore matters as they were at the time of the attachment, (5) and any alienation made in the meantime would be *pendente lite*. (6) If property is attached before the decree, as under order 38, rule 5, of the Civil Procedure Code, no fresh attachment need be made after it is passed (7), and in this case no alienation can be validly made after the aforesaid attachment. (8) The passing of a decree *nisi* under sections 86 or 88 of this Act does not conclude the suit which is deemed to be pending until the termination of the final execution-proceedings culminating in foreclosure or sale. (9)

850. Excepted Transfers.—The section saves transfers made "under the authority of the court and on such terms as it may impose." An auction-sale in execution of a decree, though held under the authority of the court, is not a sale here contemplated. In order to except a sale from the rule, the court must expressly authorize it to be free from the rule, and before doing so, it would naturally safeguard the interest of the person which might otherwise be imperilled. Such transfers may be sanctioned by the court so as to enable the defendant to satisfy the decree, and with that view may grant him a certificate authorizing him to transfer the property subject to its confirmation to the

(1) *Rutnessur v. Ramtanoo*, 12 W.R., 491 (192); *Ram Burun v. Jankee Sahoo*, 22 W.R., 478; *Khetmal v. Chunilal*, 1 L.R., 2 All., 173; *Puddomonee v. Roy Muthooranath*, 12 B.L.R., 411, P.C., *Faridunnissa v. Aladad* (1881), A.W.N., 77; *Ram Karan v. Bagar Ali* (1881) A.W.N., 158; *Tootmal v. Rai Singh*, 1 Sind., L.R., 176.

(2) *Bapuji v. Ichharam* (1877), B.P.J., 81.

(3) *Thakur Prasad v. Gaya Sahu*, I.L.R., 21 All., 349; following *Debi Prasad v. Baldeo*, I.L.R., 18 All., 123.

(4) *Raja Mulesh v. Kishanun*, 8 M.I.A., 328 (341); see also *Mungul Pershad v. Gria*, I.L.R., 8 Cal., 451; *Bisua v. Binanda*, I.L.R., 10 Cal., 416; *Ram Churn v. Jhubbo*, 14 W.R., 25.

(5) *Wooma Churn v. Kadambini*, 3 C. L. R., 146; *Mahomed v. Pitamber*, 21 W. R., 435 (see for *contra* *Krishna Chetty v. Rami Chetty*, 8 M.H.C.R., 99).

(6) *Dinendronath v. Ram Kumar*, I.L.R., 7 Cal., 107; *Bonomali v. Prosanno*, I.L.R. 23 Cal., 829.

(7) *Sarkies v. Bundho*, 1 N. W.P.H.C.R., 172.

(8) S. 490, O.P.C.; *Raj Chunder v. Isser Chunder*, Bourke, 139; *Savaramji v. Jadavi* 2 B.H.O.R., 142; cf. also S. 489, O.P.C.

(9) *Chunni Lal v. Abdul*, I.L.R., 23 All. 331 (334); *Parsotam v. Chheda Lal*, I.L.R., 29 All., 76; *Shival v. Shembhurprasad*, I.L.R., 29 Bom., 435 (447), F.B.

payment of the consideration into court. (1) Any violation of the directions of the court will, of course, entail on the transferee the disability created by the doctrine.

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferrer, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

551. Analogous Law.—In this section an attempt has been made to condense the provisions of the two English Statutes, (2) passed to protect creditors, and relating to fraudulent conveyances passed to protect purchasers, and both formerly in force in India (3) and now repealed by this Act. In the Presidency towns, the statute (4) relating to alienations made by insolvent debtors is still in force.

A vast mass of case-law, has clustered round these provisions, and which is often cited in illustrations of the rule enacted in the section. But there are important differences between them, the confusion from which should be carefully guarded against.

The provisions of Stat. 13 Eliz. upon which the section is modelled run as follows :—

(1) All and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments goods and chattels, or of any of them or of any lease, rent, common or other profit or charge out of the same lands, tenements hereditaments, goods and chattels, or any of them by writing or otherwise; and all and every bond, suit, judgment, and execution, at any time had or made to or for any intent or purpose before declared and expressed, shall be deemed and taken (only as against such person or persons, his or their heirs, successors, executors, administrators, and assigns and everyone of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs by such guiltful covinous or fraudulent devices and practices as is aforesaid are, shall or might be in any way disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate, and of none effect.

5. Provided always that this Act shall not extend to any estate or interest in lands, goods or chattels, had made, conveyed, or assured, which estate or interest shall be upon good consideration add *bona fide* lawfully conveyed or assured to any person or persons, not having at the time of such conveyance or assurance any manner of notice or knowledge of such covin, fraud or collusion as aforesaid. (5)

(1) O. 21, r. 83, Code of Civil Procedure, 1908. S. 305, Code of Civil Procedure, 1982; *Shivagappa v. Chanbasappa*, I.L.R., 80 Bom. 337 (340).

(2) (1571) 13 Eliz. C. 5 (1584); 27 Eliz. C. 4.

(3) So held in *Azimunissa v. Clement Dale*, 6 M.H.C.R., 455 (474); following *Freeman*

v. Fairlie, 1 M.I.A., 305; *Mayor of Lyons v. The E. I. Co.*, 1 M.I.A., 175; *Judah v. Abdool Kureem*, 22 W.R., 60; *Abdool Hye v. Mohamed*, I.L.R., 10 Cal., 616, P.C.

(4) 11 Vict., C. 21, S. 24.

(5) Stat. 13 Eliz. C. 5. This statute was made perpetual by Eliz. C. 5.

Since this statute was directed against fraudulent conveyances *as against the creditors*, a subsequent statute ⁽¹⁾ had to be passed to protect all subsequent purchasers. The earlier statute extends also to goods and chattels, but the later statute only applies to lands and other real estate. This latter statute was interpreted to make all voluntary conveyances, as such, fraudulent as against subsequent purchasers. ⁽²⁾ And accordingly another Act had to be passed in 1893 declaring in favour of the validity of voluntary conveyances if made in good faith. ⁽³⁾

552. Fraudulent conveyances may be avoided either under the Elizabethan Statutes the provisions of which are embodied in the section, or under the Bankruptcy and Insolvency Acts, the corresponding provisions of are which quoted below.

The Bankruptcy Act, 1883 ⁽⁴⁾ enacts as follows :—

48. (1) Every conveyance of transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due for his own money, in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying for suffering the same be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of bankruptcy—

- (a) Any payment by the bankrupt to any of his creditors;
- (b) Any payment or delivery to the bankrupt;
- (c) Any conveyance or assignment by the bankrupt for valuable consideration;
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration;

Provided that both the following conditions are complied with, namely:—

- (1) The payment, delivery, conveyance, assignment contract, dealing or transaction, as the case may be, takes place before the date of the receiving order; and
- (2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed or entered into has not at the time of the payment, delivery, conveyance, assignment, contract, dealing or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

553. This definition was substantially reproduced from the Bankruptcy Act of 1869. ⁽⁵⁾ But in dealing with bankruptcy cases under the two Acts there are certain points which, for reasons to be presently stated, do not call for particular notice in the present treatise. The Bankruptcy Act, 1883 further enacts that in the cases therein mentioned the transfer *ipso facto* amounts to an act of bankruptcy :

(1) 27 Eliz. C. 4.

(2) *Burrell's Case*, 6 Rep., 72 *Goch's Case*, 5 Rep., 60; *Standen v. Bullock*, Moo., 605; *Doe v. Manning*, 9 East, 57; *Trowell v. Shenton*, L. Q., 8 Ch. D., 318; *Buckle v. Mitchell*, 19 Ves., 100; *Goodright v. Moses*, 2 B.W. Bl.,

1019; *Chapman v. Emery*, Cowp., 278.

(3) Voluntary Conveyances Act, 1893 (56 & 57 Vict., C., 21).

(4) 46 & 47 Vict. C. 52.

(5) 32 & 33 Vict., C. 71.

4. A debtor commits an act of bankruptcy in each of the following cases :—

- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally ;
- (b) If in England or elsewhere he makes fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof ;
- (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference, if he were adjudged bankrupt.

On the commission of an act of bankruptcy, the creditor is entitled to present a bankruptcy petition against the debtor. A person subject to English law living "in England or elsewhere *i.e.*, abroad, is equally bound by the Act. ⁽¹⁾

854. In India so far as the Presidency towns are concerned, the law is still as enacted by an English Statute, the Insolvent Debtor's Act 1848.⁽²⁾ According to this Act a person commits an act of insolvency if he is imprisoned for debt for a period of twenty-one days,⁽³⁾ or departs from the jurisdiction of the Court or from his usual place of business with intent to defeat or delay his creditors,⁽⁴⁾ or makes "with the like intent any fraudulent gift, grant, conveyance, delivery, or transfer, of any of his lands, tenements, moneys, goods, or chattels, or fraudulently with like intent suffer his lands, money, goods, or chattels to be taken in execution, attached, or sequestered."⁽⁵⁾ A person committing an act of insolvency is then bound by the following law directed against fraudulent conveyances *by insolvents* :—

24. And be it enacted that if any insolvent who shall file his petition for his discharge under this Act, or who shall be adjudged to have committed an act of insolvency shall voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever to any creditor or to any other person in trust for or to, or for the use, benefit, and advantage of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent, or of the petition on which an adjudication of insolvency may have proceeded, as the case may be or if made with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this Act, or of committing an act of insolvency, shall be deemed and is thereby declared to be fraudulent and void as against the assignees of such insolvent. " (6)

855. In the mofussil the only provisions relating to insolvency were till recently in Chapter XX of the Code of Civil Procedure,⁽⁷⁾ and the only provision pertinent to the present discussion was that contained in section 351 (C) which empowered the Court to reject the application of the judgment-debtor for insolvency if he has, "with intent to defraud his creditors, concealed, transferred, or removed any part of his property, since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time ;" or that "knowing himself to be unable to pay his debts in full, recklessly contracted debts or given an unfair preference to any of his creditors by any payment or disposition of his property". These sections of the Code have now

(1) *Exp. Blain, Re Savers*, 12 Ch. D., 522 (582).

(2) 11 & 21 Vict. C. 121; see as to its extent in Bengal, Calcutta Letters Patent, S. 18. In the matter of *Tiet Kins*, 1 B. L. R. (O.J.), 84; in Bombay *vide In re James Currie*, I. L. R.

21 Bom., 405.

(3) S. 8, Insolvent Debtor's Act.

(4) *Ib.*, S. 9.

(5) *Ib.*, S. 9.

(6) S. 9, Insolvent Debtor's Act, 14.

(7) Ss. 344-360 A., Act XIV of 1882.

been repealed and replaced by the Provincial Insolvency Act⁽¹⁾ which enacts as follows :—

Acts of insolvency. 4. A debtor commits an act of insolvency in each of the following cases, namely :—

- (a) if, in British India or elsewhere, he makes a transfer of his property to a third person for the benefit of his creditors generally ;
- (b) if, in British India or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors ;
- (c) if, in British India, or elsewhere, he makes any transfer of his property or any part thereof, or of any interest therein, which would, under this or any other enactment for the time being in force, be void as a fraudulent preference if he were adjudged an insolvent ;
- (d) if, with intent to defeat or delay his creditors,—
 - (i) he departs or remains out of British India ;
 - (ii) he departs from his dwelling-house or usual place of business or otherwise absents himself ;
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him ;
- (e) if any of his property has been sold in execution of the decree of any Court for the payment of money ;
- (f) if he petitions to be adjudged an insolvent under the provisions of this Act ;
- (g) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts ;
- (h) if he is imprisoned, in execution of the decree of any Court for the payment of money.

Explanation.—For the purpose of this section the act of an agent may be the act of the principal. (2)

856. The provisions of section 213 of the Indian Companies Act ⁽³⁾ against fraudulent preference are similar to and correspond with the provisions of English Law against fraudulent preference. In effect, the section declares that a fraudulent transfer made by a company would be judged by the same standard and lead to the same consequences as a transfer made by an individual trader. The position of parties where the fraudulent purpose is not achieved would be as follows :—

Where the owner of a property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferrer is not as guilty, as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provision of any law, the transferee must hold the property for the benefit of the transferrer.⁽⁴⁾

857. The principle of this section is one of general application, and has been held to apply to the Punjab where the Act itself is not in force. Following the principle therein enunciated it has been laid down by the Chief Court that where a mortgage for valuable consideration is made with the view to defeat a particular creditor, it is void as against him.⁽⁵⁾ But this is not the view in consonance with the section under which intention to defeat an individual creditor as distinguished from the general body of creditors is not necessarily fraudulent.

(1) Act III of 1907 enacted to come into force from 1st January 1908.

(2) S. 4, Act III of 1907.

(3) Act VI of 1882.

(4) Trusts Act (Act II of 1882).

(5) *Lakshminarain v. Tara Singh*, 1 P. L. R., 513.

858. Although this section is one of those excepted by the saving clause ⁽¹⁾

Hindu Law.

in its application to Hindus, Mahomedans, and Buddhists there is no rule of Hindu, Mahomedan, or Buddhist law that lays down anything opposed to its principle. So West, J., in a case remarked: "Under the Hindu law, as under the English law, fraud vitiates every transaction. The principle has been less elaborately developed in precise rules than in the European Codes; but when Hindu law supplies a *datum* of recognized principle, the courts may well follow the English equity in the details derived from an indetical principle."⁽²⁾ And indeed, the principle therein enunciated is so manifestly just and equitable, that it has been applied to cases not governed by the Act, or arising before it was passed.⁽³⁾ But the applicability of the Elizabethan statutes to Hindus and Mahomedans was at one time by no means certain or unanimously conceded.⁽⁴⁾

859. It should be added that while the section deals only with immove-

Genesis of the rule.

able property, the first Elizabethan statute only related to moveable property, immoveable property having been the subject of the subsequent legislation. The former contained nothing beyond what would have been attained by the common law,⁽⁵⁾ whereas the second statute borrowed its provisions from the Civil law,⁽⁶⁾ in which the *pauliana actio* afforded a means of recovering for creditors property which had been alienated in order to place it beyond their reach, whether by a lucrative or an onerous title. The only difference between the two cases was that in the latter case, the transferee who was to be deprived, must have been aware of the fraud.⁽⁷⁾ From this part of the Roman law most of the nations of the civilized world have derived a stringent system of rules for annulling transactions, whatever guise they may assume, entered into for the purpose of depriving creditors of a just distribution of their debtor's assets.⁽⁸⁾ These rules have relation, no doubt, to bankruptcy, though it has been said in England that the purpose of the Bankrupt Acts was quite different from that of the 13th Eliz.⁽⁹⁾ Directly, no doubt, it was different, as the Bankrupt Acts aimed at an immediate appropriation of the insolvent traders' effects to the defrayal *pro rata* of his debts, while the statute of 13th Eliz. proposed simply to set aside any alienation by a person of any class in fraud of his creditors. But the recent changes in law of bankruptcy have placed all transfers of this nature nearly on an equal level.

860. Before the present enactment, it appears that a similar rule embodied

Previous Law.

in the two Elizabethan statutes was applied to India, but these statutes do not appear to have been authoritatively extended to it and the decisions of the courts are by no means unanimous as to their applicability to this country, and more particularly to the mofussil. ⁽¹⁰⁾

(1) S. 2 (d) *ante*.

(2) Per West, J., in *Rangilbhai v. Vinayak*, I.L.R., 11 Bom., 666 (676); following in *re Kahandas*, I.L.R., 5 Bom., 154.

(3) *Abdul Hye v. Mir Mahomed*, I. L. R., 10 Cal., 616 (624); followed in *Rangil Bhai v. Vinayak*, I.L.R. 11 Bom., 666 (676); *Har-musji v. Cowasji*, I.L.R., 13 Bom., 297 (300).

(4) It was doubted in *Arimunnissa v. Dale*, 6 M.H.C.R., 455 (474); *Freeman v. Fairlie*, 1 M. I. A., 305 (*vide footnote*); *Mayor of Lyons v. The E. I. Co.*, *ib.*, 174; see *Bhagwant v. Kedari*, I.L.R., 25 Bom., 202 (208).

(5) Per Lord Mansfield in *Cadogan v. Kennell*, Cowp., 484.

(6) Vinnius Ad. Inst. Bk., IV, Tit., 6, S. 6.

(7) *Rangilbhai v. Vinayak*, I. L. R., 13 Bom., 666 (675).

(8) Burge's Comm., S. 605.

(9) *Twyne's Case*, 1 S.L.C. 1.

(10) *Rangil Bhai v. Vinayak*, I.L.R., 11 Bom., 666 (675); in *Joshua v. Alliance Bank*, I.L.R., 22 Cal., 185 (206), while the statutes were held to be applicable to the Presidency towns, no opinion was hazarded as to their application to the mofussil.

So again the Privy Council was not until recently certain whether they applied to Hindus and Mahomedans. But this view has long since been abandoned, and it must be therefore taken, as settled now, that the statutes in question and the authorities based thereon, may be taken as unmistakeable guides to the law of India prior to the enactment of the Act. (1)

861. It seems hardly necessary to note that in certain respects the section has a more restricted operation than the statutes. For while 13 Eliz. applies to transfers both of realty and personality, the section is restricted only to immoveable property. And while 27 Eliz. was enacted for the protection of purchasers only, which included also mortgagees, a mere holder of a money decree was not within its scope. (2) A person who acquired no charge on specific property was not entitled to avail himself of this statute. With this difference, however, the section generally conforms to the two statutes, and the cases decided under the latter would therefore be, with the above reservation, authorities under the former. (3)

The section does not enunciate the law in any way at variance with the pre-existing law. (4) The section is said to be inexhaustive, (5) and considering the important principle it is intended to enunciate, the section could not have been perhaps more meagrely worded.

862. Principle.—The first paragraph of the section enacts a principle, while the second paragraph lays down what is no more than a rule of evidence. The first part defines what a fraudulent transfer is, whereas the second paragraph indicates the circumstances in which fraudulent intention may be *presumed*. Were it not for the statement of this rule, the party seeking to avoid the transaction would have had to give proof of "intent to defraud" which in many cases would not be readily available. The rule, therefore, indicates the salient circumstances which it regards as the indelible badges of fraud and from which alone a transfer *may* be presumed to have been fraudulent. Of course, it cannot be generally asserted that any one circumstance or even all the circumstances taken together would, in all cases, lead to the irrebuttable presumption condemning a transaction as fraudulent, for to do so, would be to provide an inflexible rule for judging transactions which experience shows present the greatest amount of diversity. But the intrinsic justice of the rule here laid down is so patent that any enunciation of the principle upon which it is founded is, wholly unnecessary.

863. The Elizabethan enactments upon which this section is founded have in turn their origin in the Roman civil law, which proceeded upon the same enlightened policy, and protected (§ 859) alienations of moveables and immoveables made to *bona fide* purchasers for a valuable consideration, having no knowledge of any fraudulent intent of the grantor or debtor. (6) Thus says Justinian:—"If, again to defraud his creditors, a man delivers anything to

(1) *Bhagwant v. Kedari*, I.L.R., 25 Bom., 202 (209).

(2) *Beavan v. Earl of Oxford*, 2 De.G.M. & G., 507 (532); *Benham v. Keane*, 31 L.J. Ch., 129 (132).

(3) *Bhagwant v. Kedari*, I.L.R., 25 Bom., 202 (209); explaining *Ishan Chunder v. Bishui*, I.L.R., 24 Cal., 825 (828); *Natha v. Dhum-baji*, I.L.R., 23 Bom., 1; and following *Joshua v. Alliance Bank*, I.L.R., 22 Cal., 185 (202).

(4) *Bhagwant v. Kedari*, I.L.R., 25 Bom., 202; *Natha v. Maganchand*, 5 Bom. L.R. 170 (172); *contra* in *Ishan Chunder v. Bishui*, I.L.R. 24 Cal. 825; The third paragraph certainly coincides with 13 Eliz. C. 5, S. 56; *Hakim Lal v. Moosahib*, I.L.R. 34 Cal. 999 (1009).

(5) *Lalchand v. Hasto Bai*, 7 C.P.L.R. 73 (74).

(6) *Story's Eq. Jur.* (2nd Eng. Ed.) S. 435, p. 278.

someone else, after his goods have been taken possession of by the creditors under a decision of the President, the creditors themselves are allowed to rescind the delivery and to demand the thing; that is, to allege that the thing was not delivered, and therefore remained among the debtor's goods." (1) "Indeed," says Story, "the principle is more broad and comprehensive; and, although not absolutely universal . . . yet it is generally true, and applies to cases of every sort, where an equity is sought to be enforced against a *bona fide* purchaser of the legal estate without notice, or even against a *bona fide* purchaser, not having the legal estate, where, he has a better right or title to call for the legal estate than the other party. It applies, therefore, to cases of accident and mistake, as well as to cases of fraud; which, however, remediable between the original parties, are not relievable, as against such purchasers, under such circumstances." (2) Thus, to present a summary of what has been already stated, if conveyances or other instruments are fraudulently or improperly obtained, they are decreed to be given up and cancelled. If they are money securities, on which the money has been paid, the money is decreed to be paid back. If they are deeds, or other muniments of title, detained from the rightful party, they are decreed to be delivered up. If they are deeds suppressed or spoliated, the party is decreed to hold the same rights as if they were in his possession and power. If there has been any undue concealment, or misrepresentation, or specific promise collusively broken, the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith. If the party says nothing, but by his expressive silence misleads another to his injury, he is compellable to make good the loss; and his own title, if the case requires it, is made subservient to that of the confining purchaser. If a party, by fraud or misrepresentation, induces another to do an act injurious to a third person, he is made responsible for it. If, by fraud, or misrepresentation, he prevents acts from being done, equity treats the case, as to him, as if it were done; and makes him a trustee for the other. If a will is revoked by a fraudulent deed, the revocation is treated as a nullity. If a devisee obtains a devise by fraud, he is treated as a trustee of the injured parties. In all these, and many other cases which might be mentioned, courts of equity undo what has been done, if wrong; and do what has been left undone, if right." (3) This section should be interpreted in the light of cases decided under the Elizabethan Statutes before mentioned, (4) it may be added, as modified by the Voluntary Conveyances Act. (5)

864. Meaning of Words.—"Every transfer of immoveable property": implies a transfer for or without consideration. "*With intent to defraud.*" The word "intent" by its etymology seems to have metaphorical allusion to archery and implies "aim" and thus connotes not a casual or merely possible result—foreseen perhaps as a not improbable incident, but not desired—but rather connotes the one object for which the effort is made, and this has reference to what has been called the dominant motive, without which the action would not have been taken. (6) Fraud is defined in section 17 of the Indian Contract Act. In this connexion, however, "*intent to defraud*" embraces a large number of cases, which do not come within the scope of the definition. Thus the *motive* of the person, who makes a false statement on the faith of which

(1) Jus. Bk. 4, Tit. 6, S. 6; see Hunter's Roman Law, pp. 1040, 1041.

(2) Story's Eq. Jur. (2nd Eng. Ed.) § 436. 279.

(3) Story's Eq. Jur., s. 439, 279, 280.

(4) *Joshua v. Alliance Bank of Simla*, I.L.R., 22 Cal., 185.

(5) (1893), 56 & 56 Vict., Ch. 21.

(6) *Bhagwant v. Kedari*, I.L.R., 25 Bom., 202 (226).

another is induced to act, is under this section material, though it is not under the Contract Act.⁽¹⁾

"*Voidable at the option &c.*" i.e., the transfer is not *ipso facto* void; or indeed, voidable at the instance of the transferrer or his legal representatives. It can be avoided but only by the persons named. As between the immediate parties thereto it is *prima facie* good and unavoidable except under certain circumstances discussed in the sequel.

"*Presumed to have been made.*"—Presumption may be defined to be the logical inference of the existence of the unknown from proof of the known.⁽²⁾ The phrase "may presume" has been defined in the Indian Evidence Act⁽³⁾ thus: "Whenever it is provided by this Act that the Court may presume a fact it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it." Such a term should on the one hand be distinguished from the term "shall presume" in which the Court shall regard such fact as proved unless and until it is "disproved," and on the other hand from what is "conclusive proof" in which case on proof of one fact the Court is enjoined to regard the other fact as proved, no evidence being then admitted for the purpose of disproving it.⁽⁴⁾ The presumption here to be made may then be rebutted,⁽⁵⁾ for it is not "conclusive proof of fraud." "*Nothing in this section.*" This clause was suggested by a case in which the Court observed: "The acts of one man cannot show the mind and intention of another"⁽⁶⁾ and should not prejudice him. When it is said that a deed is not executed in *good faith*, what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself.⁽⁷⁾

865. General View of the Rule.—From the earliest times law has regarded with abhorrence all attempts at fraudulent transfer of property. For while law favours the exchange and transmission of property, it sets its face against its privileges being abused to the detriment of the public. Innocent creditors who have made advances on the faith of the securities of their debtor have been from the earliest times the objects of anxious solicitude on the part of those responsible for the due administration of justice. Any attempt on the part of the debtor to withdraw his assets from the control of his creditor has always received the just condemnation of the courts, who have compelled the debtor to make good the representation on the faith of which presumably he had obtained credit, and in doing so the courts have not been loth to set aside all transactions not equally meritorious with the claims of the creditors. Now, since a person who deals with the debtor in good faith and for consideration is ordinarily entitled to the same protection as other creditors, for his case is in no way distinguishable from theirs, and hence the last clause enacts this exception subject to which the rule must be construed. Ignoring for the present such exceptional cases, the generality of cases would appear to fall into the following three classes enumerated in the

(1) See S. 17, Indian Contract Act; *Derry v. Peek*, 14 App. Cas., 365, 374; *Foster v. Charles*, 6 Bing., 396; 7 Bing 105.

(2) Best, Ev., p. 304.

(3) Act I of 1872.

(4) S. 4, Act I of 1872: it should be noted that the words here used are "may be presumed" as contradistinguished from the "shall be deemed" used in 27 Eliz. C. 4. The words of the section vest a court with a discretion,

and do not impose on it an obligation to presume fraud in the case supposed. *Bai Cooverbai v. Mhd. Abdullah*, 7 Bom. L. R., 267.

(5) See Indian Evidence Act, S. 4; *Bai Cooverbai v. Mhd. Abdullah*, 7 Bom. L. R., 267.

(6) *Doe v. Rusham*, 17 Q. B., 124.

(7) *Ramasamia v. Adinarayana*, 1 L. R. 20 Mad., 465.

first paragraph, namely, where the transfer is made to defraud (a) prior or subsequent transferees (§§ 873, 874); (b) co-owners or other persons interested in the property (§§ 868, 869); or (c) where the transfer is made to the prejudice of the transferor's creditors. (§ 873). In practice probably the third class presents the most numerous and varied examples, but it would be useful to consider what classes of persons are placed under the protecting wing of the rule. Turning first to the provision protecting prior or subsequent transferees for consideration, it should be observed that the section does not protect against fraud the actual parties to the transfer, but only third parties who may be affected thereby. If the transferor has defrauded the transferee, *vice versa* the latter can obtain no relief under the rule, although his interests are of course sufficiently safeguarded elsewhere in the Act. "The general rule is that particular persons in contracts and other acts shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect to other persons who stand in such a relation to either as to be affected by the contract or the consequences of it."⁽¹⁾

866. Voluntary Deeds when postponed to Value.—The rule protects in the first place the prior and subsequent transferees but in order to qualify them for its protection they must have been transferees for valuable consideration, since law pays no regard to mere volunteers when they compete with transferees for value. In such a case, to quote the words of Grant, M. R., "it must be assumed that a voluntary settlement, however free from actual fraud, is by the operation of that statute,⁽²⁾ deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of the prior voluntary settlement."⁽³⁾ But this statement of the law since considerably modified, may also be justified, by the reason that the same property having been disposed of to two different persons, one of whom has paid for it and the other not, the court considers that a person who has not paid for the property would lose nothing as compared to, and should not stand in the way of one who has paid for it.⁽⁴⁾ A marriage-settlement may thus be avoided by a subsequent purchaser for value.⁽⁵⁾ In fact all voluntary transfers upon how much soever a laudable or meritorious consideration made, fall within the ambit of the rule which was lucidly stated by Lord Hardwicke who said: "*Every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, through no fraud in that voluntary conveyance, nor the person making it at all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration.*"⁽⁶⁾ And similarly the Court of the Star Chamber expounded the same principle in the course of their judgment in *Twyne's case*. "Equity requires," they observed, "that such gifts, which defeat others, should be made on

(1) Kerr's fraud (3rd Ed.), 187 citing *Wallis v. The Duke of Portland*, 3 Ves., 494 (502), but which does not support the text being a case directed against maintenance.

(2) 27 Eliz. C. 5.

(3) *Buckle v. Mitchell*, 18 Ves. 100 (110); *Roshar v. Williams*, L.R., 20 Eq., 210, (218). The presumption of fraud cannot be rebutted *Clarke v. Wright*, 6 H. & N., 875; *Saunders v. Dehew*, 2 Vern., 271.

(4) *Colville v. Parker*, Oro. Jac., 151; *Dos d. Newman v. Rusham*, 17 Q. B., 723, in which Lord Campbell, C. J., observed that the

subsequent sale being repudiation of the earlier deed it must be held that he intended it when he made the conveyance an argument which does not appear to be *a priori* and forced.

(5) *Walker v. Burrows*, 1 Atk., 94.

(6) *Townsend v. Windham*, 2 Ves., S. 10. The statement of this rule was approved by Lord Thurlow who said the rule was such, and so many estates stood upon it, that it could not be shaken: *Evelyn v. Templar*, 2 Bro. C. C., 149.

as high and good consideration as the things which are thereby defeated are;...and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt.⁽¹⁾ This rule permitted of no exceptions being made in favour of a provision for wife and children,⁽²⁾ or a conveyance supported on strong moral obligations,⁽³⁾ or one even made by direction of the Court.⁽⁴⁾ The question of the settler's indebtedness at the time he executed the voluntary deed was regarded as immaterial with respect to the claims of a subsequent purchaser of the property,⁽⁵⁾ and the doctrine was carried to the length of rendering the question even of notice immaterial. So that if the purchaser took with notice of the prior voluntary deed, he was still held entitled to preference.⁽⁶⁾ But while this view was held to be justified according to the strict construction of the statute, the manifest injustice of the rule was circumvented by holding that a purchase with notice of the prior settlement being itself fraudulent should be entitled to no preference.⁽⁷⁾ But while the judges thus condemned the rule still they were unable to overthrow it. And so Grant, M.R. in deciding the case before cited had to confess: "I have great difficulty to persuade myself that the words of the statute warranted, or that the purpose of it required such a construction; for it is not easy to conceive how a purchaser can be defrauded by a settlement of which he has notice before he makes his purchase. But it is essential to the security of property that the rule should be adhered to when settled, whatever doubt there may be as to the grounds on which it originally stood."⁽⁸⁾ This view of the law was subsequently overruled by the statute which enacts that no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of the Act, if in fact made *bona fide* and without any fraudulent intent, shall be deemed fraudulent or covinous by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase.⁽⁹⁾ This statute then has had the effect of reversing the current of decisions founded upon the interpretation of the original statute⁽¹⁰⁾ to which reference has been made before.

867. But it may be a question how far these earlier decisions given on the

**Fraudulent intent
still material.**

statute have been followed in the section admittedly moulded thereon. It appears that in cases decided before the Act, and in the light of the English precedents, the courts were content to hold in conformity with the earlier English decisions since overruled.⁽¹¹⁾ So far as regards the rule here enunciated, it seems to be perfectly clear that the criterion for judging the character of the prior disposition is primarily the *intention to deceive* and not any want of consideration, although, no doubt absence of consideration is always an element not to be lost sight of in judging

(1) 1 S.L.C. (10th Ed.), 1 (3).

(2) *Watkins v. Stevens*, 1 Nels., 160; *Goodright v. Moses*, 2 W. Bl., 1019; *Chapman v. Emery*, 1 Cowp., 278; *Barton v. Vanheythessen*, 11 Hare, 126 (129).

(3) *Stiles v. Attorney General*, 2 Atk., 152.

(4) *Martin v. Martin*, 2 R. & M., 507.

(5) *Rex v. Nottingham*, Lane 47; *White v. Stringer*, 2 Sev., 106; *Townsend v. Windham*, 2 Ves., S. 11.

(6) *Gooch's case*, 5 Rep., 60; *Goodright v. Moses*, 2 W. Bl., 1019; *Tonkins v. Eunis*, 1 Eq., C. Ab., 334.

(7) *Roe v. Mitton*, 2 Wils., 358; *Pulvertoft v. Pulvertoft*, 18 Ves., 90; *Evelyn v.*

Templar, 2 Bro.C.C., 148; *Doe v. Manning*, 9 East., 71; *Clarke v. Wright*, 6 H. & N., 870; *Doe v. Martyn*, 1 B. & P.N.R., 335; *Brandlyn v. Ord*, 1 Atk., 571.

(8) *Buckle v. Mitchell*, 18 Ves., 100 (110).

(9) 56 & 57 Vict. C., 21. S. 2 (Voluntary Conveyances Act, 1893). In America a purchaser with notice of the prior disposition has no better equity—2 N. Y. Rev. Stat., 134. Ch., 7 Tit. 1, S. 2 Kent on Amer. Law (18th Ed.), 589 *et seq.*

(10) 27 Eliz. C. 4.

(11) *Judah v. Mirza Abdool*, 22 W.R., 60, in which Macpherson, J., reviewed and followed the older English case-law.

of the character of a transaction, and the second paragraph which enunciates the rule of evidence in such cases does not ignore this fact. The contrary view was taken by Salā, J., in a case, (1) but which does not appear to have commended itself to the Bench before whom the case went up in appeal. (2) Indeed, it has been pointed out by the Privy Council that a voluntary gift for charitable purposes is not necessarily fraudulent so as to be voidable at the instance of a subsequent purchaser for value. (3) It is no fraud for a man to make a voluntary conveyance unless there was some secret arrangement whereby the deed was one thing and the fact was really different. (4) The cardinal question in India as well as now in England, is not whether any consideration passed, but what was the dominating motive which prompted the transfer. Such a question may arise whether of the two competing deeds the prior or the subsequent deed be voluntary, since a subsequent sale may as much be intended to defeat a prior voluntary conveyance as the latter be to defraud a subsequent purchase. Of course, in the former case the fact of the transfer being for consideration would save in exceptional cases render the transaction indefeasible, but there is no difference in principle.

868. As regards the rights of co-owners and other persons interested in

property, it is sufficient to state that the section enacts the same rule and that the rights of co-owners should be judged by the same standard. Ordinarily a co-owner is entitled to transfer his own interest in the joint property, (5) and in certain cases he may even transfer the whole property (6) but in no case can he transfer either the whole or his own share of the joint property in fraud of his other co-sharers. Indeed, the acts of a co-sharer in derogation of the rights of the other co-sharers are void (§§. 737-743). But the rule must be taken as subject to the doctrine of estoppel, for law cannot permit a party to perpetuate one kind of fraud by trying to suppress that of another kind. So a joint creditor cannot give a valid discharge so as to bind his partners if he acts in collusion with the debtors. (7) But in the absence of collusion or fraud, a payment made to one of two or more persons jointly entitled under a deed may be pleaded as a valid discharge of the debt against all the co-shares. (8) So again in the case of partners, where both the partnership and the individual partners were insolvent, an agreement by one of them transferring his interest to the others and thereby converting what was joint estate into the separate estate of the transferee was held invalid, for although no fraud may have been contemplated, the necessary effect of the arrangement was to delay and defeat the joint creditors. (9) Co-ownership however does not always imply co-partnership, inasmuch as the latter is necessarily the result of agreement and involves community of profit or loss, which the former may not. Co-owners being simply persons to whom property descends, or is given jointly or in common joint-purchase of a property to be held by them in common makes the purchasers co-owners, but not co-partners unless that also was their intention. (10)

(1) *Joshva v. Alliance Bank*, I. L. R., 22 Cal., 185 (202).

(2) *Joshua v. Alliance Bank*, I. L. R., 22 Cal., 185 (214).

(3) *Ramsay v. Gilchrist*, [1892], A. O. 412.

(4) *Simms v. Registrar of Probates* [1900,] A. C., 923; *Bullivant v. The Attorney-General*; cited 5 C. W. N., civi.

(5) S. 44, ante, Comm.

(6) S. 41, ante, Comm.

(7) *Kanagappa v. Sokkalinga*, I. L. R., 15 Mad., 362.

(8) *Barber v. Ramana*, I. L. R., 20 Mad., 461, and cases therein cited.

(9) Ex parte *Mayore*, 4 De G. J. & S., 664; Ex parte *Walker*, 4 De G. F. & J., 509; cited in *Lindlay's Partnership* (6th Ed.), 347.

(10) *Lindlay's Partnership* (6th Ed.), 25.

869. As regards the persons interested in the property such as the members of a joint family, and those entitled to maintenance or dower, the rule is no different. And so it has been laid down that whilst the Hindu husband is allowed considerable, nay almost unfettered latitude in disposing of his self-acquired property, he cannot, except on the ground of family necessity or the administration of his estate, alienate his property so as to purposely deprive his wife of her maintenance, which is a right which cannot be evaded by any arrangement purposely made in fraud of it.⁽¹⁾ As West, J., in one case⁽²⁾ observed: "An alienation is not generally subject to the control of the wife whose acquisitions are gained for her husband, and whose own special property the husband may take in case of special necessity; but supposing that her co-ownership in her husband's estate is really anything more than a right to maintenance taking the form of an allotment of a share when the property by division is placed in danger of being dissipated, her recognized, though subordinate, interest makes her free assent necessary in transactions by which that interest would be unfairly extinguished or affected." Indeed, the claim of a Hindu widow ranks next to the family debts.⁽³⁾ A gift to a son by a Hindu parent will ordinarily be upheld.⁽⁴⁾ But as amongst the sons having a birth-right in the estate, it is not to be grossly unfair.⁽⁵⁾ Even as to self-acquired property, it is prescribed that the acquirer shall not part with it so as to leave his family destitute.⁽⁶⁾ These rules do not interfere with the usual dealings of mankind. A father supporting his family may deal with his estate, and if he incumbers or sells it to meet his engagements no one can impeach the transaction.⁽⁷⁾ He may dispose of it to meet family debts, if they arose in the ordinary pursuit of his calling or the administration of his estate, or to enable him to earn a maintenance.⁽⁸⁾ But beyond these limits the interests of the family must not be sacrificed,⁽⁹⁾ and the right of a wife to a maintenance and possibly to a share on partition, though it may not amount to more than an equity to a settlement, and is not the subject of contract until ripened and defined by events,⁽¹⁰⁾ yet it is not to be evaded by any arrangements purposely made in fraud of it.⁽¹¹⁾ An alienation made in fraud of the claim of a Mahomedan wife to dower would be judged on the same footing.⁽¹²⁾

870. The term "interested in the property" has been nowhere defined in the Act, but in cases decided under the Indian Succession Act, in which persons "claiming to have any interest in the estate of the deceased" are entitled to inspect proceedings before the grant of probate or letters of administration, it has been held that a mortgagee is interested in the property of his debtor,⁽¹³⁾ and as such he should be entitled to protect himself against a transfer made in derogation of his rights. A purchaser from the heir of a deceased person who has agreed to sell his property and has received the greater part of the consideration money by way of

(1) *Narbada v. Mahadeo*, I.L.R., 5 Bom., 99 (106, 107); citing *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom., 499 (524).

(2) *Narbadabai v. Mahadeo*, I.L.R., 5 Bom., 99 (107).

(3) *Narbadabai v. Mahadeo*, I.L.R., 5 Bom., 99 (109).

(4) *Vramitrodaya*, 250.

(5) 2 West & Buhler's Hindu law, 2nd Ed. 377.

(6) *Ib.*, 396.

(7) *Ramlal v. Lakhmichand*, 1 B.H.C.R. App. 51 (71); *Tandanaarayya v. Valli*, 1 M. H.C.R., 398: cited per West, J., in *Narbo-*

dabai v. Mahadeo, I.L.R.; 5 Bom., 99 (106).

(8) *Babaji v. Krishnaji*, I.L.R., 2 Bom., 666.

(9) *Ramlal v. Lakhmichand*, B.H.C.R., (App.) 51 (71).

(10) Cf. *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom., 494 (508, 509).

(11) *Lakshman v. Satyabhamabai*, I.L.R., 2 Bom., 494 (524).

(12) *Suba Bibi v. Aalqobbind*, I.L.R., 8 All., 178.

(13) *Kashi v. Gopi*, I.L.R., 19 Cal., 48; *Kanchan v. Baijnath*, *ib.*, 336.

earnest is sufficiently interested to be allowed to contest the will of the deceased, although the transfer has not been made, and it is presumed that he will be equally entitled to contest a transfer made in fraud of his rights.⁽¹⁾ But although the bare possibility of an interest,⁽²⁾ as distinguished from the possibility of filling a character which would give the party concerned an interest,⁽³⁾ is sufficient to entitle a person to contest a will, a legatee, or a mere creditor cannot be regarded as so interested, for the reason that it is indifferent to him whether he shall receive his debt from an executor or an administrator.⁽⁴⁾ This view, however, suggests caution in interpreting one Act by decisions made under another Act, for there can be no doubt but that a legatee will always be heard if he comes to question a transfer made in fraud of his rights, and as regards a creditor, his case has been expressly provided for by the rule.

871. It should be added that a transfer made with intent only to defraud the first two classes of persons is declared void. But a transfer made with intent even to *defeat or delay* the creditors, shares a similar fate. The protection afforded to creditors is thus in a measure greater than that in the other two cases. The attempts made on the part of debtors to overreach their creditors by depriving them of the benefit of their security are notoriously frequent, and the first Elizabethan statute was directed solely to safeguard their interests, without which no commonwealth or civil society can be maintained or continued. But before proceeding to state the law, it must be noted what class of persons are intended to be embraced by the term.

872. Who are Creditors.—In ordinary parlance the term creditor is used as a correlative to debtor, and signifies a person to whom money is due. In its ordinary acceptation the term implies a person who had lent money or goods to another, and which has remained unpaid. In its general acceptation the term includes both secured as well as unsecured creditors, and not only those who have proved their claim and obtained a decree, and are then designated judgment-creditors, but also persons who have a claim still to prove.⁽⁵⁾ But the rule seems to exclude mortgagees, as such, whose debt being secured upon their debtor's property cannot be defeated out of their rights by any subsequent alienation fraudulent or otherwise.⁽⁶⁾ If, however, the property mortgaged is insufficient to satisfy the debt, and the mortgagor is personally liable, the mortgagee will, of course, be a creditor for the balance.⁽⁷⁾ So again, if the mortgagee relinquish the security of his mortgagee, or if it somehow goes off, he will then rank as a simple creditor and be entitled to the protection of the rule.⁽⁸⁾ The husband is a creditor of a person to whom his wife had given money to invest for her.⁽⁹⁾ So a covenant on the part of the husband with the trustees of the marriage-settlement, that his wife should in the event of her surviving him receive a certain sum, was held to make the wife a creditor of the husband's estate after his death as against a fraudulent transfer

(1) *Muddun v. Kalichurn*, 1 L.R., 20 Cal. 37; *Komolothun v. Nilrutton*, 1 L.R. 4 Cal., 360.

(2) *Kipping v. Ash*, 1 Rob's Rep., 270.

(3) *Per* Sir C. Cresswell in *Crispin v. Dog-lions*, 2 S. & T., 17.

(4) *Rahamatullah v. Rama*, 1 L.R., 17 Mad., 373.

(5) *Per* Lord Romilly, M. R., in *Reese River, &c., Co. v. Atwell* L. R., 7 Eq., 347

(352); *Ishvar v. Devar*, 1 L. R., 27 Bom., 146; *Jageshwar v. Kunjwam*, 16 C. P. L. R., 164.

(6) *Stephens v. Olive*, 2 Bro. C. C., 90; *Lush v. Wilkinson*, 5 Ves., 384; *Kanchana v. Bijnath*, 1 L. R., 19 Cal., 336.

(7) *Harman v. Richards*, 10 Hare, 81.

(8) *Lister v. Turner*, 5 Hare, 281.

(9) *Parrack v. McCulloch*, 3 K. & J., 110.

made by him.⁽¹⁾ A person claiming under a voluntary *post-obit* bond is a creditor within the meaning of the rule.⁽²⁾ A creditor of an ancestor of the transferor is a creditor of the latter to whom property has descended from that ancestor.⁽³⁾ A surety who holds a bond of indemnity from his principal is as regards that bond a creditor, and even if he had no bond he will be still treated as a creditor, if having paid for the principal he sues him for indemnity.⁽⁴⁾ And even a person in whose favour a voluntary promise is legally executed, becomes a creditor for the purpose of the rule, unless the promise itself was tainted with fraud, and was made to defraud other creditors.⁽⁵⁾ But the voluntary assignment of a *chose-in-action* conveys no legal right, and does not entitle the assignee to sue.⁽⁶⁾ It would then appear that the voluntary assignee of a debt is not a creditor. But the assignee or trustee of an insolvent or bankrupt is a creditor of the bankrupt, and may take advantage of any fraud against creditors to which the insolvent or bankrupt was a party, for as Lord Loughborough said: "Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching."⁽⁷⁾ An assignee thus not only represents the bankrupt but his creditors as well, and his right to rank as such has been repeatedly recognised.⁽⁸⁾ And in England it has been even held that the sheriff or other officer executing process for a creditor is himself a creditor: "Now, if a party be in possession of goods, apparently the property of a debtor, the sheriff who has a *fi. fa.* to execute, is bound to inquire whether the party in possession is so *bona fide*, and if he find the possession is held under a fraudulent bill of sale, he is bound to treat it as null and void, and levy under the writ."⁽⁹⁾ And he may on this ground defend himself against any action brought against him for wrongful seizure and sale.⁽¹⁰⁾ Indeed, a sheriff is bound to seize goods mentioned in his writ and he may be sued for neglecting to execute it.⁽¹¹⁾

873. A person claiming an unliquidated sum of money for a tort or a breach

Who are not creditors.

of contract can hardly be designated a creditor,⁽¹²⁾ and the case of a person who has a claim for an account of a share of a deceased partner would appear to be no different.⁽¹³⁾ And so a contract to pay such sum to *A* as the latter should become answerable to *B* in an action carried on by *A* at the request of the promisor is not a liability to pay a liquidated sum and therefore not a "debt," from which it follows that *A* cannot be designated a creditor in respect of the claim.⁽¹⁴⁾ The fact that such a sum if claimed would be decreed by the court is hardly relevant, for the court not only decrees debts but also damages.⁽¹⁵⁾ And it has been held that even the amount of a verdict in an action for unliquidated damages is not a debt until judgment.⁽¹⁶⁾ But a claim for a liquidated sum, as for the price of goods sold, or for refund of purchase-money on a breach of the contract of sale, has been held to be a debt⁽¹⁶⁾ and the person entitled to it may be rightly described a

(1) *Rider v. Kidder*, 10 Ves., 369.

(2) *Adams v. Hallett*, L. R., 6 Eq., 469;

Ramsden v. Jackson, 1 Atk., 292.

(3) *Gooch's case*, 5 Rep., 60a; *Richardson v. Horton*, 7 Beav., 112.

(4) *Osborne v. Churchman*, Cro. Jac. 127.

(5) *Denning v. Ware*, 22 Beav., 185 (189); *Watson v. Parker*, 6 Beav., 283.

(6) *Sewell v. Moxey*, 2 Sim. (N.S.), 189.

(7) *Anderson v. Malby*, 2 Ves. 244 (255).

(8) *Tarleton v. Liddell*, 17 Q.B. 390 (397, 399).

(9) *Lovick v. Crowder*, 9 B. & C., 132.

(10) *Ogden v. Hesket*, 2 C. & K., 772;

White v. Morris, 11 C.B. 1015.

(11) *Christopherson v. Burton*, 3 Ex., 160.

(12) *Subbanna v. Munekka*, I. L. R., 18 Mad., 457.

(13) *Sabju v. Noordin*, I. L. R., 22 Mad., 139 (decided as to the meaning of "debt" in the Succession Certificate Act, [VII of 1889, S. 4 (1), (a).]

(14) *Johnson v. Diamond*, 11 Ex., 73.

(15) *Jones v. Thompson*, 27 L. J. (Q. B.), 234.

(16) *Sabju v. Noordin*, I. L. R., 23 Mad. 139 (144); *Penta Reddi v. Auki*, I. L. R., 22 Mad., 144 note, following *Booth v. Trail*,

creditor. In an old case during the pendency of the plaintiff's suit for recovery of a certain sum against the defendant as damages for adultery with his wife, the defendant made a conveyance of his land to trustees for the payment of certain scheduled debts and such other debts as he should appoint. The plaintiff having recovered £5,000 damages sued the defendant for setting aside his conveyance as fraudulent and intended to defeat him of his debt, but the court threw out his claim on the ground that the plaintiff was not a creditor at the making of the deed, which is perfectly sound; but the other reasons given by the court make a curious distinction between debts founded in *maleficio* and real debts, for it observed: "This deed is fraudulent, either in law or equity, for such debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and though it were made with an intent to prefer his real creditors to this debt, when it afterwards came to be a debt yet it was a debt founded in *maleficio*, and therefore it was conscientious in him to prefer the other debts before it." (1) But such pious purism would never have been countenanced by the latter-day lawyers.

The landlord is a creditor in respect of the rents due from his tenant, although rent has been held to be not a "debt" within the meaning of the Succession Certificate Act. (2) A creditor whose claim has become barred ceases to fill that character and is ineligible to sue to set aside a fraudulent conveyance. (3)

874. Future Creditors.—A fraudulent transfer may equally be impeached by subsequent creditors as well as by those existing at the time it was made. And it is no answer on the part of the debtor to say that the creditors delayed were *subsequent* creditors. For as Lord Hardwicke remarked: "It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement; for if a man does it with a view of being indebted at a future time, it is equally fraudulent and ought to be set aside." (4) So a conveyance made by a person to ward off the effects of a threatened litigation or of a suit for damages which he must have known would probably go against him, (5) is always open to the imputation of fraud, though at the time of the settlement he was free from debt. The absence of a reasonable cause or explanation of a settlement is always regarded as a suspicious circumstance, pointing to expectation of future indebtedness as a motive. (6) "If a man makes it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside." (7) "Where in order to evade the statute a person being considerably indebted makes a voluntary settlement, which would be void if impeached by those who were then his creditors, and afterwards pays them off, and a new set of creditors, stand in their places. . . . such a settlement would be void against the subsequent creditors because it would be a fraud on the statute." (8) So a settlement by a man about to embark on a hazardous undertaking was set aside on the ground that it was sufficient to avoid a voluntary

12 Q.B.D., 8 (10); *Webb v. Stentan*, 11 Q.B.D., 508 (526).

(1) *Lewkner v. Freeman* (1699), 1 Eq., C. Ab., 149, fully reported in 2 *Freem.*, 36.

(2) *Nagendra v. Satadal*, I.L.R., 26 Cal., 536; *Belchambers v. Hussan Ali*, 2 C.W.N., 493.

(3) *Cf. Burjorji v. Dhunbai*, I.L.R., 16 Bom., 1.

(4) *Stileman v. Ashdown*, 2 Atk., 481; *Freeman v. Pope*, L.R., 5 Ch., 538 (541, 545); *Graham v. Furbar*, 14 C.B., 410; *Barling v.*

Bishop, 29 Beav., 417; *Jenkyn v. Vaughan*, 3 Drew., 419; *Thomas Pillay v. Mukurama*, 4 I.C. 301.

(5) *Self v. Madox*, 1 Vern., 459; *Partridge v. Gopp*, 2 Amle., 596.

(6) *Richardson v. Smallwood*, Jac., 588; *Goldsmith v. Russell*, 5 De.M. & G., 547 (554).

(7) *Per Lord Hardwicke*, in *Stileman v. Ashdown*, 2 Atk., 477.

(8) *Per Wood, V.C.*, in *Holmes v. Penny*, 3 K.&J., 99.

settlement that the settler at the time of the settlement contemplated a state of things which might result in insolvency, although he was then solvent and continued so for some time afterwards. As *Malins, V. C.*, on a review of the authorities remarked: "A man who contemplates going into trade cannot on the eve of doing so take the bulk of his property, out of the reach of those who may become his creditors in his trading operations." (1) So a solvent person who was not then engaged in trade, and who owed no debts made a voluntary settlement upon himself for life determinable on bankruptcy with further trusts for wife and children, and an ultimate remainder to himself and fourteen years after he for the first time engaged in trade and in a couple of years became bankrupt, it was held that the settlement was void *in toto* as against the trustee in the bankruptcy, *Bacon, C. J.*, observing: "The deed is plainly fraudulent upon the face of it. What is the meaning of it? The settler in effect says, 'I have got £1,000; I do not intend my creditors to have a farthing of it; and to accomplish that purpose I will settle it in such a way that, if by any accident my creditors should hereafter have a claim to it, it shall go to someone else.' That is as plainly fraudulent as possible." (2) So Lord Westbury summed up the law on the subject in the words: "If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settler made the settlement with express intent to 'delay, hinder, or defraud creditors,' or that after the settlement the settler had no sufficient means or reasonable expectations of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to 'delay, hinder, or defraud creditors,' and is therefore fraudulent and void. It is obvious that the fact of a voluntary settler retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute." (3) In a subsequent case, however, this dictum was animadverted upon as expressed in very large terms, but it was held to be applicable to the facts of a case where a man then solvent made voluntary settlement, but immediately afterwards realized the rest of his property and denied himself of everything. (4) However, in any case in order to set aside a transfer founded on valuable consideration, actual and express intention would have to be proved. (5)

(1) *Mackay v. Douglas*, L.R., 14 Eq., 106 (192); followed in *Ex parte Russell*, 19 Ch.D. 588; *Freeman v. Pope*, L.R., 9 Eq., 206; 5 Ch., 538.

(2) *In re Pearson*, 3 Ch. D., 807 (809).

(3) *Spirett v. Willows*, 3 De G. J. & S., 298 (302); followed by *James, V. C.* in *Freeman v. Pope*, L.R., 9 Eq., 206 (211), O.

A., L.R., 5 Ch., 538.

(4) *Freeman v. Pope*, L.R., 5 Ch.D., 538 (544).

(5) *Holmes v. Penney*, 3 K. & J., 90; *Lloyd v. Attwood*, 3 De G. & J., 614 explained by *Giffard, L. J.* in *Freeman v. Pope*, L.R., 5 Ch., 538 (544).

875. Again a mere *intent* to defeat a particular creditor does not constitute a fraud so as to let in the right, (1) though such an intention if proved may give rise to suspicion; but suspicion though a ground for most minute and searching investigation is no ground for decision. (2) So again, the rule will not lend its aid to preventing assignments in which a creditor obtains a preference over another. The fact that the assignment of the whole or the bulk of his property by the debtor was made to defeat the claim of a particular creditor is of no moment if the consideration be adequate: (3) "Even if, say, the purchaser had asked Hawkins why he wanted to sell, and Hawkins had told him that it was to defeat an execution, that would have been no ground for impeaching the transaction." (4) But supposing that a transfer is made in fraud of the general body of creditors, one of them is competent to sue on behalf of himself and all other creditors, (5) in whose favour the decree will operate. (6) But a transfer voidable at the suit of the creditors cannot be questioned by a person not a creditor. (7)

876. Surety and Guarantor bound by the Rule.—Besides the debtor to whom the rule is obviously applicable, it affects also his surety who is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor. (8) Nor is the person who has entered into a guarantee for the liability of another exempt from the rule, unless under the terms of contract the liability of the guarantor is so remote that it might not enter into any one's calculations, as, for example, if a person having taken shares in a concern at a time when everybody believed them to be a valuable property settled them, though his liability ultimately turned out ruinous; but if he conveys away all his property by a voluntary settlement it is doubtful whether the settlement could in any case be supported in the event of his ultimately being called under his guarantee. (9) So where in 1872 a person gave to a Bank a guarantee to secure the balance due from his son on his banking account to the amount of £1,000, and on the 25th May, 1877, the son's account was overdrawn by £1,515, on which day the father made a voluntary settlement of a leasehold property worth £200 a year, which he held at a rent of £3-10s., and he had then no other property left except some furniture worth £200 and a debt of £1,500 due to him from a person who became bankrupt in 1880 and paid a dividend of 3s. in the pound. But it appeared that this man was solvent at the date of the settlement. The father

(1) *Per* Lord Denman, C. J., in *Wood v. Dixie* L. R. 7 Q. B., 892; *San Dun v. Mein Gale*, 3 L. B. R., 188; *Husain Buksh v. Musahib*, 5 I. C. 179 (180); *Mame v. Masaw* 8 I. C. 1205 (1206); *Mt. Mukundi v. Bulaki*, 9 I. C. 1037 (1038). But a transfer giving preference to one creditor over another though not void under this section, may be annulled if it falls under the provisions of s. 97 of Insolvency Act, *Bal Mukand v. Aya Singh*, 13 I. C. 68 (69).

(2) *Per* Kindersley, V. C. in *Hale v. The Metropolitan Omnibus Co.*, 28 L. J. Ch. 777.

(3) *Middleton v. Pollock*, 2 Ch. D., 106, *Ex parte Games*, 12 Ch. D., 321.

(4) *Per* Kindersley, V. C. in *Mall v. The Metropolitan Omnibus Co.*, 28 L. J., Ch., 777; *Darvill v. Terry*, 30 L. J. Ex., 355;

Sankarappa v. Kamyaya, 3 M.H.C.R., 321; *Tillakchand v. Jatanal*, 10 B. H. C. R., 206.

(5) *Burjorji v. Dhanbai*, 1 L. R., 16 Bom. 1 (20); *Flerahimbhai v. Fulbai*, 1 L. R., 26 Bom., 577; *Ishwar v. Devar*, 1 L. R., 27 Bom., 146; *Mohun Lall v. Balmakund*, 17 C. P. L. R., 24; *Reese River, &c., Co. v. Atwell*, L. R., 7 Eq., 347; *Crossley v. Elworthy*, L. R., 12 Eq., 163; *Cornish v. Clark*, L. R., 14 Eq. (190).

(6) *Burjorji v. Dhanbai*, 1 L. R., 16 Bom., 1 (10); *Ishwar v. Devar*, 1 L. R., 27 Bom., 146; *Hakim Lal v. Mooshabar*, 11 C. W. N., 889.

(7) *Asan Kani v. Somasundaram*, 1 L. R., 31 Mad., 206 (211).

(8) *Goodricke v. Taylor*, 2 H. and M., 380.

(9) *Ridler v. Ridler*, 22 Ch. D., 74 (80),

having died, the Bank sued to set aside the settlement as made in fraud of their rights, and it was held by the court of appeal that it could not stand as against creditors, for under the circumstances the liability under the guarantee ought to have been regarded as a substantial one, and that the settlor had no right to treat the £1, 500 due to him as a good debt, and that the settlement must then be regarded as a settlement of all his property, leaving him nothing out of which he could meet his liability under the guarantee, and that therefore, an intention to defeat or delay creditors must be inferred.⁽¹⁾ "A man," said Cotton, L. J., concurring with Lord Selborne, L. C., and Jessel, M. R., "who makes a settlement without leaving himself enough property to pay his creditors must be considered to do it with an intent to defeat or delay them, and a conveyance of leaseholds made for no consideration cannot be brought within the exception in the statute by the mere fact that the grantee becomes liable for the rent."⁽²⁾

877. What Transfers are prohibited.—Of all transfers most exposed to attack under this section, the first place must naturally be given to voluntary transfers, whether made in fulfilment of a moral obligation in favour of wives, children, or near relations, or in favour of mere strangers, if detrimental to the claims of creditors, for every man is bound to be just before he is generous,⁽³⁾ and while the court views askance at all transfers which have the effect of prejudicing creditors it regards a conveyance in favour of a stranger as conclusively fraudulent. And conveyance in favour of a relation is viewed in no better light if it has the effect of breaking in upon the rights of creditors. A person who is indebted has before him the highest of moral obligation which he does not discharge by withdrawing his property from the satisfaction of their claims, for no man has the right to set before justice the claims of affection. In the case of a person tottering on the brink of bankruptcy a voluntary conveyance is inevitably fraudulent. But if a man was at the time in opulent circumstances and his debts were small which could not have been at that time placed in jeopardy by the voluntary conveyance of a small portion of his property, it is possible that the general presumption may thus be rebutted. But in the generality of cases, if the transfer is voluntary and has the effect of impairing the security of creditors the transfer is deemed to have been made in bad faith. It has been held that in such a case the transfer must be so regarded, for it is inconsistent with good faith which a debtor owes to his creditors to withdraw his property voluntarily from the satisfaction of their claims.⁽⁴⁾

878. The presumption allowed by this section may not only be created in a case when the prior transfer is made gratuitously, but also when it is made for a grossly inadequate consideration or for a nominal price. The question of the inadequacy of consideration is a question of fact and must depend upon the circumstances of each case. If it appears that the property was transferred at a nominal price, and there is nothing to explain away the inadequacy, the presumption will be irresistibly made that the transfer was fraudulent. The mere fact of a settlement being voluntary is not enough to render it void against

(1) *Ridler v. Ridler*, 22 Ch. D., 74 (80).

(2) *Ib.*, p. 82.

(3) *Copis v. Middleton*, 4 Madd., 428; *Partidge v. Gopp*, 1 Eden., 166.

(4) *Twyne's case*, 3 Co., 81; *Townshend v. Windham*, 2 Ves., 10; *Holloway v. Millard*, 1 Madd., 414; *Copis v. Middleton*, 2 Madd., 425.

creditors; (1) nor, on the other hand, is a good consideration sufficient to support it, if the intention be to defraud creditors, (2) though the existence of a valuable consideration is a circumstance in favour of the validity of a deed. (3) A deed executed on the eve of bankruptcy will be upheld, unless it is, in effect, an assignment of the debtor's solvency. (4) Nor is the absence of any fraudulent intention on the part of the debtor, or the fact that the settlement was procured from him by the fraud of others, sufficient to uphold the deed if the effect of the transaction is to defeat the claims of the creditors. (5) But on the other hand false recitals, and the fact that settlement was one of non-existing property made by a husband in insolvent circumstances on his marriage, the wife being not party to the fraud, have been held insufficient to upset the deed. (6) A surety is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor. (7)

879. It must be taken as settled that "consideration" in this connexion includes both a valuable and a good consideration. A good consideration is sometimes used in the sense of a consideration which is valid in point of law; and then it includes a meritorious as well as a valuable consideration. (8) But it is more frequently used in a sense contra-distinguished from valuable; and then it imports a consideration of blood or natural affection, as when a man grants an estate to a near relation merely founded upon motives of generosity, prudence, and natural duty. This species of consideration is recognized by the Indian Contract Act. (9) A valuable consideration is such as money, marriage or the like, which the law esteems as an equivalent given for the grant, and it is, therefore, founded upon motives of justice. (10) "The words good consideration in the statute," says Story, "may be properly construed to include both descriptions; for it cannot be doubted that it is meant to protect conveyances made *bona fide* and for valuable consideration, as well as those made *bona fide* upon the consideration of blood or affection." (11) (§883)

880. But while alienations made for good consideration may not *per se* be presumed to be fraudulent, yet in regarding such alienations the courts will doubtless inquire into the immediate cause of such alienations. If, for example the alienor has been for some time living apart from the alienee and has never before interested himself in him, and suddenly alienates the whole or bulk of his property, such transfer will be presumed to be fraudulent. If the alienor expect insolvency, or is hopelessly involved, the presumption will grow in strength. The courts in India have always regarded with suspicion gifts and transfers on the part of involved debtors in favour of their relatives. And there are cases decided both in England and India to shew that where the effect of such alienation is to defeat the creditors, it is void even though the transaction may not be tainted

(1) *Holmes v. Penney*, 3 K. & J., 90 (99).

(2) *Bott v. Smith*, 21 B., 511.

(3) *Holmes v. Penney*, 3 K. & J., 90, (99).

(4) *Goodricks v. Taylor*, 2 H. & M., 380; 2 D. & S. 135.

(5) *Cornish v. Clark*, 14 Eq., 184.

(6) *Keenan v. Carveford*, 6 Ch. D., 29.

(7) *Dart's Law of Vendors and Purchasers*; *Goodricks v. Taylor*, 2 H. & M., 380; *Ridler v. Ridler*, 22 Ch. D., 74.

(8) *Story's Eq. Jur.*, S. 354, 233; *Coyis v. Middleton*, 2 Madd., 430; *Twyne's case*, 3

Co., 81; *Taylor v. Jones*, 2 Atk., 601; *Partidge v. Gopp*, Amb., 598, 599; s. c., 1 Eden. 67, 168.

(9) S. 25 (1).

(10) 2 Black Comm., 297; *Story's Eq. Jur.*, s 354, 233; *Indian Contract Act*, 2 (d), (see ante).

(11) *Story's Eq. Jur.*, S. 354, 233; *Doe v. Routledge*, Cowp., 708, 710, 711, 712; *Coyis v. Middleton*, 2 Madd., 430; *Twyne's case*, 3 Co., 81.

with fraud. Thus, in a case where a father, partly in consideration of annuities for his life, distributed the whole of his property amongst his children, and it appeared that the latter were aware at the time that the creditors' claims would be defeated, though it did not appear that the debtor had any such intention, the alienation was set aside as against the creditors.⁽¹⁾ Lord Romilly, M.R., observing that although the settlement of his affairs by the debtor while he was alive was very fit and proper, still the defect of it was, that it did not provide for the claims of his creditors. "And," said he, "I am of opinion that the acts of the settler or donor are equally obnoxious to the provisions of the statute, whether they proceeded from himself alone, or whether they are instigated by others."⁽²⁾ If, then, the debtor makes an alienation so as to reserve some property for his creditor, though it may not lie within the jurisdiction of the court, it would not be open to the above objection.⁽³⁾ But as Jessel, M.R., observed: "A man is not entitled to go into a hazardous business, and immediately before doing so to settle all his property voluntarily; the object being, 'If I succeed in business I make a fortune for myself. If I fail I leave my creditors unpaid, they will bear the loss.' This is the very thing which the statute of Elizabeth was meant to prevent."⁽⁴⁾

881. The cases decided under the Bankruptcy statutes afford then little light in elucidating the questions arising under the rule to be now considered. No doubt they afford valuable analogies, and subject to the reservations necessarily to be made, may be used to illustrate the points that arise in discussing the rule. But they are not direct authorities on the question, and should not be regarded as such, although they possess many points in common.

882. Consideration plays an important part in determining the nature of a transfer attacked on the ground of fraud. Indeed, in considering its nature, good faith and consideration are the only essentials that have to be considered. And if there was good faith, and no consideration, it would be permissible for the court to presume, as provided in the second paragraph. But if there was consideration, good faith would be presumed until the contrary is established. Consideration is then the most material element in such a case. The consideration required must, however, be a valuable as distinguished from a merely good consideration. And it must, therefore, be an existing consideration. If therefore a transfer is made for a consideration the recovery of which had then become barred by time, the court will naturally regard that fact as indicative of fraud,⁽⁵⁾ though that fact alone may not be sufficient to stamp the transaction as fraudulent.

883. What Consideration required.—Consideration as a determining factor in fraudulent transfers, must then be a valuable consideration, or a fair interchange of interests. Transfers founded on what is designated good or meritorious consideration, such as natural love and affection, while creating as they do, moral as distinguished from legal obligation, do not count as transfers for consideration, but are looked upon as merely voluntary within the rule.⁽⁶⁾ Again, consideration which is grossly inadequate falls into the same

(1) *Cornish v. Clarke*, L. R., 14 Eq., 184 ;
Rangi Bhai v. Vmayak, I. L. R., 11 Bom.,
 686 ; *Burjorji v. Dhunbhai*, I. L. R., 16 Bom.
 14.

(2) *Ib.*, at p. 189.

(3) *Nasir Husain v. Matapershad*, I. L. R.,

2 All., 891.

(4) *Ex parte Russell*, 19 Ch. D., 588.

(5) *Sreeswamulu v. Andalammal*, 16 M.L.
 J. R., 14.

(6) *Mathews v. Beaver*, 1 Cox., 278 (280).

category. Consideration may be regarded as grossly inadequate if its inadequacy is such as to induce the presumption of collusion, or such in fact, as might have invalidated the sale as between the vendor and purchaser without the interposition of creditors or purchasers. (1) Thus, where a man on the verge of bankruptcy assigned to his mother policies of assurance on his life amounting to £800 in consideration of a debt of £180 due to her, the transfer was set aside as a fraud against creditors. (2) In another case a transfer of a property valued at least at Rs. 35,000 for Rs. 10,000 was held to have been made for a grossly inadequate consideration. (3) In a third case the assignment of a decree worth Rs. 15,000 for Rs. 8,000 was similarly condemned. (4) In considering the adequacy of consideration regard must be had only to what was ultimately retained by the vendor. If a part of the consideration was as a part of the scheme afterwards returned to the vendor, or where it appeared not to have been *bona fide* paid, the sale was not allowed to override a prior conveyance although voluntary. (5) But the mere refunding of a part of the purchase-money does not invalidate the sale, (6) though it is suggestive of collusion and fraud. A transfer founded on a fictitious consideration cannot be supported on the ground of natural love and affection. (7) Where a transaction is supported on the ground of consideration, it is by no means essential that all the consideration for which the transfer is purported to have been made must be established, for all that is required to take a transfer out of the rule is that the consideration should be valuable and adequate. If this is established it is sufficient, though the consideration paid may not coincide with the consideration stated in the deed. (8) So where a mortgage purported to secure Rs. 8,500, was in reality executed only for Rs. 4,853, the court regarded the transaction as good *pro tanto* in the absence of circumstances showing that it had been entered into only to defeat or delay the other creditors of the mortgagor; as the court remarked: "So far as the debts were real, the mortgage may be regarded as a good transaction, so far as they were fictitious, that is, so far as valuable consideration failed to pass, the mortgage must be held to be inoperative." (9) The adequacy of consideration would no doubt be judged by the value of the property at the time of the transfer. If it is inadequate it may be a circumstance which the court may take into account; and if it is grossly inadequate the court may presume the transfer to be fraudulent if it has the effect of defeating or delaying creditors. In order, however, to justify such a presumption, the difference between the value of the property transferred and the amount of the debt should not only be substantial but so gross as necessarily to indicate that the transferer who executed the deed did so with the knowledge that the value of the property was greatly in excess of the amount of the debt. (10) Where the consideration is illusory but the transfer is purported to have been made for full consideration, the fact is of itself evidence of fraud, which the court will

(1) *Mav's Fraudulent Conveyances*, 237.

(2) *Stokoe v. Cowan*, 29 Beav., 637.

(3) *Hossenibhai v. Haji Ismail*, 5 Bom. L. R., 255 (263).

(4) *Chidambaram v. Sami Aiyar*, 1 L. R., 30 Mad., 6.

(5) *Roberts v. Williams*, 4 Hare, 130; *Mulins v. Guilfoyle*, 2 Ir. L. R., 113.

(6) *Doe v. James*, 16 East, 213 (214).

(7) *Bridgman v. Green*, 2 Ves., S. 627.

(8) *Of. Yedu v. Kesarbai*, 8 Bom. L. R.,

110 (114); *San Dan v. Mein Gale*, 3 L. B. R., 188.

(9) *Rajani Kunwar v. Gour Kishore*, 1 L. R. 35 Cal. 1051 (1057) *China Pitchiah v. Pedakotiah* 1 L. R. 36 Mad. 29; *In re Jalandanki*, 10 M. L. T., 183; 11 I. O., 868 (869).

(10) *Hanifa Bibi v. Punnamma*, 16 M. L. J. R., 11; It may be noted that even in such a case the court may presume. It is not bound to as under the English Statute—*Bai Cooverbai v. Mahomed Abdulla*, 7 Bom. L. R., 267.

lean against and reduce to what is just and equitable. (1) As against purchasers, the question of consideration is ordinarily the only question that has to be decided, for on it depends the fraudulent character of the transaction. But in displacing the rights of purchasers the court is a little more lenient, and upholds them upon (if anything) slighter considerations than those which are necessary against creditors; "for a man indebted selling his property ought to get a fair return, so as to keep the same amount of property for payments of his debts, whilst, as between a purchaser of land and a person claiming under a prior title, the question is, which has the best right; and if the first gave any consideration the conveyance to him is not lightly to be infected with the doctrine of voluntary conveyances." (2)

884. Legal obligation is the only test of a valuable consideration. Now legal obligation may arise out of a contract or out of a statutory duty by which the doer could have been compelled to do. Such an obligation may arise from the duty to make a provision for wife or family, or to indemnify the surety, (3) a joint promisor or a person who legally acquires a charge on another's property or a claim against him. Thus a manager or an agent, a contractor or a workman, may validly claim compensation for the proffered services. An old though time-barred debt may form a valuable consideration, though a conveyance made to secure it would be justly regarded with suspicion. (4) A promise made by the eldest son to his father on his death-bed to make a provision for his younger children out of the property left to him has been held sufficient consideration to support a bond made in pursuance of such promise. (5) So a promise by the aunt to settle her estate on her nephew, provided he agreed to live with her and in consequence of which the latter had been put to some expense was held to form a valuable consideration, upon which the promise could be enforced. (6) Relinquishment of a pecuniary advantage is as good a consideration as money paid. A fresh security given for the payment of all annuity voluntarily settled, on its falling into arrears, has been held to be supported by valuable consideration. (7) The courts will not specifically enforce voluntary agreements, and this fact may often furnish a useful analogy in determining whether a transaction is or is not supported by valuable consideration. (8)

885. So far as regards the consideration necessary to support transfers (its validity must be judged according to the circumstances at the time the transfer was made, and not in the light of subsequent events.) (9) But a transfer evidently made out of natural love and affection may be shown to have been founded on valuable consideration, as for example, marriage of the grantee, (10) or payment of debts, (11) or other valuable consideration which is not inconsistent with that alleged in the deed. (12) "In considering whether or not a deed is voluntary the court will take into consideration all the circumstances under which it was executed and the relative positions of the parties, and will look at other deeds

(1) *Blount v. Doughty*, 3 Atk., 485; *Ainfa Bibi v. Punnamma*, 16 M. L. J. R. 1.

(2) *Per Wilmot, C. J.*, in *Roe v. Milton*, 2 Wils. 858, cited in *May's Fraudulent Conveyances*, 238; cf. *San Dan v. Mein Gale*, 3 L. B. R., 188.

(3) *Holmes v. Penney*, 26 L. J. (Ch.), 179.

(4) S. 25, Indian Contract Act.

(5) *Eales v. Gee*, Barn. Ch., 397.

(6) *Townsend v. Toker*, L. R., 1 Ch., 446.

(7) *Gilham v. Locke*, 9 Ves., 614.

(8) *Ford v. Stuart*, 15 Beav., 501.

(9) *Hitchcock v. Giddings*, 4 Price, 185; *Hanks v. Palling*, 25 L. J. (Q. B.), 375.

(10) *Tanner v. Byne*, 1 Sim., 166.

(11) *Atwell v. Harris*, 2 Ro. Rep., 91.

(12) *Clifford v. Turrell*, 1 Y. & C. Ch. 138.

executed at the same time, if they appear to be part of the same transaction although not mentioned in the impeached deed, (1) and will take any evidence which tends to throw light on the reasons and considerations for the settlement; and though there is proof either by extrinsic evidence or by anything appearing on the face of the deeds, of any stipulations or agreements which there was sufficient consideration to support, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had; and any consideration which is found to exist will either support the whole transaction or none at all." (2) It has been accordingly held that the relinquishment of his share to which he was entitled in the property of his deceased brother by the uncle of a minor with a view to facilitate the action of the Collector in obtaining the certificate of guardianship is not a transfer without consideration, or void merely because it had been made with intent to defeat, delay or defraud the transferrer's creditors. (3) It is also well settled that a nominal consideration being expressed in the deed does not prevent the admission of evidence *aliunde* of the real consideration, provided that such real consideration be not inconsistent with the deed, (4) but to support a deed voluntary on the face of it against creditors, the proof of valuable consideration must be clear and free from suspicion. (5)

886. As between present and past consideration, there can be no doubt **Past consideration.** but that a past creditor occupies a position of greater advantage. For while one who purchases for a present consideration has nothing at stake and might with perfect safety have kept himself out of the transaction, a past creditor cannot do so without losing his claim. If therefore he exercises diligence and gets himself paid before the other creditors the latter cannot complain, for he was under no duty bound to invite them to share his good fortune. His duty was to himself, and if he has by his superior vigilance secured the repayment of his debt, it is not fraud on the other creditors. (6) (§. 892).

887. A voluntary and voidable deed may become valuable by *ex post facto* consideration, for "it cannot be denied with respect to **Ex post facto consideration.** persons who make voluntary settlements, and those who are called volunteers, that they may come to such future bargains as to make that which was originally voluntary no longer to be so considered." (7) Thus if a marriage is contracted, or money paid on the faith of a voluntary settlement, (8) the title of the transferee although derived from and passing through a voluntary deed is preferred to the claims of creditors and purchasers. (9) In such cases, consideration is said to relate back to the first instrument. But the rule is strictly confined only to cases where the subsequent payment is made in good faith without notice of or privity in the fraud, and on the faith of the particular voluntary conveyance which the subsequent consideration is to be taken as confirming. A certain connection must be established between the voidable act and that by which it is sought to be

(1) *Thompson v. Webster*, 4 Drew., 692; *Ford v. Stuart*, 15 Beav., 493; *Harman v. Richards*, 22 L.J. (Ch.), 1066.

(2) *Harman v. Richards*, 22 L.J. (Ch.), 1066, *May's Fraud. Con.*, 255, 256.

(3) *Mahammadunissa v. Bachelor*, 1 L.R., 29 Bom., 428; *Ashidbai v. Abdulla*, 1 L.R., 31 Bom., 271 (277).

(4) *Leitch's case*, L.R., 1 Eq., 281 (286).

(5) *Graham v. O'Keefe*, 16 Ir. Ch. R., 1 (14); *Townshend v. Toker*, L.R., 1 Ch., 446.

(6) *Hakim Lal v. Mooshabar*, 11 O.W.N. 889.

(7) *Per Lord Eldon*, in *Johnson v. Legard*, T. & R., 294.

(8) *Prodgers v. Langham*, Sid., 188; *Dillwyn v. Llewellyn*, 81 L.J. (Ch.), 658.

(9) *May's Fraud. Conv.*, 295.

supported, and of which the *onus* is clearly on the person who pleads the connection." (1) "There is no difference," said Lord Eldon, "between a voluntary settlement made good by a subsequent marriage, and one made good by a subsequent advance of money," and "the substantial justice of this case is very much the same where an instrument of this kind is carried to a man who, upon the authority of it, advances money, and where he advances money at the time." (2) But the doctrine of *ex post facto* consideration would appear to be confined in its application only to subsequent purchasers who, being non-existent at the time, it is said, have no right to defeat the claim of the volunteer. (3) But as against the existing creditors the same considerations do not apply, for as existing creditors they have a prior claim, and, therefore, a better title. Their right accrues immediately on the execution of the voluntary deed which is void or not according to the state of circumstances at its execution, so that in point of time their title is prior to the introduction of the valuable consideration which alone can prevail against them. (4) A voluntary deed for the benefit of the creditors may, however, become valid even against them if upon the faith of it they have refrained from enforcing their remedies against the debtor. (5)

888. Is "Mehar" or Dower a Consideration.—The dower payable to a Mahomedan wife is a debt (6) and is regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. (7) As such, it forms a valid consideration for a transfer of property. (8) Dower may be exigible or prompt called *Mojal*, or deferred called *Mowajal*. (9) A dower is presumed to be prompt unless it is shown to be deferred. (10) The former is payable on demand at any time from the consummation of the marriage up to the death of the wife, and being a debt it may be recovered by heirs for their mother at any time within twelve years of the mother's death. (11) Dower may be fixed even after marriage. (12) A widow may obtain and retain possession of her deceased husband's property in lieu of her dower debt until it is paid, (13) but she must have obtained possession with the consent or by the acquiescence of the heirs. (14) Even as such, her possession is that of a charge-holder. (15) She is therefore, liable to account to those entitled to property subject to her claim for the profits received by her. (16) She has of course, no power of alienation. (17) When she is not in possession her claim to dower may be recovered like any other debt. (18) When in possession her lien is a personal right which she cannot transmit to the purchaser of her estate, (19) and it does not survive to her heirs. (20)

(1) *Hoghton v. Hoghton*, 15 Beav., 278 (316); *George v. Milbanks*, 9 Ves., 193.

(2) *George v. Milbanks*, 9 Ves., 193 (195); cf. *Myers v. Duke of Leinster*, 7 Ir. Eq. R., 146 (166).

(3) *Johnson v. Legard*, T & R., 294.

(4) *May's Fraud*, Conv. 305.

(5) *Acton v. Woodgate*, 2 My. & K., 492.

(6) *Khajarunnissa v. Saifoola*, 15 B.L.R., 306, P.C.

(7) *Abdul Salima*, I.L.R., 8 All., 149, P.C.; *Ghulam Mustafa v. Hurmat*, I.L.R. 2 All. 854; *Suba Bibi v. Balgobind*, I.L.R., 8 All., 178; *Abbas Ali v. Karini Baksh*, 13 O.W.N. 160.

(8) *In re Seth Nemichand*, 5 I.C. 316 (317).

(9) *Khajarunnissa v. Risannissa*, 15 B.L.R., 84.

(10) *Bedar v. Khurram*, 19 W.R., 315 P.C.; *Taduja v. Hasanbiyari*, 6 M.H.C.R.,

9; *Masthan v. Assan*, I.L.R., 23 Mad., 371.

(11) *Hosseinooddeen v. Tajunnissa*, (1864) W.R. 199; *Azizullah v. Ahmad*, I.L.R., 7 All., 353.

(12) *Kamarunnissa v. Hussaini*, I.L.R., 3 All., 266.

(13) *Amani v. Muhammad*, I.L.R., 16 All. 235. O.A.; *Muhammad v. Amani*, I.L.R., 17 All., 93.

(14) *Amanatunnissa v. Basherunnissa*, I.L.R., 17 All., 77.

(15) *Mulkab v. Jehan*, 10 M.I.A., 252;

Amed Ali v. Saffihin, 9 B.L.R. (A.O.), 175.

(16) *Bachun v. Hamid*, 14 M.I.A., 377.

(17) *Chubi v. Shamsunnissa*, I.L.R., 17

All., 19; *Mahomed v. Ghasheea*, 1 Agra. 150.

(18) *Mearun v. Najeebun*, 2 Agra. 385.

(19) *Ali Muhammad v. Azizullah*, I.L.R.,

6 All., 50.

(20) *Hadi v. Akbar*, I.L.R., 20 All., 262.

889. A claim to dower must be established by the very best description of oral evidence, where no *kabinamah* is produced. ⁽¹⁾ As regards deferred dower it is sufficient to state that it is only claimable on the dissolution of the marriage either by divorce or death. ⁽²⁾ The Oudh Laws Act makes a salutary provision empowering the court to cut down the amount of dower to a reasonable amount with reference to the means of the husband and the status of the wife ⁽³⁾ and in exercise of this power the courts have even in the case of a lady of social status cut down the amount from ten lacs to Rs. 25,000, having regard to the value of the property of the husband, which was Rs. 60,000, besides an annuity of Rs. 2,940 *per mensem* settled for his life. ⁽⁴⁾ It is a notorious fact that Mahomedans often stipulate for larger sums for dower than they can ever hope to pay, and an extravagant sum is often fixed to provide against a too hasty divorce, and not infrequently through mere bravado or by way of a compliment to the wife or the husband. In such cases it may well be questioned whether the amount fixed recklessly or *in terrorem* could ever form a valuable consideration for an alienation of property. Indeed, it is too well known that *benami* or fraudulent transfers are only too often made by Mahomedan debtors in favour of their spouses ostensibly in consideration of *mehar* but really with the object of withdrawing the property from their creditors. In such cases it would be pertinent to enquire as to what were the circumstances of the husband when the *mehar* was fixed, what was its nature, and if prompt, why it had remained unpaid, and what circumstances had precipitated the transfer, and how was it effectually carried out. Nor should it be forgotten that a debtor having many debts to pay can readily place his property beyond the reach of his debtors by aliening it to his wife, and it cannot therefore be free from the taint of suspicion which is all the more enhanced if after the transfer he is shown to have continued in its possession and to have participated in its benefit.

890. Fraudulent Intent of Transferee Material:—But the presence of consideration, howsoever valuable and adequate, is alone insufficient to save a transfer from the operation of the doctrine (§ 934). Added to consideration there must be good faith at least on the part of the transferee. ⁽⁵⁾ For in order to constitute a purchaser in good faith within the section it is sufficient that there be good faith on the part of the purchaser; it is not necessary that both parties to the transaction should act in good faith. ⁽⁶⁾ If therefore he was privy to the fraud against creditors, he is in no better predicament than if his transfer had been without any consideration at all. But if he was free from fraud the fraudulent intent of the transferrer will not invalidate the deed. ⁽⁷⁾ He may have planned a flight from his creditors with the sale proceeds of his transfer. Indeed, the sole object of his transfer may have been to convert his property into cash, and thus shuffle out of sight his money and himself. But this

(1) *Huseena v. Husmutoonissa*, 7 W.R., 495; *Abdool v. Collector*, M.W.R. 65.

(2) *Hosseinooddeen v. Tajunnissa* (1864). W. R. 199; *Khojarrannissa v. Risannissa*, 5 B. L. R., 84.

(3) S. 5, Act XVIII of 1876; *Collector v. Harbans*, I. L. R., 21 All., 17; *Suleman v. Mehdi Begum*, I. L. R., 21 Cal., 135, P.C.

(4) *Suleman v. Mehdi Begum*, I. L. R., 21 Cal., 135 (140), P.C. As to the Oudh laws being unaffected by domicile see *Zakeri v. Saking*, I. L. R., 19 Cal., 689.

(5) *Chidambaram v. Sami Aiyar*, I. L. R.,

30 Mad., 6; O. A. I.L.R. 37 Mad., 227 P.C.; *Alagappa v. Dasappa*, 24 M. L. J. 293; *Hakim Lal v. Moosahar*, I. L. R., 24 Cal. 99 (1013); *Husain Buksh v. Musabibi*, 5 I.C., 179 (180); *Hassan Abbas v. Mt. Razia*, 12 I.C. 401 (402); *Koolayappa v. Balusami*, 5 M. L. T. 283.

(6) *Mackintosh v. Pogose*, [1895], 1 Ch., 505.

(7) *French v. French*, 6 De M. & G., 101; *Golden v. Gillman*, 20 Ch. D., 394, affirmed 51 L. J. (Ch.) (503); *Hakim Lal v. Moosahar*, I.L.R., 34 Cal. 999 (1017).

could not damn the deed as fraudulent, unless the transferee was the party to the fraud, or at least had notice of the transferor's designs. It is his good faith that is on trial in a case in which his transfer is in question. If he has acted innocently it does not matter how the transferor was disposed. If he was actuated by fraud, but the transferor was innocent, the transfer is still good, for the transferor's creditors cannot be permitted to try the transferee's motive for his purchase, if he had paid good and sufficient consideration for it. The transferor's fraud—his want of good faith—is then in every case essential, added to which there must be want of good faith in the transferee. But want of good faith in the transferee without a corresponding good faith in the transferor is immaterial and does not affect a transaction, and when it is said that the transferee must have been actuated by fraud, what is intended is that it must be a fraud of such a nature as law esteems fraudulent and sufficient to entail forfeiture of an advantage thereby gained. For example, a transferee may take advantage of the special information he may have received above the transferor's impending bankruptcy, and he may thereupon, secure a transfer in lieu of his debts which has the effect of placing the bankrupt's other creditors at a great disadvantage. But such transfer, though it may offend against the popular notions of honesty, and be galling to those directly affected thereby, still it is not *per se* fraudulent in the eye of the law, for, as has been observed elsewhere, in a case of this kind no creditor is under any obligation to disclose to others his special knowledge or to invite others to share in its advantage. Thus then the fact that there were some suspicious circumstances connected with his transfer will not alone suffice to displace him, for in order to affect him, it must be shown that he had acted with *mala fides* which however, if established, would then override all inquiry into the consideration.⁽¹⁾ Now whether a particular transaction was or was not tainted with fraud is naturally a question of fact. It is a question which has to be decided strictly with reference to the circumstances of each case, and in England such questions are always submitted to the jury who are to say whether the transaction was *bona fide* or fraudulent, calculated to defraud creditors.⁽²⁾ Similarly, the question is treated as one of fact by the courts of Chancery.⁽³⁾ But the question as to what circumstances constitute evidence admissible in a case is a question of law upon which the judge would naturally give his own decision.

· 891. Now as to the circumstances, it may be safely premised that those

Badges of fraud. which surround a fraudulent transfer are so unmistakable and familiar as to render themselves amenable to a simple classification. Indeed, most of them were enumerated by the court of the Star Chamber who resolved *Twyne's case* ⁽⁴⁾ to be (i) where the transferor disposes of his *entire* estate with out any exception including his wearing apparel, or, as it is said, *quod dolosus versatur in generalibus*; (ii) where he remains in possession of the property although possession is professedly transferred; (iii) where the transfer is made in secret—*dona clandestina sunt semper suspiciosa*; (iv) where the transfer is made in anticipation of or pending a suit; (v) where there is a trust between parties, for "fraud is always apparelled and clad with a trust, and trust is the cover of fraud"; (vi) where the deed contains a statement that the transfer is made honestly, truly and *bona fide*; and to which may be

(1) *Cadogan v. Kennett*, Cowp., 434; *Acraman v. Corbett*, 1 J. & H., 423.

(2) *Martindale v. Booth*, Z. & Ad., 498; *Dewey v. Baylutt*, 6 East., 257; *Reed v. Blades*, 5 Taunt., 212; *Pennell v. Dawson*,

18 C.B., 355.

(3) *Hale v. Saloon Omnibus Co.*, 4 Drew, 492.

(4) 3 Coke's Rep., 80; 1 S.L.C. (10th Ed.); 1 where the case is reported *verbatim*.

added the other circumstances equally significant, *viz.*, (vii) where the deed is antedated, although the instrument is in fact executed by the parties by whom it purports to have been executed.⁽¹⁾ (viii) The facts that the transfer was unregistered, although its registration may not have been compulsory, (ix) that the transaction was between relations, (x) and there was no apparent necessity for entering into it, as where a mortgage is made by a person possessed of other property, to satisfy the claims of his creditors, or (xi) that the attesting witnesses were not independent witnesses. All these circumstances also indicate fraud, and indeed ⁽²⁾ are facts from which fraud may be fairly inferred. In considering a case of alleged fraud in the purchase of an estate, it is material to inquire what relation the purchase-money paid bore to the value of the estate.⁽³⁾

892. Presumption and Proof of Fraud.—Having ascertained the nature of the rule and the class of interest it is intended to protect, the next question is, what evidence has one to give to invoke its aid successfully. The solution of this question depends upon what meaning is to be attached to the controlling words of the section "intent to defraud, defeat, or delay" purchasers and creditors. It will be observed that the effect of the first clause of the section is that where there is an "intention to defraud, defeat or delay" purchasers or creditors, it is immaterial whether there was consideration for the transaction, and if there was, whether it was adequate. The second clause then proceeds to enunciate a rule of evidence. While applicable to the conditions stated in it, it cannot be treated as modifying the substantive law declared in the first and third paragraphs. All it says is, that where certain conditions specified in the clause exist, the court may presume the intent to defraud defeat or delay, but it does not exclude cases of transfers where the intention to defeat or delay may exist, though, so far as consideration is concerned, there may be nothing to say against them. The third clause postulates the existence of both good faith and consideration which are held to be sufficient to take a case out of the operation of the rule embodied in the two preceding paragraphs.⁽⁴⁾ The most material ingredient in determining such cases then is the intention of the transferor. If it was to defraud, all else becomes comparatively immaterial, though, of course, as subservient to the question the transaction must be looked at as a whole and in all its aspects. But the crux of the question invariably is—what was the intention? Now intention cannot often be proved by direct evidence, for, in the luminous words of Brian, C.J., "it is a trite learning that the thought of man is not triable, for the devil himself knows not the thought of man."⁽⁵⁾ Indeed, it is often the case that fraud cannot be established by positive proofs, and on the other hand, it is not to be presumed from circumstances of mere suspicion. It is generally shown by such circumstantial evidence as overcomes the natural presumption of honesty and fair dealing and satisfies a reasonable mind that such presumption has been displaced.⁽⁶⁾ In cases of fraudulent transfer where fraud is cunningly concocted and carefully concealed it is sometimes impossible to expose it by evidence sufficient to convince a legal mind. But in this respect law judges a man's conduct by certain prescribed tests, and if certain acts are present, it assumes without requiring further proof that the intention of which those acts are invariably visible indication was also present. As an apt

(1) 1 S.L.C. (10th Ed.), 1 (2).

(2) *Shib Narain v. Shankar*, 5 C.W.N., 403.

(3) *Sreemanchunder v. Gopalchunder*, 11 M.I.A., 28 (44).

(4) *Ranchoodas v. Ghunilal*, 5 Bom. L.R.,

218.

(5) Year Book, 17 Ed., IV, 1; cited per Lord Blackburn, in *Brogden v. Metropolitan Railway Co.*, 3 App. Cas., 666 (692).

(6) *Mathura v. Ram Rucha*, 8 B. L. R., (A. C.), 108.

illustration of this process of ratiocination may be cited the authority of the clause which warrants a presumption as to fraudulent intent being made from the absence or inadequacy of consideration, and the fact that the transfer had the effect of defeating or delaying claimants. In this respect consideration plays no subaltern part in the law relating to fraudulent conveyances. For if there was consideration, it will suffice to explain the transfer, and in a great measure rebut any presumption that other facts might raise as to sinister intention, since a transfer for valuable consideration is not void merely because its effect is to defeat the claim of a less vigilant creditor. (1) The rule here enacted does not affect such transfers obtained in lawful pursuit of a legal right: it is enacted to reprobate those that aim at depriving others of the lawful pursuit of their legal rights. (2) Consequently, a transfer may be supported by consideration, but if its ulterior object was not the settlement of a transaction between the transferor and transferee, but withdrawal of the property from the transferor's other creditors, and of which the transferee was cognizant, then the transfer would be set aside as a fraud upon the rights of third parties. (3)

893. Burden of Proof.—In a fraudulent transfer the two issues that ordinarily arise are: (i) was the transfer made with intent to defeat and delay the creditors of the judgment-debtor; and (ii) if so, was the purchaser from such judgment-debtor a transferee in good faith and for consideration? The *onus* of proving the first issue lies on the creditor, and if that be established, the *onus* of proving the second will lie on the transferee. (4) Where, however, misplacement of the *onus* has been acquiesced in by the parties in the court of the first instance or in the lower appellate court, the High Court would be very reluctant to interfere with the result unless there were reasons to suppose that the error had occasioned a miscarriage of justice. (5) While generally the party pleading fraud must prove it, there are cases in which the *onus* will distinctly lie on the other party. Such, for example, is the case where the plaintiff seeks to sue on a document which is assailed on the ground of collusion and fraud by a person not a party thereto, in which case it would be for the plaintiff to repel the charge by shewing that the transaction was perfectly genuine and untainted by fraud. (6) So where a part of a property mortgaged to the plaintiff by four defendants was, subsequently to the mortgage, sold to defendants Nos. 5 to 13 at an auction-sale in execution of a rent-decree and the plaintiff sought to enforce his mortgage against the thirteen defendants, the second batch of whom pleaded collusion as regards the execution of the mortgage, it was held that the *onus* of proving that the transaction was perfectly genuine and free from the taint of fraud was on the plaintiff. (7)

894. Quantum of Evidence required.—The gravamen of fraud consists in defrauding, defeating, or delaying another person with better equities. And under this section the purchaser has a better equity if he is a purchaser for valuable consideration. The purchaser who seeks to displace the prior transferee has ordinarily to prove (i) that he is a *bona fide* purchaser for valuable

(1) *In re Jaladanki*, 11 I.C. 869 (869); *Mukundi (Mt.) v. Bulaki*, 9 I.C. 1037 (1038); *Husain Buksh v. Musabibi*, 5 I.C. 179 (180).

(2) *Of. Kaung San v. Sit Tvan*, 8 I.C. 965 (966).

(3) *Janki (Mt.) v. Bisheshwar*, 7 I.C. 614 (620); *Narmal v. Chetram*, 11 O.C. 197.

(4) *Amarchand v. Gokul*, 5 Bom L.R., 142; *Banifa Biti v. Punnamma*, 16 M.L.J.

R., 308; s. o. 17 M. L. J. R., 11.

(5) *Gangadas v. Dama*, 5 Bom., L. R., 177.

(6) *Brajeshware v. Budhanuddi*, I. L. R., 6 Cal. 268; *Shib Narain v. Shankar*, 5 C.W. N., 403 (404).

(7) *Shib Narain v. Shankar*, 5 C.W.N., 403.

consideration; (ii) that the prior transferee is not so: and (iii) that the prior transfer is collusive or designed to defeat his claim.⁽¹⁾ In such cases fraud can rarely be made the subject of direct proof. It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and tangible proofs. It is by its very nature secret in its movements; and if those whose duty it is to investigate questions of fraud are to insist upon direct proof in every case, the ends of justice would be constantly if not invariably defeated.⁽²⁾ Indeed, in no case is it possible to establish fraud by direct evidence. And it is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In other words, it is necessary to establish fraud affirmatively, but it is sufficient if it is proved by implication from the circumstances of the case.⁽³⁾ But the conclusion establishing fraud must be based on reasonable proof, and not on mere suspicion.⁽⁴⁾ This does not, however, imply that fraud can be established by any less proof, or by any different kind of proof, from what is required to establish any other disputable question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case; but what is meant is that, in the generality of cases, circumstantial evidence is our only resource in dealing with the questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing, and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it.⁽⁵⁾

895. Of course, the evidence required to substantiate fraud must necessarily vary according to the circumstances of each case. But, generally speaking, it may be premised that if fraud be proved as a fact, then whatever be the transferor's means, the transfer would be void as to all prior and subsequent creditors.⁽⁶⁾ But while there can be no doubt that as against an antecedent creditor the transfer is void, it may be doubted if the rule holds equally good in the case of subsequent creditors, and the trend of the English cases is in favour of holding that the transfer is fraudulent only as against such creditors as were creditors at the time.⁽⁷⁾ In the majority of cases the validity or invalidity of the transaction will depend upon the question whether the circumstances connected with the debtor's state of indebtedness support the presumption that he had the intention to deprive the objecting creditor of the means of recovering his debt—in effect the presumption of fraud. One cannot shut one's eyes to the melancholy fact that the average value of evidence in this country is exceedingly low, and, although in dealing with such evidence, we are not to start with any presumption of perjury, we cannot possibly take too much care to guard against undue credulity. There is hardly a case involving a disputed question of fact in which there is not a conflict of testimony—one set of witnesses swearing pointblank to a particular state of facts, the other swearing with equal distinctness to a state of facts diametrically opposite to it. If, therefore, we were to form our

(1) *In re Dhanjibhai*, 10 B. H. C. R., 327.

(2) *Mothoor Pandey v. Ram Ruchya*, 11 W. R., 482.

(3) *Lalchand v. Hasto Bai*, ↑ C.P.L.R., 73.

(4) *Sreeman v. Gopal Chunder*, 11 M.I.A. 28; *Buzloor Rahim v. Shumsoonnissa*, 41 M. I. A. 551 (601); *Fazal Baksh v. Fakeeroodeen*, 14 M. I. A. 234; *Waziruddin v. Deoki Nandan*, 6 C. L. J. 472 (488, 489) *Ramchandra v.*

Narayan (Bom. Unrep. case, No. 120 of 1872)

Balkrishna v. Bapooji, *ib.*, Case No. 195 of 1872; *Meses v. Bhagana* (1878), B. P. J., 58.

(5) *Mothoor Pandey v. Ram Ruchya*, 11 W. R., 482 (488).

(6) *Holmes v. Penney*, 8 K. & J., 90 (99); *Cornish v. Clark*, L. R., 14 Eq., 184; *Spirell v. Willows*, 3 De G. J. & S., 293.

(7) *Kidney v. Ousemaker*, 12 Ves., 136 (155); *Walker v. Burroughs*, 1 Atk., 94.

conclusions upon the bare deposition of witnesses without reference to the conduct of the parties and the presumptions and probabilities legitimately arising from the record, all hopes of success in discovering the truth must be at an end. (1) It is, therefore, essential that all the presumptions for and against a claim arising on all the evidence offered or on proofs withheld, on the course of pleadings and tardy production of important portions of a claim or defence be viewed in connection with the oral or documentary proof, which *per se* might suffice to establish it. (2) But the finding that a transfer was made in good faith and for consideration is a finding of fact which cannot be impugned in second appeal. (3)

896. In not a few cases fraud is not susceptible of being demonstrated by direct evidence, and often it may have to be inferred only from the surrounding circumstances. If a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual), that some creditors must remain unpaid, it would be the duty, of the court to infer the intent of the settler to have been to defeat or delay his creditors, and such a question would be a question of fact upon which the jury may be directed to find. (4) A transfer soon followed up by the transferor's insolvency or his embarking upon a hazardous enterprise may similarly lead to a justifiable inference that the transfer preceding it was fraudulent. (5) Thus where in a suit to establish the plaintiff's right to property purchased by him, it was found that his vendor who had many debts to pay, had sold to the plaintiff all his property, reserving nothing to himself, that the plaintiff bought the property without seeing it or valuing it, that the consideration for the sale consisted of time-barred debts or debts which were not payable at the time; that the property sold remained in the possession of the vendor who paid its assessment; and that the consideration was grossly inadequate, it was held that the circumstances clearly disclosed that there was no *bona fide* or valid sale, but a mere colourable transaction without consideration not intended to transfer the property to the plaintiff (6). These considerations no doubt only create a presumption against the *bona fide* character of the transfer, but their cumulative effect where two or more of them co-exist may be so great as to require a very strong degree of proof to repel it. On the question whether a mortgage was fictitious or a real transaction there was evidence on each side bearing directly on the character of the transaction but on neither side was the evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence given by those who were called was open to much adverse criticism. The Courts in India differed, the Subordinate Judge deciding that the mortgage was fictitious, and the High Court holding it to be a genuine transaction. It was held by the Privy Council that in determining which story was to be accepted, it was necessary for their Lordships to rely largely upon surrounding circumstances, the position of the parties and their relation to one another, the motives which

(1) *Mothoora Pandey v. Ram Ruchya*, 11 W. R., 4, 482 (484).

(2) *Rajendro v. Shecupurshun*, 5 W. R., 55 P. C.

(3) *Manohar v. Ram Autar*, I. L. R., 25 All., 431 (435).

(4) *Freeman v. Pope*, L. R., 25 Ch., 538

541; cf. *Halifax Joint Stock, &c., Co. v. Gledhill* [1891], 1 Ch., 31 (37).

(5) *Ex parte Russell*, 19 Ch. D., 538 (598); *Mt. Champo v. Sankar Das*, 14 I. C. 232, (234, 235).

(6) *Nana v. Rautmal*, I. L. R. 22 Bom., 255.

could govern their actions, and their subsequent conduct; and so dealing with the case, their Lordships upheld the decision of the High Court. The fact that if a genuine transaction it was advantageous to the mortgagor, and if fictitious it afforded him no immediate protection from creditors (which was the motive alleged by the defendants for entering into the transaction) was held to be a very material circumstance in the case. (1)

The burden of proving the fraudulent nature of a transaction lies on the person who seeks to impeach it. (2) (§§ 893, 906). But where the transfer is made for valuable consideration, the fact would show that there may be purposes in the transaction other than the defeating or delaying of creditors, which would make the case of those who contest the deed more difficult. (3) Relationship between the vendor and the purchaser is by itself not a sufficient evidence of fraudulent intention, but the fact is not on that account unimportant. (4) One great test of fraud is to inquire whether the appearance and reality of the transaction correspond. Thus Rolfe, B., in one case (5) observed: "In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest, and give him a security which left his other creditors unprovided for. But that is not the sense in which the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument according to its apparent character and effect." The question whether a particular transaction is *bona fide* or fraudulent is always a question of fact; and while it is true that initially the *onus* will lie on the person impeaching the transfer as fraudulent, there may be circumstances on a consideration of which it may be shifted. In judging of a transaction, it has been repeatedly held that regard must always be had to all the circumstances of the case, there being really no inflexible canon by which such transactions are to be judged. As Kindersley, V.-C., said: "With respect to the question whether the sale was *bona fide*, it was at one time attempted to lay down rules that particular things were indelible badges of fraud; but in truth every case must stand upon its own footing; and the court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration." (6)

897. There must appear to be intentional fraud in the hindrance or delay

Venial fraud.

that is caused to the creditor. Otherwise, a voluntary transfer of a particular property in the ordinary course of business which causes some delay to a creditor in proceeding to recover his debt (a not uncommon occurrence), might be vitiated as fraudulent, although the debtor had sufficient other means available to the creditor. (7) Thus where *M.* the first mortgagee, did not take possession of the title-deeds from the mortgagor

(1) *Dalip Singh v. Nawal Kunwar*, I. L. R. 10 All., 268 P.C.

(2) *Brajeshware v. Budhanuddi*, I. L. R., 6 Cal., 268; *Dawlat Rao v. Keshao Rao*, 1 O.P. L. R., 59; *Raja Gokul Das v. Mt. Jankes*, 9 C. P. L. R., 142.

(3) *Rajani Kumar v. Gour Kishore*, I.L.R. 35 Cal., 105 May's Fraud. Convoy., 84; *Raoji v. Amrit Rao*, 2 O.P.L.R., 68.

(4) *Mt. Janki v. Thakur Prasad*, 1 O.P.L. R., 69.

(5) *Eveleigh v. Pirssord*, 2 Mo. & R., 541.

(6) *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J., Ch., 777; see also *Sankarappa v. Kamayya*, 3 M.H.C.R., 238; *Pullen Chetty v. Ramalinga*, 5 M. H. O. R. 361; *Rajan v. Ardeshir*, I.L.R., 4 Bom., 70; *Mt. Janki v. Thakur Prasad*, 1 O.P.L.R., 68.

(7) *Gnanabhai v. Shrinivasa Pillai*, M H. C.R., 87; following *Holmes v. Penney*, 26 L. J., Ch., 179; *Thompson v. Webster*, 28 L.J., Ch. 702; see also *Freeman v. Pope*, 5 Ch. D. 538.

who subsequently mortgaged the same property to another, who obtained possession of them, it was held that *M* by not obtaining possession of the deeds, enabled the mortgagor to deal with his estates as an unincumbered owner, and that the subsequent mortgagee having been diligent in obtaining the deeds, acquired priority. So an incumbrancer who advanced his moneys after ascertaining the possession of the deeds, and upon the faith that there was only one prior mortgagee could not be postponed to another incumbrancer of whose title he had no notice. (1) Again, the setting up of a false case by a party should not affect his rights already created. Where, for instance, a mortgage purporting to secure Rs. 8,500 was executed in fact to secure only Rs. 4,853, but it was not then executed to defeat or delay the mortgagor's creditors, but after the latter had attached the mortgaged properties, the mortgagee set up his mortgage as good for Rs. 8,000, it was held that the setting up of a false claim by the mortgagee did not preclude his recovering the sum actually advanced on the security of the mortgage. (2)

898. An objection that a transfer was made with intent to defeat creditors, must be taken by the creditors themselves. It is not open to strangers to attack the transfer on that ground. (3) In the absence of any allegation as to fraud in the pleadings, it cannot be presumed from the mere fact of inadequacy of consideration. (4) Ordinarily, the person charging another with fraud must prove it. (5) He must before proving clearly allege it in specific terms. (6) "With regard to fraud," observed Lord Selborne, L. C. (7) "if there be any principle which is perfectly well settled, it is that the general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice." (8) And similarly in the same case Lord Hatherley observed (9) : "Now I take it to be as settled as any thing well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest." This case was followed with approval by their Lordships of the Privy Council who added (10) : "When fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges." (11) If he does not do so in the first court, he cannot, in

(1) *Clarke v. Palmer*, 21 Ch. D., 124.

(2) *Rajani Kumar v. Gour Kishore*, I.L.R., 35 Cal. 1051; In re *Jaladanki*, 11 I.C. 868 (869). But such a case must be distinguished from one in which the amount of consideration is fraudulently overstated — *Chidambaram v. Sami Aiyar*, I.L.R., 30 Mad., 6 O.A.; *Chidambaram v. Srinivasa*, I.L.R. 37 Mad., 227 P.O.

(3) *Asan Kani v. Somasundaram*, I.L.R., 51 Mad., 206 (211).

(4) *Eusain Buksh v. Musahib*, 5 I.C., 179 (180).

(5) *Mahomed v. Mahomed*, I. L.R., 21 Cal. 612; *Mannily v. Venkatachellam*, 10 I.C. 922 (928); *Mt. Hamidannissa v. Mt. Nazimun-*

nissa, 1 I.C., 795 (796).

(6) *Chanvirapa v. Danava*, I. L. R., 19 Bom., 593; *Jyoti Prakash v. Jhonmull*, 13 O. W.N. 87.

(7) *Wallingford v. Mutual Society*, 5 App., Cas., 685.

(8) *Wallingford v. Mutual Society*, 5 App., Cas., p. 597.

(9) *Ib.*, p. 701.

(10) *Gunga Narain v. Tiluckram*, I.L.R., 15 Cal., 533 P.C.

(11) *Ib.*, p. 537; see also *Krishnaji v. Wamanji*, I.L.R., 18 Bom., 144; *Balaji v. Gangadhar*, I.L.R., 32 Bom., 255; *Promoda Nath (Raja) v. Kineo*, 8 C.L.J. 135.

appeal be allowed to amend the plaint for the purpose of specifying certain instances of the alleged fraud. (1)

899. Allegations of facts made by a party from his own knowledge must be supported by him from the witness-box. The practice of shirking the responsibility of supporting allegations made by parties by their own evidence has been justly reprobated by all the High Courts. In England, the non-appearance in the witness-box of a party in support of his own allegations of facts within his own knowledge would ordinarily be regarded, in the absence of some satisfactory explanation, as throwing great doubt on the *bona fides* of his case, and there can be no doubt but that in appraising evidence this fact will always weigh with the judges. (2)

900. What Evidence excluded.—The fact that a party had in other cases taken *benami* sales is no legal evidence affecting the integrity of the transaction in dispute, (3) unless the several transactions were so closely allied as to the proximity of time, or similarity of intention and action, in which case the evidence becomes material. (4) In other words, the evidence of other fraudulent acts is only admissible as evidence of a systematic course of conduct, when that is a fact in issue. (5) Thus the fact that the settler was at the time of the settlement largely engaged in speculative transactions, (6) or was about to embark upon a perilous trade, (7) affords strong evidence that notwithstanding his apparent solvency the real intention of the settler was to place the property out of the reach of his creditors, and the fact that he had already made provision for the objects of the settlement may not be immaterial in estimating the *bona fides* of the transaction. (8) It is immaterial in such cases that the settler had no creditor at the time he made the settlement. (9)

901. It is not necessary that the purchaser and the vendor should cease to be on good terms after the purchase. (10) Then, again, the fact that the purchaser—a poor man—has failed to give a satisfactory account as to the manner in which he became possessed of the money to buy the property, is not a circumstance which by itself would justify an inference of fraud, for it is conceivable that the person who becomes the purchaser of an estate may be unwilling to give a very full statement, as where he may have received the consideration-money from questionable sources, or in a manner deprecating publicity. But while the purchaser is, it is true, under no obligation to show whence the money was derived, (11) still his non-disclosure can hardly be regarded as a circumstance free from suspicion, which taken along with the other circumstances may be sufficient to turn the scale against the transferor. It is not permissible to infer

(1) *Krishnaji v. Wamanji*, I.L.R., 18 Bom., 144.

(2) Bom., H.C.C. No. 1752 of 1900; cited in *Subhaji v. Shiddapa*, I.L.R., 26 Bom., 392 (394).

(3) *Sreemanchunder v. Gopalchunder*, 11 M.I.A., 28 (46).

(4) *Emp. v. Vajeram*, I.L.R., 16 Bom., 414.

(5) *Rez. v. Wyatt* [1904], 1 K.B., 188; *Makin v. Attorney-General*, [1894], A.C., 57 (65); *Reg. v. Rhodes* [1899], 1 Q.B., 77 (81) *Reg. v. Ollis*, [1900], 2 Q.B., 758 (764, 768).

(6) *Crossby v. Elworthy*, L.R., 12 Eq., 158.

(7) *Mackay v. Douglas*, L.R., 14 Eq., 106; *Re Pearson*, 3 Ch. D. 808; *Ex parte Russell*, 19 Ch. D., 588.

(8) *Crossby v. Elworthy*, L.R., 12 Eq., 158, *Kerr's Fraud* (3rd Ed.), 189.

(9) *Mackay v. Douglas*, L.R., 14 Eq., 106.

(10) *Sreemanchunder v. Gopalchunder*, 11 M.I.A., 28 (46); *Mt. Hamidunnissa v. Mt. Nazirunnissa*, 1 I.O. 795 (796); *Mt. Ishab Kuar v. Ram Singh*, 9 I.O., 1018 (1019).

(11) *Ib.*, 49.

collusion from the mere fact that the vendor and the purchaser happened to be related to each other, although the fact may justifiably give rise to suspicion, but as the Privy Council remarked: "If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe." (1) But this does not mean that relationship between the transferor and transferee has no bearing on the question of fraud. For, unquestionably it is a circumstance evidencing fraud, though by itself insufficient to create a presumption in favour of it. (2) Indeed, it is a well known fact that a hard-pressed debtor anxious to save for himself something out of the wreck, naturally turns to his relatives and friends to lend him their names in his predicament. So the facts that the transferor was on the verge of bankruptcy and that the transferee is his near relative (3) or friend (4) have been held to be sufficient to establish a *prima facie* case of fraudulent transfer which would lose even the virtue of plausibility if it is unsupported by any demonstrable consideration. (5) Where the circumstances attending the transaction are by themselves suggestive of *bona fides*, the evidence of intention afforded by the subsequent conduct of the parties must be clear and cogent. It must not be of an equivocal character but absolutely inconsistent with the *bona fides* of the transactions, and leading to one, and but one presumption—the presumption of fraud. (6) Then again, as has been stated before, if a transfer is supported by valuable consideration and good faith it is not void merely because its effect is to defeat the claim of a less vigilant creditor. (7) One creditor is under no legal or moral duty to invite him to a rateable distribution of his insolvent debtor's assets. His duty is to himself, to see that he realizes his debt, and it does not matter to him if nothing is left over to satisfy the claims of others.

902. Voluntary Deeds.—As opposed to deeds supported by valuable consideration, there are the voluntary deeds or 'deeds in which valuable consideration does not enter. Such deeds follow distinct rules, which have to be carefully distinguished from those which regulate the other class of deeds in which consideration gives the purchasers a protection which is only forfeited if they are shown to have colluded with the transferor, or to have taken with notice of the meditated fraud. Voluntary deeds are, on the other hand, regarded as void as against third parties, if they have the effect of defeating or delaying creditors. It is not necessary that there should be proof of actual fraud, or indeed, that fraud should have been intended by the donor, but if it is proved that it would necessarily have that effect, it is sufficient to avoid it. But as between the parties themselves and all persons claiming under them a voluntary deed is binding, but in so far as it has the effect of defeating or delaying creditors, they are not *bona fide* and are regarded as void against them, (8) and only to the extent necessary to safeguard their rights. (9) For every other purpose it is good, unless it is so tainted with fraud as to necessitate its avoidance *in toto*, so as to work justice between the parties. (10)

(1) *Ib.*, pp. 47, 49; *Mt. Ishar Kuar v. Ram Singh*, 9 I.C., 1018 (1019).

(2) *Mt. Hamidunnissa v. Mt. Nazirunnissa*, 1 I.C., 795 (796).

(3) *Raja Ram v. Mt. Umdan*, 18 I.C., 519.

(4) *Maunglu v. Venkatachellam*, 10 I.O. 922 (924).

(5) *Obaidulla v. Ibrahim Ali*, 10 I.C., 906 (907).

(6) *Ebrahim v. Foolbai*, 4 Bom. L. R.,

180.

(7) *Mt. Mukundi v. Bulalli*, 9 I.C., 1037 (1038); *In re Jaladanki*, 11 I.C., 868 (869).

(8) *Petre v. Espinasse*, 2 M. & K., 496; *Robinson v. M'Donnell*, 2 B. & Ald., 134; *French v. French*, 6 De. M. & G., 95; *Olliver v. King*, 8 De. M. & G., 110; *Re Carter and Kenderdine*, [1897], 1 Ch., 776.

(9) *Croker v. Martin*, 1 Bligh. (N.S.), 5.

(10) *Tarleton v. Liddell*, 17 Q.B., 418.

903. Indeed, at one time the tendency of the courts appears to have been to regard as void all voluntary conveyances merely as such, (1) in other cases, if they were in conflict with a subsequent purchase for valuable consideration ; (2) the view then being that a voluntary deed however free from fraud should not stand in the way of a valuable albeit subsequent deed. So Lord Hardwicke observed : "Every voluntary conveyance made, where afterwards there is a subsequent conveyance for valuable consideration, though no fraud in that voluntary conveyance nor the person making it all indebted, yet the determinations are that such mere voluntary conveyance is void at law by the subsequent purchase for valuable consideration even with notice of the earlier deed." (3) But this is an extension of the doctrine which is unsupported by reason or equity. Even the rule in favour of giving priority to subsequent purchases had soon to contend against the attacks directed against it, for there was indeed no reason why a title created by a gift should be any more precarious than one created by purchase. "There are no doubt," said Lord Romilly, "various circumstances which may be connected with a voluntary deed which will induce this court either to set the deed aside or to refuse to execute the trusts contained in it. There are also statutory enactments, which may defeat a voluntary deed, which would be otherwise valid ; but assuming a voluntary deed to be complete, *bona fide* and valid, and to be unaffected by any statutory disability, I know of no distinction between such a deed and one executed for valuable consideration." (4) And this view ultimately triumphed and was accepted by the Legislature. (5) The view, therefore, now is that a voluntary deed is not void, merely because it is voluntary, but if added to being voluntary *the effect of a deed "is to"* "defraud, defeat, or delay prior or subsequent transferee," then the deed is void as regards the transferee so defrauded or defeated.

904. Now as regards voluntary deeds it is declared in the second clause that if they have the effect of defeating or delaying creditors, they may be presumed to have been made with fraudulent intent. The only questions then that can arise in such cases are (i) whether the deed is voluntary or for a grossly inadequate, consideration ; and (ii) whether it had the effect of defrauding, defeating, or delaying the creditors. The solution of the first question depends upon what is to be regarded as a voluntary deed. It is clear that a deed founded upon valuable consideration is not voluntary provided that it is not so entirely inadequate as from its insufficiency to induce the presumption of fraud. The court does not go into the smallness of the consideration except so far as it affords evidence that the transaction was a sham. (6) In considering whether or not a deed is voluntary, the court will take into consideration all the circumstances under which it was executed, and the relative position of the parties, and will look at other deeds executed at the same time if they appear

(1) *Oxley v. Lee*, 1 Atk., 625 ; *Senhouse v. Earle*, 1 Amb. 289.

(2) *Townsend v. Windham*, 2 Ves., s. 10 ; *White v. Samson*, 3 Atk., 412.

(3) *Townsend v. Windham*, 2 Ves., s. 10.

(4) *Dickinson v. Burrell*, L.R., 1 Eq., 343.

(5) Voluntary Conveyance Act, 1893 (56 & 57 Vict., c. 21, s. 2). This Act is declared to be retrospective, *ib.*, s. 2, which runs thus : "S. 2. Subject as hereinafter mentioned no voluntary conveyance of any lands tenements or hereditaments, whether made before or after the passing of this Act, if in

fact *bona fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. Ch. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding." It may be noted that a gift to a charity was even before this Act regarded as protected by law—*Ramsay v. Gilchrist* [1892] A.C. 412 (415, 416).

(6) *Bayspoole v. Collins*, L.R., 6 Ch., 228.

to be part of the same transaction, although not mentioned in the impeached deed, and will take into consideration any evidence which tends to throw light on the reasons and considerations for the settlement, and, though there is no proof either by intrinsic evidence or by anything appearing on the face of the deed of any stipulation or agreement for which there was sufficient consideration to support, yet several transactions may be viewed together, and the parties to them must be considered to have stipulated according to the rights which they had, and any consideration which is found to exist will either support the whole transaction or none at all. (1) A will is a voluntary conveyance, (2) but an assignment of a lease subject to the performance of covenants therein reserved had been differently regarded, (3) but this view appears to be unsound and has been questioned. (4) A deed though purporting to be voluntary may be shown to have been executed for consideration consistent with its terms, but which must be established by clear and cogent evidence. (5) A voluntary deed executed but not communicated to the beneficiary fails of its effect, since a deed which has not been even communicated to the beneficiary negatives the possibility of the presence of any consideration, or of the equity created by the change of position of the donee. (6)

905. Turning next to the second ingredient of the transfer presumed to be fraudulent, it would be noted that the clause takes no note of the intention to defraud, but presumes it from the fact that the voluntary deed had resulted in defrauding, defeating, or delaying the creditors and other persons protected by the rule. Whenever the effect of a conveyance is to materially impair the security available to the creditors, law assumes that the debtor had intended to defraud them, because his action has resulted in their being defrauded. A settlement made of the whole or the bulk of the settler's property, or of any property by a debtor who was heavily indebted would inevitably be so regarded. In considering the character of such transactions it is not immaterial to look at the motive which prompted the transfer. A trustee who had committed a breach of trust, replaced voluntarily on the eve of his bankruptcy the amount misappropriated, and the transaction was upheld by the court of appeal on the ground that the dominant motive of the trustee was not to prefer the *cestui que trust*, but to repair the wrong done by him. (7) In another case a husband having led a dissipated life incurred some debts. These were settled by his father-in-law who induced him to settle all his property on his wife which consisted of moneys held by the Accountant-General. Soon after the execution of the deed of assignment, he relapsed into his former habits and began again to contract debts. Some of these he paid off with the moneys he continued to receive from the Accountant-General to whom no notice of the assignment had been given. One of the creditors sued him and in execution thereof sought to attach the property assigned as of the husband's and prayed for the cancellation of the instrument as a fraud upon creditors. Both the husband and the wife were impleaded as defendants, to which a preliminary objection as to misjoinder was raised, but was overruled on the ground of the identity of the reliefs claimed against both. On the merits it was laid down that the assignment though voluntary was founded on good consideration of natural love and affection and that having been

(1) *Harman v. Richards*, 10 Hare, 98.

(2) *Villers v. Beaumont*, 1 Vern., 105; *Brudwell v. Boughton*, 2 Atk., 625.

(3) *Price v. Jenkins*, 5 Ch. D., 610; *Ex parte Doble*, 26 W. R., 407; *Harris v. Tumble*, 42 Ch. D., 79.

(4) *Lee v. Mathews*, 6 L. R., Ir., 530; *Shurmur v. Sedgwick*, 24 Ch. D., 597.

(5) *Kelson v. Kelson*, 10 Hare, 385.

(6) *Jones v. Bygott*, 44 L. J., Ch., 487; *Cracknell v. Janson*, 11 Ch. D., 1.

(7) *In re Sake* [1901], 1 Q. B., 710.

made at a time when the assignor had no creditors, it could not be set aside as fraudulent merely because it had the effect of defeating the subsequent creditors. It was further ruled that the omission on the part of the assignor to give notice of the assignment to the Accountant-General and the failure on the part of the wife to obtain an order from the Accountant-General for payments to herself, coupled with the fact that even after assignment, payments continued to be made to the assignor and which were utilized by him towards satisfaction of his debts, did not render the transaction a fraudulent one.⁽¹⁾ Perhaps the same conclusion might have been supported on the ground that the assignment was made for valuable consideration paid by his father-in-law to his son-in-law's debtors.

906. Standpoint of Indian View.—A voluntary conveyance of property by a person indebted, by which is understood, in embarrassed circumstances, ⁽²⁾ has always been regarded in England as fraudulent. It should be noted, however, that the section states the rule from another standpoint—that of the creditor defrauded or delayed, or in other words, it regards primarily the effect of the transfer on the creditor and not the state or solvency of the transferor at the time of the conveyance. It might be urged that this does not afford a surer basis for interpreting the rule, but it must be conceded that protection to the creditors is what the rule aims at, and if he was in any way defeated or delayed, the rule would be infructuous, if it was for that purpose ineffectual. Keeping this object in view, the second clause enacts that if the creditor is hindered and the transfer is gratuitous, it shall be presumed that the transfer was made fraudulently. The burden of proof that it was made *bona fide* would then lie on the transferor. (§§ 893, 897). What are then the facts which tend to create or negative the presumption? It has been held that the fact that the settler was at the time largely indebted or was in indigent circumstances are unmistakable circumstances to shew that fraud was premeditated. Where the settler is shown to have been indebted, he must be taken to have known the state of his circumstances, whether he really did so or not;—evidence that he did not, will not rebut the presumption.⁽³⁾ Again, a person in affluent circumstances may make himself insolvent by giving away all he has. The question then, is not what he was *possessed of* at the time he made the conveyance but rather what property was *left* after the conveyance, and whether it was enough to pay his debts.⁽⁴⁾ “If the debt of the creditor,” said Lord Westbury, L.C., “by whom the voluntary settlement is impeached existed at the date of the settlement and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement.”⁽⁵⁾ But regarded solely from the creditor's objective, inasmuch as the clause only creates a rebuttable presumption, it does not work so harshly in extreme cases as the English rule, under which in the words of James, V.-C., “it is immaterial whether the debtor had any intention whatever of defeating his creditors; but if, in the result, from some accident, a small debt remained unpaid for some years, and by reason of a voluntary settlement and subsequent insolvency of the debtor, the creditor was

(1) *Ebrahim v. Foolbai*, 4 Bom. L.R., 180.

(2) *Townsend v. Windham*, 2 Ves., 1 (10); *Russel v. Hammond*, 1 Atk., 13; *Walker v. Burrows*, *ib.*, 94; “indebted” construed as “embarrassed” in *Townsend v. Westcott*, 2 Beav., 340 (344); *Smith v. Cherrill*, L. R., 4 Eq., 390.

(3) *Christy v. Courtenay*, 13 Beav., 96 (101).

(4) *Jackson v. Bowley*, Car. M., & 97; *Mohan Lal v. Balmokund*, 17 C. P. L. R., 24. The test is applied in the Bankruptcy Acts (32 & 33 Vict., C. 71, S. 91).

(5) *Spirell v. Willows*, 34 L. J., Ch., 365 (367).

delayed in the payment of his debt, then, however honest the settlement was, however solvent the settler was at the time, if at the time he had 100,000*l.*, and put 100*l.*, in the settlement and a creditor for, say 10*l.*, happened to be unpaid in consequence of the settler losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement." (1)

907. Even in such a case, in order to create a presumption against the debtor, the cardinal question to be primarily considered is—
When is a creditor delayed. Has the creditor been defrauded, defeated, or delayed? In other words, what do these terms signify. Suppose the debtor settled his property leaving undisposed of property sufficient for the payment of his debts. In the absence of any special circumstances of fraud, can it be said that his creditors had been defrauded or delayed by the settlement? It would appear not, for if they had immediately taken steps to recover their debts, the settlement would have been no impediment in the way of their obtaining repayments. If, therefore, they neglect to recover the amounts, and wait until the debtor, it may be by reverses of fortune, becomes embarrassed, is not the non-payment due to the creditor's laches, who cannot then fall back upon the settlement which was in no sense an obstacle in their way? (2) It may then be deduced as a principle from this reasoning that the presumption may be rebutted by the debtor by shewing that at the time he made the voluntary settlement, his debts could have been satisfied from the available assets then in his hands remaining or that the non-satisfaction of the debts was due to the creditor's own negligence. (3)

In considering the value of the assets, only property having present market value would come in for calculation. A policy of assurance on the settler's own life cannot, for instance, be reckoned as assets, as being not available to the payment of his existing debts in his lifetime. (4) The amount of property withdrawn from the creditors must always be taken into consideration, for a person worth Rs. 10,000 may unquestionably settle Rs. 1,000, but if having that amount he is indebted in a similar sum and settles Rs. 5,000, it would clearly be a fraud. (5) A change of investment is not a transfer unless it has the effect of withdrawing any portion of the property from the power of creditors. (6) A gift to a relation is open to more suspicion than one to a stranger, (7) but in the case of a transfer for valuable consideration, the fact of the transferee being a relation is not of itself an evidence of fraud, and in the absence of anything fraudulent the court will not say that a man may not sell to a relation on better terms than he would have to give to a stranger. (8)

908. Transfer of entire Estate.—Although the transfer by the debtor of all his property is an index of fraud, and is under the Bankruptcy Acts regarded as an act of bankruptcy, (9) still such a circumstance is not to be regarded as of itself sufficient to condemn a transaction as fraudulent. Indeed,

(1) *Freeman v. Pope*, L. R., 9 Eq., 206 (210).

(2) *Clements v. Eccles*, 11 Ir. Eq., 229 (237); *McCormick v. Grogan*, L. R., 4 E & I., 82.

(3) *Morley v. Morley*, 2 Ch. Ca., 2; *Jones v. Lewis*, 2 Ves., 8, 240; *Lawson v. Copeland*, 2 Bro. O. C., 156; *Bailey v. Gould*, 4 Y. & O. Ex. Ca., 221; *Powell v. Evans*, 5 Ves., 339; *Caney v. Bond*, 6 Beav., 486; *Fenwick v. Greenwell*, 10 Beav., 412; *Tickner v. Smith*,

3 Sm. & Giff., 42.

(4) *Christy v. Courtenay*, 13 Beav., 96 (100).

(5) *French v. French*, 6 De M. & G., 95.

(6) *Acraman v. Corbett*, 1 J. & H., 410.

(7) *Taylor v. Jones*, 2 Atk., 600 (608).

(8) *Per Lord St. Leonards in Moore v. Crofton*, 3 J. & Lab., 443; *Copis v. Middleton*, 2 Madd., 423.

(9) 3 G. (1) Bankruptcy Act, 1869 (32 & 33 Vict. C., 71).

Giffard, L. J., in one case went the length of remarking that it made no difference whether the deed dealt with the whole or only a part of the grantor's property. "If the deed is *bona fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth."⁽¹⁾ But this is reasoning in a circle for the question is not whether the deed is *bona fide* or a mere cloak, but rather whether for the purpose of determining its true character an inference may be drawn from the generality of the transfer. According to the *dictum* in *Twyne's* case a presumption against its *bona fides* may be made from the generality of the transfer, but the tendency of more recent cases appears to be that, while under the Elizabethan statute it made no difference whether the debtor dealt with the whole or only part of his property, the fact is most material under the Bankruptcy laws.⁽²⁾ But even then apart from the Bankruptcy laws, the alienation of the bulk of the assets and the spontaneous alienation for debts which have long remained unpressed, have always been classed among the recognized indicia of an intent to delay creditors. For it is improbable that the debtor would really wish to part with, or the purchaser really wish to take everything; and where claims long dormant are suddenly revived in view of an execution, the dominant, if not the sole conceivable motive obviously is to make the ostensible consideration an excuse for the out-and-out withdrawal of the assets. Such circumstances, however, are not by themselves conclusive when the Bankruptcy law is not applicable,⁽³⁾ but are only among the signs and marks of fraud, the cumulative effect of which leaves no alternative to the conclusion that the common intent of the parties was to defraud. But, if the purpose of the parties was honest and fair and the deed was made for valuable consideration, the court will not readily impute fraud, for there may be purposes in the transaction other than the defeating or delaying of creditors.⁽⁴⁾ So a deed of gift by the debtor of all her property in trust for her daughters, in consideration of their covenant to pay her debts incurred up to date, was upheld as being an honest intended family arrangement.⁽⁵⁾ "The question," said May, C. J., "in each case is, was the dealing a bargain or a gift? The existence of onerous liabilities, from which the covenantee covenants to indemnify the assignor, may give the transaction the character of a bargain for good and valuable consideration, while, on the other hand, the gift of a valuable interest in land is not less a gift because the property so given carries with it certain obligations. The gift is thereby diminished, but it does not necessarily lose its essential character of gift because it must be taken *cum onere*."⁽⁶⁾

909. Transfer without Possession.—It often happens that the transferor while nominally conveying his property remains himself in possession of it. Though this circumstance is by itself insufficient to establish fraud, still it is none the less a significant factor in determining the nature of the transaction. So in a case the court observed: "This has been argued as a case in which the want of possession is the *only* evidence of fraud, and that it was not such a circumstance, *per se*, as makes the transaction fraudulent

(1) *Alton v. Harrison*, L. R., 4 Ch., 622 (626); *Ex parte Gimes*, 12 Ch. D., 314 (324). S. also held in *Natha v. Maganchand*, I. L. R., 27 Bom., 322.

(2) *Smith v. Pilgrim*, 2 Ch. D., 127, *Ex parte Saffery*, 4 Ch. D., 555; *In re Gibson*, 8 Ch. D., 230.

(3) *Alton v. Harrison*, L. R. 4 Ch., 622; .

Tillakchand v. Jitmal, 10 B. H. C. R., 206.

(4) *Golden v. Gillam*, 20 Ch. D., 389; *Natha v. Maganchand*, I. L. R., 27 Bom., 322.

(5) *Golden v. Gillam*, 20 Ch. D., 389 (393); followed *Gopal v. Bank of Madras*, I. L. R. 16 Mad., 397.

(6) *Lee v. Mathews*, 6 L. R. Ir., 530.

in point of law. That is the point we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent." (1) And Lord Ellenborough arrived at the same result in a case where the transferee was put in possession conjointly with the transferor: "To defeat the execution there must have been a *bona fide* substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors." (2) But in the light of later cases these decisions may be regarded as marking the extreme limit to which the doctrine may be carried. If there has been a *bona fide* transfer otherwise sufficiently established, the presumption of fraud made from the absence of transmutation of possession may be explained. If, therefore, the sale has been sufficiently notorious and there are undisputed circumstances which negative a presupposition of fraud, the transfer may be upheld although it has not been followed by change of possession. Thus, where actual delivery was impossible, as in the case of a sale of a ship at sea, no presumption of fraud could arise by the substitution of merely symbolical possession for actual delivery. (3) But in the absence of any cogent explanation the continuance of the possession in the transferor is regarded as the sign of trust, (4) and as such it certainly creates a presumption against the transferor, but which he may, no doubt, rebut by alleging and proving the circumstances which rendered the giving of possession impossible. (5) So in a case where the sale of goods was made by the husband to his wife and it appeared that she had paid him the price, the fact that the possession of the goods had not actually changed hands was held to be insufficient to damn the transaction. "The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them." (6)

§ 10. Then again, when it is said that a transfer unaccompanied by possession raises a presumption against its *bona fides*, the remark must naturally be understood as applying only to such transfers in which from the nature of the transaction there must have been naturally change of possession. If, for instance, the transfer is by way of mortgage, the transaction from its very nature does not call for any transmutation of possession. So even in an absolute transfer, if it is agreed that possession shall continue with the vendor till a condition is fulfilled, and it is consistent with the deed, it is idle to refer the absence of possession to fraudulent motives. But at the same time such conditions have to be narrowly watched, lest they should have been introduced for the purpose of rebutting the presumption which may otherwise arise, and if it appear that the term had been introduced for the purposes of fraud, the deed would be held to be invalid and nugatory. (7) In one case a trader being in

(1) *Edwards v. Harbean*, 2 T. R., 587; *Bamford v. Baron*, *ib.*, 594 note; *Reed v. Blades*, 5 Taunt., 212; *Paget v. Perchard*, 1 Esp. 205.

(2) *Wordall v. Smith*, 1 Camp., 333; *Jagat Chandra v. Radha Nath*, 9 I.C. 638 (624).

(3) *Atkinson v. Maling*, 2 T. R., 472.

(4) *Twyne's case*, 1 S. L. C. (10th Ed.), 1 (3).

(5) *Twyne's case*, 1 S. L. C. (10th Ed.), 1.

(6) *Per Lord Esher, M. R., in Ramsay v. Margrett*, (1894), 2 Q. B., 18 (25).

(7) *Nunn v. Wilsmore*, 8 T. R. 521; *Riches v. Evans*, 9 C. & P., 640.

fear of a writ of sequestration, executed a deed of mortgage which was registered as a bill of sale, vesting all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor shall remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced, his possession was to cease. A writ of sequestration having subsequently issued, the question arose whether the mortgage was not fraudulent, but Giffard, L. J., upheld the deed holding that the question in cases of this kind is as to the *bona fides* of the transaction. "If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors and was not a contrivance resorted to for his own personal benefit, it is not void, but must have effect." (1) Where transfer is made for the benefit of creditors, but is not communicated to any of them, the debtor can revoke it. (2) Such an assignment would be valid only when it is communicated to one or more of the creditors. In the former case, since no other person but the settler is interested, the deed may be regarded as a mere direction as to the mode in which the settler's property should be applied for his benefit and, as such, it is revocable by the settler. (3) But this rule is excepted in the case of a minor beneficiary, when the trust will at once take effect. (4) When the donor gitts away all his property, under section 128, "the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein." (5)

911. Acquiescence by Aggrieved Party.—A creditor otherwise entitled to relief may forfeit his right by acquiescing in a transaction which he might have otherwise avoided, (6) and even a mere notice of it will some time have the same effect. (7) So where a person is shown to have concurred in a settlement, he cannot afterwards be heard to say that it was a fraud upon him. Having agreed to the alienation of the assets, he must be taken to have consented to take satisfaction out of the property which remained. (8) A creditor loses his right against a deed by holding it out to third persons as a valid deed. (9) At one time the prevailing doctrine appears to have been that notice will not deprive a purchaser of his right to avoid a deed "for the notice of the purchaser cannot make that good which an Act of Parliament made void as to him," (10) but this view did not dominate the courts for long, for it did not harmonize with the accepted principles of equity and was soon condemned by the courts, (11) and eventually overruled. (12)

Where the property obtained by fraudulent conveyance is mixed up with the other property of the assignee and cannot be separated, its equivalent in money would for the purposes of the rule be taken to represent it. (13)

(1) *Alton v. Harrison*, L.R., 4 Ch., 622 (626); followed in *Ex parte Games*, 12 Ch. D., 314 (324); *Ramasamia v. Adinarayana*, I. L. R., 20 Mad., 455; *Bhagwant v. Kedart*, I. L. R., 25 Bom., 202 (212)

(2) Indian Trusts Act (II of 1982), S. 78 (c).

(3) *Kanye Das v. Ramgopal*, 16 S. D. A., 23, cited in *Golam Yassein v. The Official Trustee of Bengal*, I. L. R., 8 Cal., at p. 890.

(4) *Id.*; citing *Bill v. Cureton*, 2 M. & K., 503.

(5) S. 128, *post*.

(6) *Steel v. Brown*, Taunt., 381; *Baldwin v. Cawthorne*, 19 Ves., 166.

(7) *Woodham v. Baldock*, 2 J. B., Moo., 11.

(8) *Olliver v. King*, 8 De M. & G., 110.

(9) *Per* Lord St. Leonards in *Myers v. Duke of Leinster*, 7 Ir. Eq., R., 146 (166).

(10) *Gooch's case*, 5 Rep., 65; *Pulvertoft v. Pulvertoft*, 18 Ves., 90.

(11) *Buckle v. Mitchell*, 18 Ves., 110.

(12) See § *supra*.

(13) *In re Monat-Kingston Cotton Mills Co. v. Monat* [1899], 1 Ch., 381.

912. Secrecy as a Badge of Fraud.—As the notoriety of a transfer is regarded by law as securing the aim which it has of suppressing secret and under-hand transactions, it follows that a transfer made in secret will always be the theme of adverse comment and regarded as one which is presumably tainted with fraud. And so in *Twyne's case* the court advised that "when any gift shall be to you in satisfaction of a debt, by anyone who is indebted to others also (i) let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. (ii) Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt (iii) Immediately after the gift, take the possession of them; for continuance of the possession in the donor is the sign of trust."⁽¹⁾ It may be added that a transfer witnessed only by near relations or friendly neighbours would be regarded as a secret transaction whatever may be the number of witnesses who may have subscribed to it, while, on the other hand, a transfer made in a place which people have free recourse to would be vested with proportionate notoriety. In this connection the time at which the transfer was made and which it took to complete are obviously essential. The fact whether the intending purchaser ever inspected the property, had it valued, and whether the transferor had ever opened negotiations with other purchasers, and if so with what result, the chances offered to other purchasers to buy the property, its fair market-value as judged from the value of other properties of similar nature, or as sworn to by professional or other appraisers, are all material as reflecting upon the question of publicity.

913. Transfer subject to Trust.—A transfer subject to trust in favour of the settler is in reality no transfer at all but a cloak to deceive those who may have a claim upon the property. For the same reason a power of revocation inserted in a deed has always been looked upon as a strong evidence of fraud as against creditors, and so as to make the disposition generally void against them.⁽²⁾ A *de facto* revocation, though not in express terms, or where there is an equivalent to what is a power of revocation are regarded in no different light.⁽³⁾

914. Protestations of Honesty.—A statement in the deed that it has been made honestly, truly and *bona fide* is almost invariably inserted to veil its true character but which it can seldom disguise successfully. Such expressions are only too commonly to be found inserted in Indian deeds where they are believed to lend additional security to a deed and to pledge parties to stand by it.

915. Antedated Transfer.—A deed is usually antedated to give it a priority over rival deeds or claims which it would not otherwise possess. Such a deed is nothing less than a forgery: ⁽⁴⁾ the perpetrators thereof are liable to be punished accordingly. In India inasmuch as deeds take effect from the date of their execution (§ 765) and their registration may be effected at any time within four, and in exceptional cases up to eight months, there is some facility afforded to the fraudulently inclined to give fictitious priority to a favoured deed, and as the co-operation of accomplices is not difficult to secure, it is often a matter of great difficulty to unravel a deed after it has been once fabricated. But such a deed as often as not will be found to afford sufficient internal

(1) *Twyne's case*, 1 S. L. C. (10th Ed.), 1 (3).

(2) *Jenkyn v. Vaughan*, 3 Drew., 427; *Smith v. Hurst*, 10 Hare, 30.

(3) *Tarback v. Marbury*, 2 Vern., 509; *Acraman v. Corbett*, 1 J. & H., 410.

(4) S. 464 ill. (h) Indian Penal Code (Act XLV of 1860).

evidence to insure its own condemnation. Besides the marks of hurry which will be everywhere traceable, it should be usual to inquire when the stamp paper was purchased, who was the scribe and what publicity attended its execution, who are the witnesses and why and when were they called in to affix their attestation; to whom was the deed made over after its execution, and what change did it immediately make in the *status* of the parties. A deed more cunningly concocted may requisition the services of an expert who should, with the aid of chemical and other tests, find it possible to tell the age of the writing, but this will probably be seldom found satisfactory.

916. Transfer in Anticipation of Suit.—A transfer made to baulk a threatened suit is again justly regarded with suspicion. If the transfer had been made after the institution and notice of the suit, the transfer would be bad as contravening the rule as to *lis pendens* enunciated in the last section. But a transfer made in anticipation of an attachment or execution is not necessarily fraudulent, any more than it is fraudulent for the transferee to make bargain with a transferor who is making away with his property.

917. Transfer made to defeat Execution.—It may be taken to have been decided from the earliest times that a transfer, if it is a real transaction between the parties for valuable consideration, is not void though its object may have been to defeat an expected execution,⁽¹⁾ but that if the transaction be only a colourable one, not intended to confer upon the transferee any beneficial interest in the property but simply to substitute such transferee as a *nominal* owner in lieu of the real owner (the debtor) with the object of screening the property from execution, the transferee is then a mere trustee, and the creditor is entitled to proceed against the property.⁽²⁾ And so if a transaction is made for the *bona fide* purpose of discharging the debtor's existing liabilities, and not with the intention of delaying or defeating the other creditors, it cannot be impeached by the other creditors. This view proceeds upon the view that a mere *intent* to defeat a particular creditor does not constitute a fraud.⁽³⁾ No doubt intent to defraud a creditor may give rise to suspicion, but "suspicion though a ground for most minute and searching investigation is no ground for decision."⁽⁴⁾

918. This view is justified by the reason, that while on the one hand there is no particular reason why a creditor, who by superior activity has obtained satisfaction or security, should disgorge in favour of a less vigilant creditor, who may possibly have recourse to other assets or the general liability of the debtor, neither on the other hand, even supposing all assets to have been swallowed up in the transfer impugned, is there any reason why the unsatisfied creditor should obtain the exclusive benefit of recovering from the alienated property when there may be others equally entitled.⁽⁵⁾ Of course, there is no indication of

(1) *Shankarappa v. Kamayya*, 3 M. H. C. R., 231; *Tillackchand v. Jitmal*, 10 B.H.C. R., 206; *Muhammadunissa v. Bachelor*, I.L.R., 29 Bom., 428; *Janki v. Thakur Prasad*, 1 C. P. L. R., 63 *Jugraj v. Kissan*, 3 C. P. L. R., 147; *Ishan Chunder v. Bishu*, 1 L. R., 24 Cal., 825; *Wood v. Dixie*, 7 Q. B., 892.

(2) *Shankarappa v. Kamayya*, 3 M. H. C. R., 231 (235); *Tillackchand v. Jitmal*, 10 B. H. C. R., 206 (210); *Wood v. Dixie*, 7 Q. B., 892; *Darvill v. Terry*, 30 L.J. Ex., 855; *Hale v. Metropolitan Saloon Omnibus Co.* 28

L. J., Ch., 777.

(3) *Per* Lord Denman, C. J., in *Wood v. Dixie*, 7 Q. B., 892 (896); *Muhammadunissa v. Bachelor*, I. L. R., 29 Bom., 428 (434); *Hakim Lal v. Mooshahar*, I. L. R., 34 Cal., 999 (1018).

(4) *Per* Kindersley, V. C., in *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J., Ch., 777.

(5) *Bhagwant v. Kedari*, I. L. R., 25 Bom., 202 (213, 214); *Hakim Lal v. Mooshahar*, I. L. R., 34 Cal., 999 (1014).

fraud merely in a man preferring one creditor to another. (1) A man is at liberty to dispose of his effects to anyone he likes, and if the fact that he had disposed them of to one creditor to the exclusion of others had been a badge of fraud then a person in debt would lose all control over his property.

919. An alienation effected with the object of defeating an execution, but the consideration for which was natural love and affection, has been held to be equally valid. (2) But in view of the rule enacted in the second clause, the soundness of this view is open to grave doubt. Of course, there is nothing in sections 23 and 24 of the Indian Contract Act to support the opinion that a sale made with the view of defeating a probable execution is a sale necessarily effected with a fraudulent and unlawful object and therefore void within the meaning of those sections. (3) And so it has been held that a sale made for a good and valid consideration to one creditor, even if effected to delay and defeat another, (4) and in contemplation of the transferor's insolvency, cannot on that account be set aside. (5) A transfer of property by a debtor before attachment would not *per se* be invalid even though he may have transferred it to defraud his creditors. (6) But where a man in pecuniary difficulties gifts away his entire property to his wife and minor sons, such a gift cannot be supported against the claims of one of his then existing creditors who is entitled to sell the property in execution. (7) No debtor can give an unfair preference to one creditor by giving him a large proportion of his property, so as to reduce the aliquot share of the other creditors. If he does so, he acts fraudulently within the meaning of this section, and no title is given to that particular creditor as against the assignees who represent the creditors generally. (8) Such a transfer can only be maintained if the transferee has passed a valid claim, or made a purchase in good faith. (9) In all cases the creditor, complaining of undue preference has no specific *lien* on his debtor's property until it is attached in the due course of law. (10) The courts will, in deciding cases of alleged fraud, be generally governed by the principle of equity and good conscience. (11)

920. Benami not fraudulent:—*Benami* purchases being common in this country and not necessarily attributable to fraudulent motive are not to be regarded as *per se* or presumably fraudulent. Even in England where the habit is not so inveterate as in India the same rule has been laid down. (12) But while it is true that all *benamees* are not necessarily fraudulent, it is equally true that all fraudulent transfers are necessarily *benamee*, and consequently, the connection between the two is often more than usual; and while a *benamee* transfer by a person in affluent circumstances would pass without scrutiny—such a transfer executed by one on the verge of bankruptcy or when overwhelmed by debt or pecuniary distress would unfailingly be condemned as fraudulent.

(1) *Alton v. Harrison*, L. R., 4 Ch., 622; *Middleton v. Pollock*, 2 Ch. D., 104; *Ex parte Games*, 12 Ch. D., 314 (319); *Hanifa Bibi v. Punnamma*, 16 M. L. J. R., 11; *Ilakim Lal v. Mooshabar*, 11 C. W. N., 889 (900).

(2) *Nasir Hossain v. Mata Prasad*, I.L.R., 2 All., 891; and see Indian Contract Act, S. 22 (1).

(3) *Rajan v. Ardesbir*, I.L.R., 4 Bom., 70.

(4) *Suba Bibi v. Balgovind Das*, I. L. R., 8 All., 178.

(5) *Gopal v. Bank of Madras*, I. L. R., 16 Mad., 397.

(6) *Jugraj v. Kisan Singh*, 3 C. P. L. R., 147.

(7) *Hormusji v. Cowasji*, I.L.R., 13 Bom., 297.

(8) *Dadapa v. Vishnudas*, I. L. R., 12 Bom., 424; *Rangil Bhai v. Vinayak Vishnu*, I.L.R., 11 Bom., 666.

(9) *Joakin v. The Secretary of State for India*, I.L.R., 3 All., 530; *Rangil Bhai v. Vinayak Vishnu*, I.L.R., 11 Bom., 666.

(10) *Rajan Harji v. Ardesbir*, I. L. R., 4 Bom., 70.

(11) *Abdul Hye v. Mir Mohammed Mozaffar Hossain*, I.L.R., 10 Cal., 616, P.C.

(12) *Lady George's Case* cited in *Crisep v. Pratt*, Cro. Car., 550; Sugd. V. & P., (14th Ed.), 705.

921. In the case of persons standing to each other in fiduciary relation-ship, *e. g.*, solicitor and client, the party benefited must show that the transfer was just and proper under the circumstances of the case. In rebutting such a presumption it is not enough that the person had independent advice, unless he acted upon it. (1) Where a party intends to rely upon a document as not within the scope of the section, because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more. (2)

922. Effect of Fraud Inter Partes :—The effect of fraud *inter partes* may be considered (a) when the parties uphold the transfer which is successfully impeached by the third party affected thereby, and (b) when the transferor himself resiles from it and sets up its invalidity either as (c) plaintiff or (d) as defendant and (e) before or (f) after the purpose of the fraud has been accomplished. In the first case it has been held that a fraudulent decree so declared at the instance of a third person does not cease to be operative *inter partes*, it being still a subsisting decree as between the original parties, and as such it is capable of execution. (3) In this case *A* sued *B* and *C* for partition and obtained a decree by consent upon the award of certain arbitrators. *C* then sued for and obtained cancellation of the decree on the ground that both the award and the decree were fraudulent and void. *A* then sued out its execution against *B* who objected to it on the ground that since the decree had been declared to be fraudulent and void as against *C* it was void altogether, but the Court held that the fact that the decree was annulled against *C* did not render it inoperative against *B* who still remained bound by it. (4) But in this case *C* had sued for a similar relief, then the question would have arisen whether *B* was a *particeps criminis*, and if so, whether the purpose of the fraud had been accomplished. At one time the courts were by no means unanimous upon the rights of the parties to a fraudulent transfer, it being sometimes held that the transferor was estopped by his own deed (5) or that he could not take advantage of his own fraud (6) while in other cases the courts have applied the maxim *in pari delicto potior est conditio defendentis*. A fraudulent transfer may be complete or incomplete, and it may be effected either with or without the privity of the transferee. Again, its invalidity may be sought to be established either by the transferor himself, or by the transferee, or by a stranger to the fraud. Or again, it may be relied upon as a ground of attack or defence according as the party suing is the plaintiff or the defendant. In all such cases the courts do not afford the same relief, and in some cases, they even refuse to give any relief at all. Indeed, in this respect the practice of the courts is by no means logical or uniform. Where, for instance, the transferor transfers his property in favour of another with a view to screen it from his creditors and where the ostensible owner refuses to re-deliver it, can the fraudulent conveyancer be allowed to prove that his transfer was a sham transaction entered into to defraud the creditors? It has been held by the High Court of Bombay

(1) *Powell v. Powell*, [1900], 1 Ch., 249.

(2) *Narayan v. Viraraghavan*, I. L. R., 23 Mad., 184.

(3) *Pasupati v. Nando Lal*, I. L. R. 30 Cal., 718; following *Bhimaji v. Rakmabai*, I. L. R., 10 Bom., 338; *Natesa v. Amasaim*, I. L. R. 25 Mad. 426.

(4) *Pasupathi v. Nando Lal*, I. L. R. 30 Cal., 718 (720).

(5) *Roushan v. Collector*, (1846), B. S. D. A.

120; *Brihono v. Ram Dolab*, (1949), B. S. D. A. 279; *Raj Narain v. Jugmunath*, (1851), B. S. A. 774; *Koonjee Singh v. Jankee Singh*, (1852), B. S. D. A. 838; *Bhowanny v. Parem*, 2 Sel. R. 149; *Montefiori v. Montefiori*, 1 W. B. L. 363.

(6) *Hurry Sunkur v. Kali Coomar*, (1864), W. R. 265; *Alok Soondry v. Horo Lal*, 6 W. R. 287; *Kashub Chand v. Vyasmones*, 7 W. R. 118; *Kasee Nath v. Doyal Kristo*, 18 W. R. 87.

that such a plea is good and can be proved.⁽¹⁾ But overwhelming authorities are in favour of the rule that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed:⁽²⁾ *Allegans suam turpitudinem non est audiendus*.⁽³⁾ Such a transfer will only be set aside in order that effect might be given to a compromise arranged between the transferor and his creditors, ⁽⁴⁾ i.e., where it would be in the interest and for the protection of innocent third parties. ⁽⁵⁾

923. There can be no doubt that if a voluntary deed has been kept in the hands of the grantor, and has never been acted upon, nor the grantee informed of its existence, a court of equity will treat it as an imperfect instrument, and, if the grantee surreptitiously gets possession of it, a court of equity will relieve against it ⁽⁶⁾. Again, where a defendant is allowed to show the turpitude of both himself and the plaintiff in order to protect himself against an action by the plaintiff to give effect to a contract or deed entered into for an illegal or immoral purpose an exception is allowed, but not for the sake of the wrong-doer, but on the grounds of public policy, since the court ought not to assist a plaintiff to recover property or enforce a contract, in respect of which he has no true title or right⁽⁷⁾. The rule of public policy cannot be applied without allowing the defendant to benefit by it. But the benefit is allowed him by accident as it were, and not in order to secure him any right to which he is entitled. ⁽⁸⁾ Even this exception is not allowed if a decree has been obtained by fraud and collusion of both the parties. In such a case it is binding on both. ⁽⁹⁾ "But where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality or base and unconscionable conduct on his own part, in such case courts of equity will leave him to the consequences of his own iniquity and will decline to assist him to escape from the toils which he has studiously prepared to entangle others. ⁽¹⁰⁾ Especially will this be the case if the purpose of the fraud has been effected by defeat of a third person's rights asserted in court or effected in any other material way. ⁽¹¹⁾ Where two persons concoct a fraud against a third party they cannot plead fraud against him, but are not barred from pleading it against each

(1) *Babaji v. Krishna*, 1 L.R., 18 Bom., 372.

(2) *May on Fraudulent Conveyances*, 432; *Taylor v. Bowers*, 1 Q.B.D., 291 (300); *Kearley v. Thomson*, 24 Q.B.D. 742; *Yarmati v. Chundra*, I.L.R., 20 Mad., 326 (329); *Gobardhan Singh v. Ritu Roy*, I. L. R., 23 Cal. 962 (966); *Gobinda Kuar v. Lala Kishen Prasad*, I. L. R. 28 Cal., 370; *Honapa v. Narsapa*, I. L. R. 23 Bom., 406 (409); *Balbhadaar v. Sheodilal*, I.L.R., 24 All., 514.

(3) "He is not to be heard who alleges his own turpitude."

(4) *Symes v. Hughes*, L. R., 5 Eq., 475.

(5) *Yarmati v. Chundra*, I.L.R., 20 Mad., 326 (329).

(6) *Cecil v. Butcher*, 2 J. & W., 565.

(7) *Rangammal v. Venkatachari*, I. L. R., 20 Mad., 323 (325); *Yarmati v. Chundra*, I. L. R., 20 Mad., 326; *Raghavalu v. Adinarayana*, I. L. R., 32 Mad. 322 (324) *Sham Lal v. Amarendra Noth*, I. L. R., 23 Cal., 460; (474); *Ragho v. Purshotam*, 4 N. L. R., 26; *Baji Rae v. Harpal*, C. P. L. R., 165; *Jana-raham v. Paikanlal*, 7 C. P. L. R., 60 (Where

the plea of fraud is set up for the defence not against an innocent person but against a party to the fraud, the defendant holds the stronger ground. The courts will not assist the plaintiff in such a case on grounds of public policy). *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 708; but see *Param Singh v. Talji Mal*, I. L. R., 1 All., 408.

(8) *Holman v. Johnson*, Cowper, 343; *Luckmdas v. Mulji*, I. L. R., 5 Bomr., 296; *Venkatramanna v. Viramma*, I. L. R., 10 Mad., 17.

(9) *Ahmedbhoy v. Vullebhoy*, I. L. R., 6 Bom., 703; *Prudhan v. Phillips*, 2 Amb., Rep., 768; *Chenvirappa v. Pattappa*, I.L.R., 11 Bom., 738; *Varadarajulu v. Shrinivasulu*, I.L.R., 20 Mad., 333.

(10) *Story's Eq. Jur.*, §. 268; *Honapa v. Narsapa*, I.L.R., 23 Bom., at p. 409.

(11) *Ahmedbhoy v. Vullebhoy*, I. L. R., 6 Bom., 703; *Venkatramana v. Viramma*, I. L.R., 10 Mad., 17; *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 708; *Rangammal v. Venkatachari*, I. L. R., 18 Mad., 378.

other; (1) *In pari delicto potior est conditio possidentis*. (2) But this is said to be only permissible if the fraud has not accomplished its purpose as where a conveyance executed for an illegal purpose has not been used for the purpose for which it was executed. And so the Calcutta High Court has, on consideration of the balance of authorities on the subject, held that it is always open to a party to show that a document merely executed, but not carried into effect, is a *benami* and colourable document, and to recover possession of property against the party claiming under such document. (3) And this view has since been indorsed by the Privy Council (4) in a case in which *A* had executed an equitable mortgage of his land in favour of *B* to defeat which he subsequently executed a *benami* deed of sale in favour of *C*. *B* then sued on his mortgage and obtained a decree both as against *A* and *C*. The latter paid up the decretal amount. *A* then sued *C*, for the possession of his property alleging that the sale deed was a *benami* transaction, and it was held that as the purpose of the fraud which *A* contemplated had been defeated, and as *A*'s suit was not in furtherance of the illegal transaction, but was intended to put every one in the same position as they were in before that transaction was determined upon, his suit was maintainable. (5) Where the owner sold his property to another for an illegal purpose, and such purpose was not carried into effect, neither he nor his heirs can afterwards eject the purchaser without proving that the purpose never got beyond the mere stage of intention. (6) So where the transferor against whom several money-decrees were outstanding executed a deed of relinquishment of his properties in favour of another with the object of protecting them from the claim of the decree-holders, and on the decrees being set aside on appeal he sued the transferee for possession alleging the real nature of the transaction, the court held that inasmuch as the object of the transfer, which was to defraud the transferor's creditors, had not been accomplished, he was not debarred from establishing the truth and recover possession of the properties. (7)

924. The view there taken may be summed up in the words that where the fraud has been inchoate and the net attempted to be thrown over the transaction is not complete, there is still a *locus penitentie* and the fraudulent transferor may then be allowed to undo the mischief which he had attempted to perpetrate, but where the fraud has been accomplished, as where a creditor has been actually defrauded or where the true owner of a property has successfully used another's name to shield his property from his creditors, and has defrauded a creditor by passing as a real transferee whereas he intends to be merely a nominal one, in short, where the object of the colourable conveyance has been effected, then the transferor cannot be permitted to show up the real nature of the transaction, for otherwise the transferor might be

(1) *Jiwan Singh v. Jora*, (1905), P. R., No. 25.

(2) "In equal fault the condition of the possessor is the more favourable" *Platamone v. Staple*, Coop. 251.

(3) *Shamlal Mitra v. Amarendra Nath Bose*, I. L. R., 23 Cal., 460; *Jadu Nath v. Rup Lal*, I. L. R., 33 Cal., 967; *Story's Eq. Jur.* 8. 657; *Kaleenath Kur v. Doyal Kristo Deb*, 13 W. R., 87; *Ranganmal v. Venkatachari*, I. L. R., 18 Mad., 378; *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 709; *Phool Bibi v. Goor Surun Das*, 18 W. R., 485; *Sreenath Roy v. Bindu*, 20 W. R., 112; *Debia Chowdhraim v. Bimola Soonduree Debia*, 21 W. R., 422; *By-*

kunt Nath v. Goboollah, 24 W. R., 391; *Mukun Mullick v. Ramjan*, 9 O. L. R., 64.

(4) *Petheperumal Chetty v. Muniandy*, I. L. R., 35 Cal., 551 P. C.

(5) *Petheperumal Chetty v. Muniandy*, I. L. R., 35 Cal., 551, P. C.; following *Taylor v. Bowers*, 1 Q. B. D., 291; *Symes v. Hughes*, L. R., 9 Eq., 475; *In re Great Berlin Steam Boat Co.*, 26 Ch. D., 616; *Kearley v. Thompson*, 24 Q. B. D. 742.

(6) *Ragho v. Purshotam*, 4 N. L. R., 26.

(7) *Jadu Nath v. Rup Lal*, I. L. R., 33 Cal., 967. (969); *Petheperumal v. Muniandy* I. L. R. 35 Cal., 551 (559) P. C.

encouraged to practise deception upon his creditors with impunity and make the court his tool for his own selfish ends.⁽¹⁾ Accordingly, it has been laid down that where a colourable transfer is made for the purpose of enabling the transferor to defraud his creditors, and, where the intended fraud has been wholly or partially carried into effect, the court will not lend its aid to enable the transferor who has thus defrauded his creditors to get his property back from the transferees.⁽²⁾ But this is regarded as an exception to the above rule. Thus in an earlier case⁽³⁾ it was observed: "Although, no doubt, it is improper that transactions of this kind should be entered into for the purpose of defeating creditors, yet the real nature of the transaction is what is to be discovered, the real right of the parties. If the courts were to hold that persons were concluded under such circumstances, they would be assisting in a fraud, for they would be giving an estate to a person when it was never intended that he should have it." As to this, however, it may be replied that if the courts were to inquire into and assist such fraud, besides encouraging the man in his turpitude, the courts would be lending a security to transactions which but for it would not be so readily entered into. Where both parties are *in pari delicto* it is difficult to understand why the court should assist one party any more than the other. All the courts are agreed that in such a case if a collusive decree is suffered, it cannot be re-opened. If so, surely the passing of a decree cannot sanctify a transaction otherwise base and immoral.

925. As regards a conveyance executed with the privity of the transferee the authorities are clear that the parties thereto cannot be heard to allege their own fraudulent purpose, and in such a case the court will refuse relief to whichever party comes before it in the guise of plaintiff,⁽⁴⁾ and it will even take the objection as to the illegality of the transaction *suo motu* even though the defendant does not.⁽⁵⁾ The position of a *particeps criminis* is thus secure so long as he is defendant, the reason being not because he is more favoured, but because the court will not assist the plaintiff to recover back money or property paid or delivered in pursuance of an illegal or immoral contract.⁽⁶⁾ Of course, this is only so where the fraud has been completed: if it is inchoate the court will, as observed before, assist the plaintiff in putting the parties in the same situation as they were in before the illegal transaction was determined upon and before the parties took any steps to accomplish it⁽⁷⁾: so that the transferor, may, as plaintiff sue for a declaration of the invalidity of the transfer, or for its cancellation and recover possession, or he may on that ground resist a suit for specific performance by the intended transferee.⁽⁸⁾ If the transferor's heirs happen to be the plaintiffs, and plead unaccomplished fraud on the part of those through whom they derive their title, they must establish it, otherwise the court will enforce the maxim *in pari delicto potior est conditio defendentis* (9).

(1) S. 84; Indian Trusts C. (Att II of 1882), *Gobinda Kuar v. Lala Kishen Prosad*, I. L. R., 28 Cal., 370 (380); *Goberdhan v. Ritu Roy*, I.L.R., 23 Cal., 962; *Kali Charan v. Itask Jal*, ib., p. 962 note; *Banka Behary v. Rajkumar*, I.L.R., 27 Cal., 231; *Jadunath v. Ruplal*, I.L.R., 33 Cal., 967; *Munisami v. Subharaya*, I.L.R., 31 Mad., 97. *Siddhalingappa v. Hirasa*, I. L. R., 31 Bom. 405 (411).

(2) *Gobinda Kuar v. Lala Kishen Prosad*, I. L. R., 28 Cal., 370 (380).

(3) Sir Richard Couch, in *Debia Chowdhraim v. Bimala*, 21 W. R., 422.

(4) *Cecil v. Butcher*, 2 J. & W., 572; *Doe v.*

Roberts, 2 B & Ald., 369; *Williams v. Williams*, 20 Ch.D., 659; *Palamalai v. S.I. Export Co.*, 20 M.L.J. 211; 5 I.C. 33.

(5) *Hamilton v. Ball*, 2 Ir.Eq., 191 (194).

(6) *Taylor v. Chester*, L.R., 4 Q.B., 312.

(7) *Taylor v. Bowers*, 1 Q.B.D., 300; *Re Great Berlin Steamboat*, 26 Ch. D., 616. *Burrows v. Rhodes*, [1899], 1 Q.B., 816.

(8) *Munisami v. Subbarayar*, I.L.R., 31 Mad., 97 (99).

(9) *Ragho v. Purshotam*, 4 N.L.R. 26 (27). The party on whom the onus of proof lies must establish at least a *prima facie* case—*Rajani Kumar v. Gour Kishore*, 7 C.L.J. 586 (588).

926. The rule that the court will not assist accomplices in fraud, is not without exceptions. Where, for instance, the two accomplices are not *in pari delicto*, as where one party has been made to act under circumstances of oppression, misrepresentation, undue influence, inequality of age or condition, the court may assist him in spite of his complicity. Again, the court will assist the plaintiff where its benefit will reach a third party, or where its intervention is called for on the ground of morality or public policy. (1) On this principle, an assignment by a fraudulent bankrupt was set aside. (2) In transactions where the transferee is innocent, the court is equally reluctant to assist the plaintiff. So where the plaintiff made a voluntary deed without the knowledge of the grantee and kept it with himself the court still refused to relieve him against it. (3) The underlying principle applicable to such cases is thus stated: "Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, of the effect of permitting the transferee to retain the property might be to defeat the provisions of any law the transferee must hold the property for the benefit of transferor. (4)"

927. Out of the three circumstances here mentioned, (5) the first two have been already discussed before. A case under the last may arise where the fraud though accomplished, the transfer would be set aside because if the law stays its hand it might overreach itself. Such would be the case where a refusal to annul the transfer would deprive the other creditors of their security, or enable the transferee to hold the property in defiance of, say, the Insolvency Law.

928. Parties to Suit.—Under this section, it has been held that a suit for the declaration of the invalidity of a transfer made in fraud of the creditors must be instituted by all the creditors jointly. (6) It cannot be instituted by a single creditor, though it may be instituted by him on behalf of all the consentient creditors. This rule is said to be directed against multifariousness, (7) though it may also serve another purpose. A single creditor cannot complain that he alone was defrauded, if the transfer had otherwise benefited the general body of creditors, and in such a case even if the transfer had been intended to defraud him, he has no remedy. (8) An objection on the ground of non-joinder must, however, be taken betimes, otherwise the defect will be condoned in appeal. (9) The view that all creditors must join in suing the defrauding debtor, however, appears to take no note of the fact that the creditor intending to sue may not know about the existence of other creditors, and there may be cases in which the delay involved in communicating with him may be fatal to his case. Indeed, it has been held in Bombay that it is competent to a creditor to sue alone the defrauding party without impleading all the creditors who may have been defrauded by the transaction. (10) The creditor may sue on behalf of all the creditors generally, (11) and even then he is

(1) *St. John v. St. John*, 11 Ves., 535.

(2) *Adams v. Swoorder*, 2 De. J. & S., 44.

(3) *Cecil v. Butcher*, 2 J. & W., 578; *Brackenbury v. Brackenbury*, 2 J. & W., 392; *Roberts v. Williams*, 4 H.A., 130.

(4) S 84 Indian Trusts Act (Act II of 1882).

(5) *I.*

(6) *Hbakim Lal v. Mooshabar*, 11 C.W.N., 889; following *Burjorji v. Dhumbai*, I.L.R., 16 Bom., 1 (20); *Ishvur v. Devar*, I.L.R., 27

Bom., 146; *Reesc River Silver Mining Co., v. Atwell* L.R., 7 Eq., 347.

(7) *Hakim Lal v. Mooshabar*, 11 C.W.N., 889 (894).

(8) *Wood v. Dixie*, (1845), 7 D.B., 892.

(9) *Hakim Lal v. Mooshabar*, 11 C.W.N., 889 (194).

(10) *Fbrahimhai v. Fulbai*, I.L.R., 26 Bom., 557.

(11) *Ishvur v. Devar*, I.L.R., 27 Bom., 146.

under no obligation to join them, though they will all have the benefit of the decree if any obtained against the deed. (§ 875). All such persons as have participated in the fraud would, of course, be necessary parties, and rival creditors may have to be arrayed on opposite sides if they have obtained a fraudulent transfer of the debtor's property. Apart from fraud, however, one attaching creditor cannot sue his rival attaching creditor for a declaration that his decree was bad in law. (1)

929. Fraudulent Preference.—The rule enunciated in the section deals only with the law on the subject of fraudulent conveyance, but it does not exhaust the subject of conveyances into which fraud enters. Closely akin to the subject of fraudulent conveyances before discussed is that of "Fraudulent preference" in which a transfer by a debtor in favour of a creditor, with a view of giving such creditor a preference over the other creditors is deemed fraudulent as against the trustee in bankruptcy, if the debtor is adjudged a bankrupt within three months from the transfer. (2) The same rule has been adopted in India (3) except in the Presidency towns where a transfer so made within two months before filing of the insolvency petition is declared to be fraudulent and void as against the assignees of the insolvent. (4) In order to create a fraudulent preference, the transfer must be the spontaneous act of the debtor, and it must appear that the transfer was made with the view of preferring the creditor, and it must have been his dominant motive. The determination of the question whether a transaction amounts to a fraudulent preference depends upon the language of the section of the statutes relating to Bankruptcy or Insolvency. (5) And even then the courts look to the motive and not at the result. (6) There is no fraudulent preference if money is paid under pressure as distinguished from a mere request on the part of the creditor. (7) And it appears to have been even conceded that a payment made in response to a *bona fide* demand would take the case out of the rule. (8) Nor is there a fraudulent preference if the payment has been made in the course of ordinary business, (9) or in discharge of a promise to pay on a given day (10) or in fulfilment of an undertaking to that effect. (11) But a mere request for payment, though often repeated and refused but ultimately complied with, will not alone prevent a preference on the eve of bankruptcy from being fraudulent. (12) On the other hand, if payment is pressed for, the fact that the circumstances of the debtor were desperate and were so known to the creditor, would not be a fraudulent preference if the payment had been made on real pressure, (13) but it is different if the matter originated with the debtor, and payment was voluntary. (14) So if the creditor received payment with knowledge of the preference and *a fortiori*, (15) if he was privy to the fraud, (16) he is not protected.

(1) *Lachmi v. Har Danni*, I.L.R., 25 All., 347.

(2) S. 48, Bankruptcy Act, 1883.

(3) S. 37, Provincial Insolvency Act (III of 1907).

(4) S. 24, Insolvent Debtors Act (11 & 12 Vict., C. 21).

(5) *Ex parte Griffith*, 23 Ch., D., 69.

(6) *Re Stenotyper*, [1901], 1 Ch., 250.

(7) *Tomkins v. Saffery*, 2 App. Cas. 225.

(8) *Strachan v. Barton*, 2 L. R., 11 Exch., 650; *Johnson v. Fesemeyer*, 3 D. & J. 24;

Ex parte Tempest, L. R. 6 Ch., 74; *The*

Official Assignee v. Brij Kishore, 3 A. L. J.

R., 604.

(9) *Bills v. Smith*, 6 B. & S., 321.

(10) *Ex parte Blackburn*, L. R. 12 Eq., 358; *Ex parte Kewan*, L. R., 9 Ch. 758.

(11) *Ex parte Hodakin* L. R., 20 Eq., 755; *Bills v. Smith*, 6 B. & S., 321.

(12) *Per Jessel. M. R.*, in *Ex parte Griffith*, 23 Ch., D., 69.

(13) *Ex parte Hall*, 19 Ch. D., 580.

(14) *Re Wright*, 3 Ch. D., 70.

(15) *Tomkins v. Saffery*, 3 App. Cas., 235.

(16) *Ex parte Reader*, L. R., 20 Eq., 765; *Golden v. Gillam*, 51 L. J. Ch., 154; *Mardan Singh v. Karumaj*, 13 O. P. L. R., 180 (187).

930. The *onus* of proving both insolvency and fraudulent preference is on the trustee in bankruptcy.⁽¹⁾ An unconditional surrender by the debtor of all his property for the benefit of his creditors, is neither void under the section nor under the Bankruptcy Acts.⁽²⁾ But such creditors' trust-deeds are upheld only if they do not create preferences or vest the debtor's property in one of his creditors for the mere purpose of protecting himself against the claims of his other creditors.⁽³⁾ Fraud by the drawer of a bill of exchange selling it at great undervalue, both he and the acceptor having intended to become bankrupts, ⁽⁴⁾ fraud by the debtor in composition-deeds whereby he secretly secures undue advantage to some creditors over the rest ⁽⁵⁾, are other instances of fraud upon creditors. A debt incurred by fraud, or a grant made to a person defeasible on his bankruptcy, and fraudulent devises, afford other instances of a similar character and which are all subject to the same rules.

931. There is a difference between the fraudulent transfers here contemplated and those treated of in the Bankruptcy Act, the provisions of which are far more artificial and stringent, rendering as they do certain acts as *per se* fraudulent, which, however, may not be fraudulent in common law or under the statutes of Elizabeth.⁽⁶⁾ Thus for example, the assignment of the whole or nearly the whole of his property by a trader is an act of bankruptcy, and as such fraudulent, although it is not so at common law.⁽⁷⁾ The ground upon which a deed assigning all of a trader's property is regarded as an act of bankruptcy is, that it takes away from him all further power of carrying on his trade and subjects all his property to distribution without the safeguards and assurances, which the bankrupt laws provide, and this ground applies with equal force whatever may be the trader's motive for executing the deed.⁽⁸⁾ And the courts have even gone so far as to hold that an assignment not executed in any way to defeat or delay creditors, but on the other hand, made for the express purpose of benefiting the creditors, was no less an act of bankruptcy.⁽⁹⁾ And so it has been laid down that the absence of pressure though relevant to the question of fraudulent preference, is not a necessary element of an act of bankruptcy, consisting in an assignment of the whole of a trader's goods.⁽¹⁰⁾

932. It is to be noted that in a fraudulent conveyance under the bankruptcy laws, the mere act is necessarily an act of bankruptcy, and the law assumes the intent to defeat or delay the creditors as a necessary consequence of the act.⁽¹¹⁾ Similarly, in India it has been ruled following the English cases that the assignment by a debtor of all his property for the benefit of all his creditors is in itself an act of insolvency.⁽¹²⁾ And so it has been determined that a transfer of property by a party in insolvent circumstances is absolutely void although there be no evidence of any fraudulent preference. So where a person conveys all his property to trustees in favour of his creditors, his act is an act of insolvency and all his property vests at once in the official assignee, it

(1) *Ex parte Green*, 5 *Manson*, 48.

(2) *Godfrey v. Poole*, 13 *App. Cas.*, 497.

(3) *Smith v. Hurst*, 10 *Ha.*, 45.

(4) *Jones v. Gordon*, 2 *App. Cas.* 632; *Re Aylmer* 70 *L. T.* 244.

(5) *Danglish v. Tennant*, *L.R.*, 2 *Q.B.*, 49; *McDermott v. Boyd* [1894], 3 *Ch.*, 365.

(6) *Karsandas v. Magan Lal*, *I. L. R.*, 26 *Bom.*, 476.

(7) *Per Lord Eldon in Dutton v. Morrison*, 17 *Ves.*, 193.

(8) *Simpson v. Sikes*, 6 *M. & F.*, 312.

(9) *Per Turner, L. J.*, in *Ex parte Alsop*, 1 *D. S. & J.*, 289.

(10) *Karsandas v. Magan Lal*, *I. L. R.*, 26 *Bom.*, 476.

(11) *Per Mellish, L.J.*, in *In re Wood*, *L. R.*, 7 *Ch.*, 306; *Steward v. Moody*, 1 *Cr. M. & R.*, 777 (780).

(12) *Karsandas v. Magan Lal*, *I. L. R.*, 26 *Bom.*, 476; cf. now *S. 4 (a) Provincial Insolvency Act (III of 1907)*.

being unnecessary to prove that the assignment was void as being fraudulent. (1) So an assignment by a trader in insolvent circumstances of his property followed by a petition for insolvency was held to be void under section 6 (b) of this Act, as made with the object of defeating the provisions of the Insolvency Act (2)

933. Proviso.—The proviso excepts from the operation of the rule transfers made in good faith and for consideration. Similarly, it is enacted in the first Elizabethan Statute (3) that "this Act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed, or assured, or hereafter to be had, made, or assured, which estate or interest is or shall be upon good consideration and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having, at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion as is aforesaid."

934. The effect of the proviso is that whatever may have been the intent of the transferor, or the effect of the transfer, it cannot be avoided if the transferee is a *bona fide* transferee for valuable consideration. In other words, in order that a transfer may be set aside not only must fraud be shown, but it must be shown that the transferee was privy to it, (4) the only exception being the case of a volunteer, who, howsoever innocent he may have been, is displaced in favour of other transferees for value, if the transferor alone had intended to defraud or delay them, or if not so intending, his transfer has had that effect upon them. Of course, when a transfer is manifestly, or shown to be fraudulent, it will be for the transferee to show that he is a transferee in good faith and for value. These are both questions of fact, the determination of which must necessarily depend upon the circumstances of each case. But it may be generally premised here that a transferee cannot be imputed knowledge of the fraud to which his solicitor was privy, (5) nor can his rights be defeated by merely showing that some of the circumstances attending his transfer were suspicious. (6) And so as regards consideration, while a nominal consideration is virtually no consideration (7); still it will suffice if there was some consideration though it may not be sufficient or adequate, provided that the transaction was otherwise above board. (8) And though a mere inadequacy of consideration is not in general a matter of account, still where the inadequacy is so great as to be in itself indicative of fraud, the court will go into it, and if there are other indications of fraud, as for example, if the parties are relatives, the court will then weigh in very nice scales the amount of consideration, and if it finds it grossly insufficient, or so insufficient as would not have induced the transferor to part with his property to any other transferee, it may presume the transfer to be colourable and

(1) *Karsandas v. Maganlal*, 1 L. R., 26 Bom., 476; following *In re Villars*, L. R., 9 Ch., 442; doubting *In re Ratnagar*, 10 B. H. C. R., 327. The provisions of S. 24 of the Insolvent Act (11 & 12 Vict., C. 21) are almost exactly the same as of the Jamaica Insolvent Act (11 Vict., C. 28, S. 68), explained by P. C. in *Nunes v. Carter*, L. R., 1 P. C., 342, but they differ from those of the Queensland (N. S. W.) Insolvent Act (5 Vict., C. 17, S. 8), which were construed in *Bank of Australasia v. Harris*, 15 Moo. P. C., 97.

(2) *Jaffer Meher Ali v. The Budge Budge Jute Mills Co.*, 1 L. R. 33 Cal. 702 O. A.

1 L. R. 34 Cal. 289.

(3) 13 Eliz., C. 5, S. 5 (Revised Edition) commonly printed as S. 6.

(4) *Copis v. Middleton*, 2 Mad., 426; *French v. French*, 6 De M. & G., 101; *Golden v. Gillam*, 20 Ch. D., 394; O. A. 51 L. J. Ch., 503.

(5) *Re Tetley*, 3 Manson, 321.

(6) *Hall v. Metropolitan Saloon Omnibus Co.*, 4 Drew, 496.

(7) *Rosher v. Williams*, L. R., 20 Eq., 210.

(8) *Townsend v. Toker*, L. R., 1 Ch., 445; *Baysscole v. Collins*, L. R., 6 Ch., 228.

fraudulent.⁽¹⁾ In such case the first thing to be established is good faith. If that is wanting the transfer is void though it may be supported by ample consideration.⁽²⁾ And so far is good faith necessary in the transferee, that the transfer would be void if he was wanting in it, though the transferor was not.⁽³⁾

935. A person taking under ante-nuptial settlements or post-nuptial settlements⁽⁴⁾ made in consideration of ante-nuptial articles or of an additional portion⁽⁵⁾ or of the husband giving up interest in his wife's estate,⁽⁶⁾ or the wife giving up her equity to a settlement⁽⁷⁾ is protected by the proviso. A person who, between the voluntary settlement and the purchase, has acquired as a purchaser under the voluntary settlement any legal or even equitable right, is a purchaser.⁽⁸⁾ A settlement made by a widow upon her re-marriage on the children of her former marriage was at one time regarded as made for valuable consideration, but this view is now no longer tenable.⁽⁹⁾ The settlement of a woman's property on her illegitimate children has been similarly held not to be voluntary.⁽¹⁰⁾ And it has been held that where the limitations which were not within the marriage consideration were covered by those that were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument without also giving effect to the others, the former limitation could not be defeated.⁽¹¹⁾

936. Competition between Two Innocent Transferees :—It is settled that representatives of parties guilty of fraud are in the same position as if they themselves were parties thereto.⁽¹²⁾ But a purchaser without notice of fraud from one who had obtained a conveyance by fraud takes the property purged of its defect, the principle being that subsequent *bona fide* transactions imported a consideration which related back, and made the voluntary instrument which was impeached good *ab initio*.⁽¹³⁾ But in an Allahabad case it was said that this clause will not protect a *bona fide*-purchaser for value from one who had absolutely no right to convey; so that if *A* fraudulently convey his property to *B* who should sell it for value to *C*, who should take it as a *bona fide* transferee for value without notice, *C* would have no equity against a subsequent transferee from *A*, on the ground that *C*'s vendor had nothing to convey to *C*, and that *C* could have ascertained that fact if he had inquired.⁽¹⁴⁾ But it is submitted that a distinction exists and must be recognized between conveyance by a person having nothing to convey and one conveying it for a fraudulent

(1) *Twyne's case*, 3 Rep., 836; *Doe v. James*, 16 East, 213; *Strong v. Strong*, 18 Beav. 408; *Thompson v. Webster*, 7 Jur. (or. S.) 532; *Golden v. Gillain*, 20 Ch. D., 396; O. A., 51 L.J. Ch., 503.

(2) *Per* Lord Mansfield in *Cadogan v. Kennell*, Cowp., 434.

(3) *Cornish v. Clark*, L.R., 14 Eq. 184; *Golden v. Gillain*, 20 Ch. D., 389.

(4) *Kirk v. Clark*, Br. Cha., 275.

(5) *Dundas v. Dutens*, 2 Cox, 235.

(6) *H-wison v. Negus*, 16 Beav., 594; *Teesdale v. Braithwaite*, 5 Ch. D., 630; *Shurmer v. Sedgwick*, 24 Ch. D., 597.

(7) *Re Home*, 54 L. T., 301; *Re Foster*, 6 Ch. D., 87.

(8) *Prodgers v. Langham*, 1 Sid., 133; *George v. Milbanke*, 9 Ves., 198; *Parr v. Eliason*, 1 East., 95.

(9) *Attorney-General v. Jacobs-Smith*

[1895], W.N., 85.

(10) *Clarke v. Wright*, 5 H. & N., 410, *ib.*, 842; *Gale v. Gale*, 6 Ch. D., 144; but dissented from in *De Mestre v. West*, [1891], A. C. 264.

(11) *De Mestre v. West*, [1891], A. C., 264.

(12) *Rangammal v. Venkatachari*, I.L.R., 18 Mad., 378, O. A., I.L.R. 20 Mad., 323; *Yaramati v. Chundra*, *ib.*, 326; *Natha v. Dhunbairji*, I.L.R., 23 Bom., 1.

(13) *George v. Milbanke*, 9 Ves., 190; following *Prodgers v. Langham*, Sid., 133; *Doe v. Martyn*, 1 B. & P. (N. R.), 332 *In re Barker's Estate*, 44 L.J. (Ch.) 487; *Hafillaz Joint Stock Co. v. Gledhill*, [1891], 1 Ch. 13 (39) *Gopal v. Bank of Madras*, I.L.R., 16 Mad., 397.

(14) *Basti Begum v. Banwari Prasad*, I.L.R., 30 All., 297 (308).

purpose. In the latter case the fraud merely affects property in the hands of the transferee, because he is *in pari delicto*, but a transfer made by him to another who takes it innocently for consideration, would have a good title. The question in such a case depends not upon what *O* took, but upon which of the two innocent transferees must suffer, and where both are equally innocent, why not *qui prior est tempore potior est jure*? Fraud does not make a transaction void, but only voidable at the instance of the person defrauded.⁽¹⁾ And this proviso would seem to place beyond controversy the rights of a *bona-fide* transferee.

937. Limitation.—Relief on the ground of fraud may be obtained by a suit instituted at any time, within three years from "when the fraud becomes known to the party wronged."⁽²⁾ Where, however, the other party "has by means of fraud been kept from the knowledge of such right or on the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time for instituting a suit or making an application against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production."⁽³⁾ Article 95 of the Limitation Act has, however, no application where the plaintiff does not ask for relief on the ground of fraud, as where he institutes a suit for a declaration merely.⁽⁴⁾ That article is to be construed to enlarge and not restrict the period of limitation for suits directed against fraud. Hence where the suit falls under some other article it would not apply. As observed by Jackson, J. : "It certainly could not have been intended that, whereas, in an ordinary case, the plaintiff would be allowed twelve years to bring a suit for possession, the period of limitation should be cut down to three years, because, in addition to wrongful possession on the part of the defendant, there had been a gross and carefully concocted fraud."⁽⁵⁾ The article has really reference only to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequence of those acts.⁽⁶⁾

938. A party may forfeit the relief to which he might be otherwise entitled on account of his laches or acquiescence, as where for a period of ten years he stands by and takes no steps to assert his rights.⁽⁷⁾ But apart from laches or acquiescence, the party defrauded may be out of time if he were the plaintiff suing to impeach the transaction on the ground of fraud, but as defendant he would not be thereby precluded from resisting claim made against him on that ground.⁽⁸⁾

939. Fraudulent Transfer of Moveable Property :—While the section is confined only to *immoveable property*, the English statutes which extend alike to moveable property restrict their application to only such property as is

(1) *Rangnath v. Govind*, I.L.R., 28 Bom. 639.

(2) Art. 95 Indian Limitation Act (XV of 1877); Act IX of 1908.

(3) S. 18, Indian Limitation Act (XV of 1877); Act IX of 1908.

(4) *Gour Mohun v. Dinonath*, I.L.R., 25 Cal., 49 (51, 52).

(5) *Chunder Nath v. Tirthanund*, I. L. R., 3 Cal., 504 (507).

(6) *Chunder Nath v. Tirthanund*, I. L. R. 3 Cal., 507.

(7) *Null v. Easton*, [1899], 1'Ch., 873.

(8) *Rangnath v. Govind*, I. L. R. 28 Bom. 639 (642).

liable to be seized in execution for the payment of debts. (1) In India there is no statutory provision restraining the fraudulent transfer of *moveable* property, which will have to be judged in accordance with the general principles of justice, equity and good conscience. (2) But in so far as the section is declaratory of a natural equity its provisions may be usefully kept in view even in cases relating to a transfer of moveable property. Thus an alienation by a person even of his moveable property is void against creditors when he was in a state of insolvency, or when the alienation has left him without the means of paying his present debts. (3) So where a decree-holder executed an assignment of his decree in favour of his creditor for consideration stated to be Rs. 15,000 out of which only Rs. 8,000 was really due to the assignee, the balance being really intended to be reserved for the benefit of the assignor, and which had the effect of defeating the executions of the assignor's other creditors of which the assignee had notice, it was held that the assignment being made with intent to defraud the assignor's creditors to which the assignee was privy, it was wholly void as against the claims of the other attaching creditors, and that the assignee could not even contend for its validity to the extent of the consideration actually advanced. (4)

(1) *Guy v. Pearkes*, 18 Ves., 197; *Ex parte Howker*, L. R., 7 Ch., 214.

(2) *Chidambaram v. Sami Aiyar*, I. L. R., 30 Mad., 6 (9); affirmed O. A. *Chidambaram v. Srinivasa*, I.L.R. 37 Mad. 227 P.C.

(3) *Corlett v. Radcliffe*, 14 M. P. C., 136,

followed in *Chidambaram v. Sami Aiyar*, I. L. R., 30 Mad. 6 (9).

(4) *Chidambaram v. Sami Aiyar*, I. L. R., 30 Mad. 6 (10-11); affirmed O. A. *Chidambaram v. Srinivasa*, I.L.R. 37 Mad. 227 P. C.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.
"Sale defined."

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
Sale how made.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract for sale.

It does not, of itself, create any interest in or charge on such property.

940. Analogous Law.—This section defines "sale" of immoveable property, and is a paraphrase of s. 77 of the Indian Contract Act ⁽¹⁾ which defines "sale" of moveable property in the following words:—"Sale is the exchange of property for a price. It involves the transfer of ownership of the thing sold, from the seller to the buyer." The second paragraph of this section also corresponds with s. 78 of the Indian Contract Act which lays down how the sale of moveable property may be effected. "Sale or exchange" has been defined by Blackstone as a "transmutation of property from one man to another in consideration of some price or recompense in value."⁽²⁾ It is clear that Blackstone made no distinction between a "sale" and an "exchange" which are, however, clearly distinguishable, and have been so treated in the Act. ⁽³⁾ Another writer defines it to be "a transfer of the absolute or general property in a thing for a price in money," ⁽⁴⁾ and in which respect, it differs from an "exchange" in which "price in money" does not enter. Indeed, sale may be

(1) Act IX of 1872.

(2) 2 Black Comm., 446

(3) Ch. VI (Ss. 118 121).

(4) Benjamin on Sales (2nd Ed.) 1; see also 2 Kent's Comm. (11th Ed.), 615.

defined to be a species of exchange in which the consideration is paid or payable in money. It implies an actual transfer as distinguished from a mere contract or treaty preceding a sale, although in popular parlance, the term is indiscriminately used to denote both. This chapter may be generally compared with the provisions of Chapter VII of the Indian Contract Act relating to the "sale of goods."

941. The provision as to registration is also made by s. 17 (b) of the Indian Registration Act, (1) which enacts in favour of compulsory registration in respect of all non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property. (2) Now while the Registration Act makes no distinction as regards tangible or intangible property in its relation to registration, the section, it will be noted, enacts that a sale of an intangible property irrespective of its value must be registered. The provisions of this section as to registration have been extended to the cantonments.

942. The penultimate paragraph defines a "contract for sale," and the last sentence marks a departure from the English law in that it declares that such a contract does not *per se* create any real rights over property, as in England where the purchaser² is regarded as the equitable owner of the property from the date of the contract, (3) so that if the vendor keeps possession until completion and payment of the purchase-money, he is in the position of a trustee for the purchaser, and bound, as such, to take reasonable care to preserve the property, and on a proper cause arising, the purchaser can maintain an action for breach of trust against the vendor. (4) This notable deviation has more far-reaching consequences than would at first sight appear. The subject will be found fully discussed in the sequel. (§ 998)

943. The effect of the section is to abrogate the rule of Hindu law which recognized transfer by parol, (5) and required that the vendor should at the time of the sale be in possession of property sold. (6) Sale of property by a vendor out of possession was regarded as nothing more than sale of a right of entry which, however, was allowed. (7) Under Hindu law, delivery of possession was not, however, invariably essential to complete the title of a purchaser for value, (8) but it was the customary mode of completing the transfer of immoveable property, whether by gift, sale or mortgage. (9) In this respect the rule of Mahomedan law agreed with the Hindu law. (10) But

(1) Act III of 1877.

(2) S. 17 (b), Indian Registration Act (III of 1877)

(3) Sugd. V. & P. (14th Ed.), 186.

(4) *Clarke v Ramuz*, [1891], 2 Q.B., 456.

(5) *Mohesh Chunder v. Issur Chunder*, 1 I.J. (N.S.), 266.

(6) *Girdhar v. Daji*, 7 B. H. O. R. (A. C.), 4.

(7) *Bai Suraj v. Dalpatram*, I.L.R., 6 Bom., 380; *Vasudev v. Tatia*, I. L. R., 6 Bom., 387; *Ugachand v. Madapa*, I. L. R., 9 Bom., 324; *Kalidas v. Kanhaya*, I. L. R., 11 Cal., 121, P. C.

(8) *Gungahurry v. Raghubram*, 14 B. L. R., 307; *Narain v. Dattaram*, I. L. R., 8

Cal., 597; *Vasudeva v. Narasamma*, I. L. R., 5 Mad., 6; *Ramasami v. Marimuttu*, I L.R., 6 Mad., 404; *Blukan v. Bhaiji*, 1 B. H. C. R. 19; *Nagubai v. Motigir*, 1 B. H.C.R. 5; *Girdhar v. Daji*, 7 B.H.C.R., (A.C.), 41; *contra in Kachu v. Kachoba*, 10 B.H.C.R. 491, abandoned and the rule in the text restored in *Lakshman v. Davrat*, I. L. R. 6 Bom., 163; *Sobhagchand v. Bhaichand*, *ib.*, 193; *Bai Suraj v. Dalpatram* *ib.*, 380.

(9) *Lakshman v. Davrat*, I.L.R., 6 Bom., 168; *Sobhagchand v. Bhaichand*, *ib.*, 193.

(10) *Lakshman v. Davrat*, I.L.R., 6 Bom. 168.

in cases determined by the British courts prior to the passing of the present enactment, it was held that a deed of sale is complete on the date when it is signed and attested by the *Kazee*, and consideration is paid for it, and that delay in the delivery of the deed did not invalidate it. ⁽¹⁾ In subordinating possession to registration, and limiting it to transfers of the value below Rs. 100, the section has assigned it a place of little importance in the law relating to transfers. On the other hand, possession does not at all count for anything in the transfer of and above the value of Rs. 100, though now, as before, change of possession still remains the usual mode of symbolizing a transfer. Prior to the passing of the Act, however, the execution of a deed of sale by a Hindu did not suffice to pass the estate, irrespective of the actual delivery of possession, ⁽²⁾ and by which test, such transfers will have to be still judged since the section is neither retrospective nor does it enunciate any rule of universal equity so as to commend itself apart from its legislative sanction. ⁽³⁾

944. Principle.—This section opens with the definition of "sale," which being general, applies to sales of all kinds including those by operation of law. To constitute a valid sale, five essential ingredients must be present: there must be (a) parties competent to contract; (b) mutual assent; (c) a thing, the absolute or general property in which is transferred from the seller to the buyer; (d) a price in money paid or promised; (e) conformity to the requisite form. The subject of the capacity of the parties has already been dealt with in the preceding pages. Mutuality of assent is the essential of all contracts and thus of the contract which precedes all voluntary sales. The third requisite postulates the existence of a thing which is sold, and the fourth essential of all sales is the price, which is the *quid pro quo*, for which the vendor agrees to part with his property. Lastly, there can be no sale in law unless it is made in conformity with the form prescribed by law, *viz.* by the second, third and fourth paragraphs, which enjoin registration of the deed of sale, or transfer of possession as a legal necessity to complete it. Regarded from another standpoint, a sale implies (a) a contract, and (b) a transfer, the term being properly used only to denote the latter act, although it is loosely used also to signify the former. A contract of sale of immoveable property is here aptly distinguished from an actual sale, which is the accomplishment of the contract, which in itself creates no rights *in rem*, although, like all other contracts, it does create a right *in personam*, the infraction of which would, however, not only be relievable in damages, but ordinarily also enforced by specific performance, for it is a characteristic feature of such a contract that the breach of it cannot presumably be adequately relieved by compensation in money. ⁽⁴⁾ It will be thus seen that a

(1) *Bhukun Singh v. Mt. Jumeela*, (1864), W.R. 62.

(2) *Perhlad Sein v. Budhoo*, 12 M. I. A. 275 (282).

(3) *Jairam v. Balkrishnadas*, 3 N. L. R. 72 (75) in which it was held that the assignment of the equity of redemption did not require registration in Berar to which the Act had not then been extended. It has been extended since: see § 22 *ante*. But though the Act was not extended to the area within the ordinary Civil jurisdiction of the Recorder of Rangoon till the 1st January 1893, still since under the Burmah Laws Act, 1898 (Act XIII of 1898) except questions regarding succession, inheritance, marriage or caste or

any religious usage or institution, all other questions are ordered to be dealt with according to the law applicable to High Court in Calcutta in the exercise of its ordinary Civil jurisdiction, and since the present enactment was applied to Bengal from its very commencement (1st July 1882) the provisions of this section as to registration became applicable to Rangoon as from that date, so that a verbal sale of land for over Rs. 100 was invalid as contravening the provisions of this section—*Mg. San U. v. Ma. Hymin* 17 I. C. 954.

(4) S. 12, Exp. Specific Relief Act (Act I of 1877).

contract for the sale of immoveable property possesses an incident which distinguishes it from all other contracts, with which, it however shares this common feature, that it does not create any interest in or charge on such property. What we are to understand by these terms will be the theme of a subsequent discussion.

945. The principle of this section as to compulsory registration was much canvassed at the time of the passing of this Act, but while the Local Governments were empowered to exempt any territories within their jurisdiction from the operation of the second and third paragraphs of section 54, and section 59 and two other sections, (1) it was considered advisable to act upon the opinion of Sir Richard Garth, and to enact in favour of compulsory registration. Sir Richard Garth's views were these:—"On the whole," he wrote, "I would strongly advise the Government to consider the expediency of making that which now is undoubtedly the general rule of the law of the land. I am satisfied that it would be the means of preventing a vast amount of fraud and litigation, that it would be a great blessing to the whole community, and especially so to those who want security and protection most, namely, the poorer and more ignorant classes." Earlier in the same note he had written;—"The fact is, that, so long as the law allows facilities to people to defeat *bona fide* purchasers, the dishonest and ignorant try to take advantage of them; and it is, of course, a much easier thing and involves less risk to set up fraudulent transactions by word of mouth than by a written instrument, more especially as in all transactions above Rs. 100 in value, the written instrument is useless unless it is registered." (2) Instruments of the value under Rs. 100 were exempted on account of their unimportance, and the amount of labour and expense which their compulsory registration would have entailed. So the law Commissioners wrote:—"In the absence of a much larger number of registration offices than at present exist in India the requirement of registration in the case of every petty transaction relating to land would be an intolerable hardship." (3) These considerations were however cast to the winds in the recent amendment of sections 59 and 107. (4)

946. Meaning of Words.—"In exchange for a price" means money only, for if the thing given in exchange consists of anything else, there is no sale but an exchange dealt with in Chapter VI. All sales are exchanges, but a sale is the exchange for a *price*. Sale then may be said to be a species belonging to the genus "exchange." "*Tangible immoveable property*" means much the same thing as corporal hereditaments or property such as lands, houses, etc. "*Reversion or other intangible thing*" means incorporeal rights which are not capable of present possession, such for instance, as the equity of redemption of an usufructuary mortgage. (5) "*Reversion or other intangible thing*" seems to include all such intangible immoveable property not comprised in the term "*tangible immoveable property*," such as easements, corodies, franchises, annuities, rents and profits, mortgages, liens, contingent interest (6) a right to redeem a mortgage (7) and the like. An undivided share in immoveable property

(1) See. S. 1, *ante*.

(2) Proceedings of the Legislative Council, *Gazette of India*, Feb. 7, 1882 (see App.)

(3) See App. *post*.

(4) Act VI of 1904.

(5) *Ramasami v. Chinnan*, I. L. R., 24 Mad. 449; *Jairam v. Balkrishnadas*, 3 N.L.

R. 72 (74).

(6) *Subramaniam v. Perumal*, I.L.R. 18 Mad., 454 (455); *Pearelal v. Lala*, 11 I.C. 673 (674).

(7) *Rahmat Ali v. Muhammad*, 11 A.L.J. 407; *Mulsaddi v. Muhammad*, 10 A.L.J. 167 (168).

is, however, regarded as "tangible" property.⁽¹⁾ "*Reversion*" must refer to the reversionary interest as of an heir to a Hindu widow. Ordinarily, reversion signifies that portion left of an estate after a grant of a particular portion of it, short of the whole estate, made by the owner to another person. "When a person has interest in land, and grants a *portion of that interest*, or in other words, a *less estate than he has in himself*, the possession of those lands shall, on determination of the granted interest or estate, *return*, or *revert to the grantor*. This interest is what is called the grantor's reversion."⁽²⁾

"*Registered instrument*" means an instrument registered in accordance with the provisions of the Indian Registration Act.⁽³⁾

"*It does not itself, etc.*," means that the contract alone unaccompanied by something else does not create any interest, etc.

947. What is a Sale.—This chapter deals with the sale of immoveable property by act of the parties, *i.e.*, by contract, as distinguished from a compulsory sale, as for instance, in execution of a decree or for non-payment of rent or revenue, in which case, although the elements constituting a valid sale as here defined are always present, still both the nature of the interest conveyed as well as the form of conveyance materially differ. It is not within the province of the present Act to deal with a sale of this description, and this fact would have to be particularly borne in mind whilst regarding the next section which bears no analogy to the covenants implied in a compulsory sale, the nature of which would then be only incidentally described for the purpose of comparison.

A sale is here defined to be a transfer of ownership for a price. What constitutes a transfer within the meaning of law has been already generally described elsewhere.⁽⁴⁾ But the subject calls for more particular treatment here. The term is here used as denoting an executed contract as distinguished from an executory contract or *contract to sell* or a *contract for sale* which precedes what is often designated a contract of sale or an accomplished transfer and which is accompanied by the creation of the rights hitherto enjoyed by the vendor in the purchaser and which constitute his ownership.

948. "Tangible" and "Intangible" Property.—For the purpose of this transfer, this section prescribes a certain form in which alone can a valid sale be made. With this object in view it divides property into (a) tangible and (b) intangible property. This division is for the first time recognized by the Act, but in doing so it follows the division made in English law between (a) corporeal and (b) incorporeal property, to which the former terms are respectively synonymous.

By tangible property is no doubt here meant land, as a thing which is capable of present possession, while intangible property, comprises rights over things or land or something issuing therefrom or exercisable therein as distinct from its enjoyment, such as, for instance, a right to redeem a mortgage,⁽⁵⁾ a contingent, as distinguished from a vested interest⁽⁶⁾ reversion,⁽⁷⁾ rents, services, tithes, commons, and other profits *in alieno solo*, pensions, offices,

(1) *Peare Lal v. Lala*, 11 I.C. 673. See (168).
§ 947 *post* cited therein.

(2) *Watkin's Conv. C.* 16.

(3) Act III of 1877.

(4) Ss. 5 and 195 *ante*.

(5) *Rahmat Ali v. Muhammad*, 11 A.L.J. , 407; *Mutsaddi v. Muhammad*. 10 A.L.J., 167

(6) *Subramaniam v. Perumal*, I.L.R. 18 Mad., 454 (455); *Peare Lal v. Lala*, 11 I.C., 673 (674); see s. 19 *comm*.

(7) *Damotlar v. Girdhari*, I.L.R., 27 All., 564.

franchises, liberties, villeins and dignities, (1) but not a debt which has already become due to the vendor by a third person. Hence, an assignment of the village profits already due by a lambardar to a co-sharer being an assignment of a debt does not require to be registered. (2) Since the section speaks of the transfer of an intangible thing, it necessarily assumes that it is property and possesses the incident of transferability. The section does not enact any substantive rule of law affecting property, but merely prescribes a form of transfer of property which is otherwise transferable. For instance, the right of a son or daughter or other heir of a person to inherit that person's property on his death may well be regarded as an "intangible thing" but it does not on that account become legally transferable under this section, though it is otherwise untransferable as a *spes successionis*. (3) So a Hindu widow's right to maintenance, as such, may be an intangible thing, but so long as it is not charged on land, it remains a personal right incapable of transfer, so that its release would not require to be registered. (4) Such is also an "easement," which, were it transferable (§ 215) would be subject to this section, but since the grant of an easement is not its transfer, its creation need not be similarly evidenced. (5) Again, an "intangible thing" is a loose expression used in this context to connote only intangible immoveable property (6) excluding other intangible things such as a chose in action the assignment of which forms the subject of another chapter. (7) So where the profits of a village collected by the Lambardar for a past year were assigned to the plaintiff and who sued therefor, whereupon the defendant objected to the assignment as requiring registration under this section, the court held the intangible thing sold to be a debt the sale of which was not provided here. (8) But this raises a question not free from difficulty: when a mortgage debt is an intangible thing, it is also an intangible immoveable property, for since the section must be held confined to immoveable property it will not apply unless it is so, though the contrary has been laid down by all the High Courts. (§ 64.) Now it is evident since the amendment of the definition of "actionable claim" (9) in 1900, that whatever may have been its character before, it is no longer to be regarded as an actionable claim, and as it secures interest in immoveable property, it cannot but be regarded as an intangible immoveable property the transfer of which is compulsorily registrable under this section. (10) Other instances of intangible things which would fall under the provisions of this section have been already given. (§§ 63—66).

949. Besides the intangible immoveable property, properly so called, transfer of other interests in immoveable property which though not strictly speaking intangible, would have to be effected by a registered instrument,

(1) Hale's *Analysis*, p. 48, but Blackstone enumerates ten principal kinds: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents—1 Black Comm., 21.

(2) *Damodar v. Girdhari*, I.L.R., All., 27 564.

(3) § 6 (a) ante; *Abdul Hoosein v. Goolam Hoosein Abdul*, I.L.R., 30 Bom., 304; *Sham-suddin v. Hoosein*, 8 Bom., I.L.R., 252.

(4) *Kalpaqathachi v. Ganapathi*, I.L.R., 3 Mad., 184 (91).

(5) *Bhagwan Sahai v. Narsingh Sahai*, I.L.R. 31 All., 612; *Krishna v. Rayappa & M.* H.C.R. 92.

(6) See the heading of this chapter.

(7) Ch. VIII, *Subramaniam v. Perumal*, I.

L. R., 18 Mad., 454 (455). The rest of this judgment cannot be now supported. The view that the sale of a mortgage is merely the sale of a debt charged on immoveable property and therefore saleable as an actionable claim would have been right enough under the unamended definition of "actionable claim" and under the English Law, but since its express exclusion by the Amending Act I of 1900 it has certainly passed out of that category. See 92—94.

(8) *Damodhar v. Girdhari*, I.L.R., 27 All., 564 (566).

(9) By Act II of 1900; See 92—94.

(10) *Ramasami v. Chinnam*, I. L. R. 24 Mad., 449 (463); followed in *Matsaddi Lal v. Mahomed Hanif*, 10 A.L.J. 167.

because it is practically impossible to deliver possession of them—the only other alternative allowed by the section.

The term "tangible immoveable property" would comprise not only things, such as land, houses and the like, but also shares and interest thereon. An undivided share in immoveable property would, for instance, be such property the sale of which, if for below Rs. 100, need not be registered. (1)

950. But though a sale may be in conformity with the form here prescribed, it will not be necessarily effective and complete, unless it is complete in its other essential particulars. These may be stated to be (i) that the property be saleable; (ii) the vendor must have the title; (iii) and be competent to sell; (iv) the price must be fixed, and paid or promised; or part-paid or part-promised; and (v) the property of which the ownership is transferred must be determinate and properly described; of these the first three essentials have been already considered. (2) It will be necessary to consider the other two presently. (§§ 957-959, 985).

951. Of course, a thing cannot be regarded as "tangible" of which no present possession is possible. Consequently the equity of redemption in a possessory mortgage would be an "intangible thing" while the same right in the case of a non-possessory mortgage would be a "tangible" thing, and similarly, while the right of the mortgagee in a non-possessory mortgage would be an "intangible thing" his right in a possessory mortgage would be a "tangible thing." (3) As regards tangible property the section enacts that where its value exceeds Rs. 100, sale of such property can only be made by a registered instrument. But where its value is less than Rs. 100, then a sale may be made either (i) by a registered instrument, or (ii) by delivery of possession. But as regards intangible property it prescribes the uniform rule that, irrespective of its value, it can be sold only by a registered instrument. But though the requirements of the section as regards registration may be complied with, it does not thence follow that the mere registration of a conveyance is of itself sufficient to pass the property or to make the sale a completed one, for there might be circumstances that would show that it was not intended that the transfer should have any immediate operation, although the deed had been registered. (4) For unless the registration is followed up by some other overt act evidencing the relinquishment of his rights by the vendor, there is not a complete sale.

952. Necessary Ingredients of Sale.—In order then to complete the transaction, there must besides be either delivery of the sale-deed to the vendee or receipt of consideration or some other overt act such as effectuation of the mutation of names evidencing the completion of transfer, to justify the court to hold that the vendor had finally divested himself of his rights in the property in favour of the purchaser. (5) Hence if it was intended by the parties that the title should pass only upon the fulfilment of a condition as upon the payment of the consideration-money, no title will pass unless the condition has

(1) *Peare Lal v. Lala*, 11 I. C. 673.

(2) For the property being saleable—s. 6; the vendor's title and competency—s. 7.

(3) *Ramasami v. Chinnam*, 1 L. R. 24 Mad., 449 (463); *contra Subramaniam v. Perumal*, 1 L.R. 18 Mad. 454, dissented from; *Mutsaddi Lal v. Muhamad Hanif*, 10 A.L.J. 167.

(4) *Sheo Narain v. Darbari*, 2 C.W.N., 207 (208); *Ramalinga v. Ayyadorai*, 1 L.R., 28 Mad., 124.

(5) *Sheo Narain v. Darbari*, 2 C.W.N., 207; followed in *Manladan v. Rughunandan* 1 L.R., 27 Cal., 7; *Tindanmal v. Muhamad*, 5 Sindh L.R., 83.

been performed, or the payment made. (1) On the other hand, where the whole of the purchase-money had been paid and possession delivered to the purchaser, and nothing remained to be done but the execution of a registered conveyance, it was held that from the date of the payment of consideration and the transfer of possession, the vendor was nothing more than a bare trustee, and that he had no interest in the property which his creditor could attach. (2) It was, however, conceded that the case would have been different if at the time of the attachment the purchase-money had not been paid. (3) As it is, it may be permissible to express a doubt as to the soundness of the decision for which the section affords no authority. It is conceivable that the purchaser would acquire a charge on the property for the amount of his purchase-money, (4) but the acquisition of a charge is not tantamount to the acquisition of ownership, which the law has declared can only be made by a registered conveyance. (5) Registration is *prima facie* proof of intention to transfer the title, and the party who alleges the existence of a collateral agreement must strictly prove it. (6) The mere non-payment of the purchase-money where it is not made a *conditio sine qua non* does not afford evidence of such an intention as to render a registered deed inoperative. So where a deed of sale had been duly executed, registered and delivered and the purchaser had been paid a portion of the purchase-money, it was held that these facts amounted to a full transfer of ownership so as to entitle the purchaser to maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed. (7) In the converse case, it was held, in a case decided before the Act, that where the sale-deed, though signed and registered, has not been delivered, and no part of the purchase-money was paid, the vendor could not be compelled to complete the transfer. (8) In another case, a bill of sale, though duly executed, was not delivered to the purchaser, but was deposited with a third party, to be held by him until the purchaser should perform certain acts, the performance of which was the consideration for the sale. The purchaser subsequently, by a trick, got possession of the sale-deed before he had performed all the acts in question, and then sued for possession, but the court threw out the claim, holding that the conditions on the fulfilment of which the sale was to become complete not having been performed, the purchaser was not entitled to enforce the deed. (9) As regards the necessity of registration, it was at one time held by the Calcutta High Court that the section was not exhaustive and imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated so as to confer a valid title, (10) but the assumption made was unwarranted and the case had soon afterwards to be overruled. (11) In ordinary

(1) *Manladan v. Rughunandan*, I.L.R., 27 Cal., 7; *Gostho Behary v. Rohini Gowalinn* 13 C.W.N. 692; *Sanqu v. Cumarasami*, I.L.R., 18 Mad., 61; *Ramalinga v. Ayyadoras*, I.L.R., 28 Mad., 124 (126).

(2) *Karalia v. Mansukhram*, I. L. R., 24 Bom., 400.

(3) *Hormasji v. Keshav*, I. L. R., 18 Bom., 13; distinguished by Jenkins, C. J., in *Karalia v. Mansukhram*, I. L. R., 24 Bom., 400 (402).

(4) S. 55 (6) (b) *post*.

(5) *Cf. Papireddi v. Narasareddi*, I.L.R., 16 Mad., 464; *Shoo Narain v. Darbari*, 2 C. W. N., 207.

(6) *Shoo Narain v. Darbari*, 2 C. W. N. 207 (209).

(7) *Managi Singh v. Sarat Lal*, 4 C.L.J., 334; *Shib Lal v. Bhagwandas*, I. L. R., 11 All., 244; dissenting from *Ikbāl Begam v. Gobind*, I. L. R., 3 All. 77.

(8) *Indurjeet v. Gujadhur*, 5 W. R., 348.

(9) *Raj Chunder v. Raj Nath*, (1864), W.R. 222.

(10) *Khatu Bibi v. Madhoram*, I. L. R., 16 Cal., 622.

(11) *Mukhanlal v. Banu Behari*, I. L. R., 19 Cal., 623, F.B.; overruling *Khatu Bibi v. Modhuram*. I. L.R., 16 Cal., 622.

cases the transfer of ownership may be sufficiently symbolized by the registration of a sale-deed.⁽¹⁾

953. Sale below Rs. 100.—As regards the sale of property for less than Rs. 100, the rule enacted is that the sale should either be made by a registered instrument, or that it must be attended by transfer of possession. If the vendor of property of less than Rs. 100 in value conveys it by an unregistered sale-deed and does not deliver possession, the vendee by the force of this section acquires absolutely no right therein, but of course such a document would be a muniment of his title which he can sue on, if necessary, for specific performance of the contract as evidenced thereby. "Delivery of possession" does not imply any formal making over of possession by the vendor. It is sufficient if the vendee takes it in such form, as possession in the property is susceptible of being transferred.⁽²⁾ "I do not think it is necessary," said Trevelyan, J., "that there should be any formal making over of possession. It can scarcely be supposed that the Legislature, while making provision for transactions which would mostly be between poor people, would insist upon very strict formalities. Where the vendee obtains possession on the date of the sale and remains in possession thereafter, I think it is reasonable to presume that the possession so obtained was a lawful one, and had been given by or with the assent, express or implied, of the person previously in possession, namely, the vendor."⁽³⁾ Beverley, J., however, dissenting, observed in the same case that the question of the delivery of possession depended upon the intention of the parties. And this view was not only affirmed but carried further in a subsequent case in which the view taken appears to have been that the delivery of possession must not only be with the intention of transferring ownership but it must be made in such a manner as the nature of the property admits of.⁽⁴⁾ But it has been held by the Madras High Court that the registration of a sale-deed constitutes a sufficient delivery.⁽⁵⁾ Again, since sale is defined to be the transfer of "ownership," it follows that if the vendor is not the owner of the property he is incapable of selling it, but in such a case although the purchaser cannot enforce his sale immediately, he may, if he chooses to wait, be able to enforce it, if the vendor at any time afterwards acquires the property sold.⁽⁶⁾

954. Conditional Sale: Covenant for Repurchase.—Transfer of ownership implies transmutation of all such rights as the vendor possessed in the property. If, therefore, the vendor has reserved some rights for himself or has stipulated for rights inconsistent with the nature of the interest conveyed, there is then no sale in law. It does not infrequently happen that the vendor stipulates with the purchaser that should he at any time pay him a price certain or ascertainable, the purchaser would then be bound to reconvey the property to him in pursuance of the covenant. Two questions may arise in this connection: (a) is the covenant a covenant running with the land and enforceable against all subsequent vendees? and (b) what is the nature of such a covenant and within what limits would it be enforced? The nature of deeds containing such covenants is often a matter of some complexity: For such deeds of sale are not

(1) *Ponnayya v. Muttu Goundan*, I.L.R., 17 Mad., 146.

(2) *Gangri v. Kali Churn*, I. L. R., 22 Cal., 179; *Makhanlal v. Banku*, I. L. R., 19 Cal., 623, F. B (overruling *Khatu Bibi v. Madhokaram*, I. L. R., 16 Cal., 622).

(3) *Ganga v. Kali Churn*, I. L. R., 22 Cal.,

179 (181).

(4) *Sibentrapada v. Secretary of State*, I.L.R., 34 Cal., 207.

(5) *Ponnayya v. Muttu Goundan*, I. L.R., 17 Mad., 146; following *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 597.

(6) S. 43, ante.

often distinguishable from mortgage-deeds, and, indeed, the adoption of peculiar nomenclature to designate such transactions as mortgages by *conditional sale* suggests their close affinity to sales from which the only differentiating element present in them is the existence of a condition for repurchase or redemption in favour of the ostensible vendor, but which in truth places the relationship of the parties upon an altogether different footing. The question is said to be one of intention and so it is, but it scarcely affords any solution of the question. For the question still remains, how is the intention to be determined. For this purpose, several tests have been applied and these may be taken as the indicia of intention. (i) In the first place, it is a salutary rule to keep in view that an instrument designated and executed as a sale would be so treated, unless the contrary is made manifest. (1) For this purpose, oral evidence is wholly inadmissible, (2) though documentary evidence of contemporaneous (3) or subsequently executed deeds between the same parties would be admissible. This may lead to how whether (ii) the consideration is the debt advanced of the price paid : (iii) if the former, was there any stipulation for the payment of interest or increase on repurchase, and what proportion did it bear to the market price of the property, (iv) was possession parted out and out, or did the vendor retain some hold on the property, (v) was any provision made against its deterioration and improvements ; (vi) was the covenant for repurchase mutual and reciprocal so that the vendee could resell as much as the vendor could repurchase at his option ; (4) (vii) what proportion do the profits bear to what would be a reasonable and current rate of interest on the consideration ; (viii) how far is the language of the deed consistent with sale or mortgage. Is it more consistent with one than the other. (ix) Subsequent conduct of the parties, e.g., delay in reclaiming the property. (5) (x) Was there any reason for masking the real nature of the transaction ? If it was a mortgage why was it not plainly so called ? If it was a sale, why were dubious expressions used in connection therewith ? As to the last it is a matter of common knowledge that in transactions entered into by Mahammadan creditors who have religious scruples against the taking of interest the charging of which is prohibited by the *Koran* a subterfuge is sometimes resorted to by giving a mortgage the garb of a sale and stipulating for its resale upon terms which correspond to those of a mortgage. And even where an out and out sale is intended a covenant for repurchase is sometimes inserted as a *solatium* to the grieved vendor who continues to cherish the illusion that he has after all bid only an *au revoir* and not a good-bye to his ancestral lands.

(1) *Ayyavayyar v. Rahimansa*, I.L.R., 11 Mad., 170 (172).

(2) S. 94. Indian Evidence Act (Act I of 1872); *Sjmana v. Gadigrya*, I.L.R., 35 Bom. 231 ; So is inadmissible a prior written agreement which is deemed to have been superseded by the subsequent conveyance, *Milebourn v. Lyons*, (1914), W. N. 234. Strangers to the deed are competent to shew by oral evidence that sale was a mortgage. *Bageshri v. Pancho*, I. L. R., 25 All. 473 (474).

(3) *Wajid Ali v. Shofamat Husain*, I.L.R. 33 All. 122; *Kandz Singh v. Wahiduddin*, I.L.R. 33 All. 585 (593, 599); *Ghulam Nabi Khan v. Niazunnissa*, 8 A. L. J. 113 ;

(4) *Goodman v. Grierson*, 12 R. R. 82 ; Per Lord Manners ; "The fair criterion by

which the Court is to decide whether this deed is a mortgage or not I apprehend to be this: Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to ?" Cited and followed in *Jhanda Singh v. Wahiduddin*, I.L.R., 33 All. 585 (591) ; *Ghulam Nabi v. Niazunnissa*, 8 A. L. J. 119.

(5) *Ayyavayyar v. Rahimansa*, I.L.R. 14 Mad. 170 (172) ; *Gurunath v. Yamanawa*, I. L.R. 35 Bom. 258 (260) ; Per Lord Cranworth in *Alderson v. White*, 2 De. G. & J. 97 (105). "I think that the Court after a lapse of 80 years ought to require cogent evidence to induce it, to hold that an instrument is not what it purports to be."

955. Such a mere reservation of a power to re-purchase does not, of course, convert a sale into a mortgage, if there has been a *bona fide* purchase of an interest out and out. ¹⁾ The condition is a privilege conferred on the vendor and would be strictly enforced. ⁽²⁾ Hence, if a power to re-purchase be given upon a condition, the right cannot be enforced unless the condition has been complied with. ⁽³⁾ A stipulation that the money required for the re-payment should not be raised by borrowing or by selling or mortgaging or agreeing to sell or mortgage the property sold, and that if the money were so raised, the vendor would forfeit his right to re-purchase, would thus be enforced. ⁽⁴⁾ Where a share in an estate was sold on condition that the purchaser should possess it himself as landlord, and that if desirous of parting with it, he should restore it to the original owner or his heirs at a fixed price, and the purchaser, having been restrained by his agreement from selling the property to a third person, on his retirement to England, gave other persons a farming lease of it for fifteen years, the lease was set aside on the ground that as the object of the original stipulation was to secure the constant possession of the share to some one with whom the original owner or his heirs, who still retained the residue of the estate, could keep up friendly relations, the grant of the farmer's lease was a violation of the covenant; and that the heirs of the original owner were entitled to have the share in suit conveyed to them at the stipulated price. ⁽⁵⁾ Where the terms of an agreement are that the purchaser should redeem a mortgage thereon and obtain a formal conveyance from the vendor, the transfer is not complete until these terms are fulfilled, though the purchaser may have been let into possession. ⁽⁶⁾

956. Of course, such covenants must be discriminated from those in which transfer by sale or mortgage is altogether prohibited and which are then void as offending against the rules which have been before discussed. ⁽⁷⁾ Parol evidence is always admissible to shew that in spite of the form, the transaction was really intended to be a mortgage. ⁽⁸⁾ It is not necessary that if embodied in a separate agreement, it should be registered, and such a stipulation is not void as opposed to public policy, for it is a paramount public policy not to interfere lightly with the freedom of contract. ⁽⁹⁾ A condition for repurchase at an advanced price is similarly enforceable. Such transactions do not savour of a mortgage merely because the parties agree that the sale shall be cancelled under given circumstances mutually agreed to. But in all such cases there must have been a *transfer of ownership* which implies that the purchaser, as such, must have been put in possession of the property, ⁽¹⁰⁾ and that the transfer should not have been made by way of security for a debt due or taken by the transferor. Though a covenant for repurchase may assume a variety of forms still in its simplest form it is usually expressed in the formula: "I sell you this land, for a certain price; but should I want it back you will have to resell it for the same or a certain price." In such cases the transaction is unquestionably a sale with a covenant for repurchase. The

(1) *Verner v. Winstanley*, 2 Sch. & Sel., 393; *Servier v. Greenway*, 19 Ves., 413; *Gurusamy v. Swaminadha*, 2 M. H. O. R., 450; *Buldeo v. Dhukrum*, Marsh, 632.

(2) *Barrell v. Sabine*, 1 Vern., 269; *Ens-worth v. Griffiths*, 5 Bro. P. O., 184; *Davis v. Thomas*, 82 P. R., 257; *Gungadhar v. Shamley*, 14 C. P. L. R., 166 (168).

(3) *Davis v. Thomas*, 1 Rus. & My., 506; *Sugd. V. & P.* (14th Ed.), 199, 200.

(4) *Gangadhar v. Shamley*, 14 C. P. L. R.,

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(5) *Ramnath v. Wise*, 25 W. R., 373.

(6) *Varda v. Lakshmi*, (1877), B. P. J., 184.

(7) S. 6 *Comm. ante*; *Mahram v. Ajudhia*, I. L. R., 8 All., 452.

(8) *Muttylal v. Anundo Chunder*, 5 M. I. A., 72.

(9) *Ib.*, p. 168.

(10) *Holmes v. Mathews*, 9 Moo. P. C., 413 (431).

transferor executed a sale deed in favour of the transferee, and the latter executed a contemporaneous "counterpart document" agreeing to resell the same if a certain sum was paid him by a date fixed therein, failing which the sale should become absolute. The courts held the two deeds to constitute a sale with an agreement for repurchase, because there was no stipulation for payment of interest, nor any power reserved to the purchaser to sue for his purchase-money. The transferor had executed a *previous* mortgage which was superseded by the sale, and there was no explanation why a different form of mortgage was required. There was a delay of fifteen years in reclaiming the land, and there was no evidence that the parties intended to enter into a transaction different from that which appeared on the face of the instruments. (1) In another case two similar documents were executed on the same date, the sale being expressed to be "subject to the terms of the deed of agreement executed by the vendee" and which were held to convert the sale into a mortgage (2) distinguishing the case in which the agreement for repurchase being declared to be given as of grace, the Privy Council held the sale to be a sale with an independent agreement for repurchase by the vendor. (3) But it would seem that where two documents are contemporaneously executed apart from express words to that effect, one would be read as subject to the other and in a similar case decided by the same court, two similar deeds were held not to convert the sale into a mortgage, because the two deeds were executed a week apart; (4) and because in two subsequent settlements the vendor did not set up his claim as mortgagor, but suffered the purchaser to be recorded as a full owner. (5) In another case of the same court the two contemporaneous deeds similarly worded were held to bear their literal meaning and constitute a sale with a covenant for repurchase, there being nothing in the deeds to suggest that the purchase money was advanced as a debt, nor did the parties possess mutual and correlative rights, while the sale-deed declared that the sale had become "absolute and final" which, it was held, must be given their due weight. (6) Such deeds have been similarly construed in Bombay. (7) [Deeds which fall on the other side of the line will be found discussed under s. 58 *post*.]

957. Of all the tests before set out, the best test for determining the true character of a transaction is to enquire whether the original purchaser had power to recover the sum named as the price for such repurchase. If he had, the transaction is a mortgage; in any other case there is no mortgage. (8) An instance of a transfer of rights short of ownership is a lease in which the lessor while conveying away certain rights still continues to be the owner of the property, a right in recognition of which the lessee pays him rent in some shape or form. (9) But it has been held that a *Mulgeni* (perpetual) lease is a purchase *pro tanto* of the interest thereby assured. (10) The question in such cases naturally turns upon the intention of the parties as expressed in the deed, and the *onus* is upon him who sets up a case against its

(1) *Ayyappaiah v. Rahimansa*, I. L. R., 14, Mad., 170; *Bhagwan Sahai v. Bhagwan Din*, I. L. R., 12 All., 887, P. C.

(2) *Wajid Ali v. Shafakat Husain*, I L. R., 33 All., 123.

(3) *Bhagwan Sahai v. Bhagwan Din* I. L. R., 12 All., 887 P. C.

(4) *Thanda Singh v. Wahiduddin*, I. L. R., 33 All., 585 (600, 602).

(5) *Ib.*, p. 604.

(6) *Ghulam Nabi v. Niazunissa*, 8 A. L. J., 119; *Rama Kant v. Kalijoy*, 11 I. C. 124.

(7) *Bapuji v. Senavarajo*, I. L. R., 2 Bom., 231; *Vasudev v. Bhanu*, I. L. R., 21 Bom., 528; *Gurunath v. Yamanava*, I. L. R., 35 Bom., 258.

(8) *Perry v. Meddowcroft*, 4 Beav., 203.

(9) *Sobhanadri v. Venkata Narasimha*, I. L. R., 26 Mad., 403 (409); following *Sanniyasi v. Salur Zamindar*, I. L. R., 7 Mad. 268.

(10) *Narayan v. Shri Ramchandra*, I. L. R., 27 Bom., 373 (377); following *Attorney-General v. Payne*, 27 Beav. 168.

plain intention, who may, have further to rebut the presumption arising from the conduct of the parties that the title as it stood was consistent with their real intention.⁽¹⁾ An agreement made subsequently to the sale by the purchaser to hand back the property to the vendor on the last day of *Jeth* of any year on having repaid the purchase-money does not convert the sale into a mortgage.⁽²⁾ On the other hand, cases will often arise in which, though a deed may in terms purport to convey the property itself, yet it is clear upon the face of the instrument that the intention of the parties was to convey the right of entry or the equity of redemption, and nothing more. In such cases the court should not lay stress on the mere terms of the instrument, but give effect to the intention of the parties. But there are manifest limitations on the operation of this rule. For evidence of intention is a wide term, and while it is admissible within the limits here defined, it cannot be given to shew that a deed was intended to have an effect wholly different from what it *prima facie* purports to be. For instance, where a deed is on its face, and purports to be a deed of sale, no extrinsic evidence will be admitted for the purpose of shewing that it was in reality intended to be only a deed of gift.⁽³⁾ And though in such a case the vendor may show that the consideration stated to be paid in the deed was never in fact received,⁽⁴⁾ still evidence that it was never intended to be paid would be inadmissible.

958. Fixation of Price.—Upon the principle, that a fixed price was an essential ingredient in a contract of sale, the ancient Roman Lawyers doubted whether an agreement that did not settle the price was at all binding. Justinian's Institutes and the Code state that doubt, and resolve it by declaring that such an agreement should be valid and complete, when and if the party, to whom it was referred, should fix the price; otherwise it should be totally inoperative; *quasi nullo Pretio Statuto*; and such is declared to be the law of England.⁽⁵⁾ And so in this country since sale is the transfer of ownership in exchange for a price, it follows that the price must be settled before there can be a valid sale, and the date of the sale would then be the time when the amount of the price is fixed.⁽⁶⁾ But it is not necessary for the specific enforcement of a contract for sale that the price should have been ascertained if the agreement was to sell at a fair valuation, or if the mode of ascertaining the price was subsidiary and non-essential.⁽⁷⁾ But such a contract must be distinguished from one in which the price is agreed to be according to the valuation of two persons, one chosen by each party, or of an umpire to be appointed by those two in case of disagreement,⁽⁸⁾ or where it is agreed to be fixed by arbitrators who fail to fix it.⁽⁹⁾ In all such cases price is deemed to be of the essence of a contract of sale, conditional on the determination of the price, failure to fix which puts an end to the contract.⁽¹⁰⁾ "When the agreement is," observed Grant, M. R., "that the price of the estate shall be fixed by arbitrators, and they do not fix it, there is no contract, as the price is of the essence of the contract of

(1) *Holmes v. Mathews*, 9 Moo, P. C. 413 (460).

(2) *Ram Din v. Ram Lal*, I.L.R., 17 All., 451.

(3) *Faizunnissa v. Hanifunnissa*, I.L.R., 27 All., 612.

(4) *Sab Lal v. Indarjit*, I.L.R., 22 All., 371, P.C.; *Balkrishnan v. Legge*, I.L.R., 22 All., 149, P.C.

(5) *Per Sir William Grant in Milnes v. Grey*, 14 Ves., 400 (403).

(6) *Bombay Tramways Co. v. Bombay Municipal Corporation*, 4 Bom, I. L. R., 384

(7) *Gaskarth v. Lord Lowther*, 12 Ves., 107; *Emery v. Wase*, 8 Ves., 505; *Milnes v. Grey*, 9 R. R., 307; *Gourlay v. The Duke of Somerset*, 18 R. R., 234; *Dinham v. Bradford*, L. R. 5 Ch., 519; *Budhia v. Hari Ram*, 14 C.P.L.R., 117 (120).

(8) *Milnes v. Grey*, 14 Ves., 400.

(9) *Gourlay v. The Duke of Somerset*, 19 Ves., 429.

(10) *Gourlay v. The Duke of Somerset*, 1 Ves., 429 (431).

the sale, and the court cannot make a contract where there is none; but, where the contract has determined that the agreement is binding and concluded and such as ought to be executed, it does not require foreign aid to carry the details into execution." (1) But where the fixation of price is left to two indifferent persons to be chosen by either party, the question of price is not regarded as of the essence of the contract, since "if the valuation cannot be made *modo et forma*, the court will substitute itself for the arbitrators." (2) So again, where the covenant was to refer a matter to an arbitrator in case of difference, the clause was disregarded as non-essential, since "the court is not at liberty to suppose there will be a difference, for there may not be any difference at all." (3) So again where the conditions of sale provided that "whatever complete assessment may be fixed by the punches or the Survey Department in respect of the land is to be paid, but the same shall have to be paid from Rs. 2-8 to Rs. 5 per acre," the sale was held to be valid, though if the assessment be fixed beyond the rate prescribed by the parties, the Civil court would have jurisdiction to get rid of the excess. (4) There is a great difference between the appointment of an arbitrator and of a valuer or referee; the first is appointed to decide differences which have arisen, the second to prevent differences arising. (5) Once the price is settled, it is immaterial if it is paid to the vendor, or to any one on his behalf at his request. (6) On the other hand, if the vendee has refused to pay him the price, it is by itself no reason for setting aside the sale, since a sale once complete cannot be rescinded for failure of consideration, unless that right be expressly reserved, in which case the suit will benot in consequence of any general right vested in the vendor, but on the express covenant made. In any other case all that the vendor can claim is damages for the breach of promise to pay the price. And it is so even in case of the sale of moveable property where the vendor has only a lien upon the chattel sold so long as it does not go out of his possession. (7) This principle has been extended also to the assignment of choses in action. (8)

959. Adequacy or inadequacy of price is not an essential element in

Adequacy or pre-payment of price immaterial.

completing sale. Nor is it necessary that the vendee should have paid the full amount of the purchase-money, for if only a part has been paid, the transfer is complete and the vendee can sue for possession. (9) Under this section all that is necessary is that the price should have been paid, or promised, or part-paid, or part promised. (10) Hence if possession is made over to the vendee, the mere fact that the latter has not paid the purchase-money does not entitle him to treat the sale as inchoate, but his only remedy is to sue for recovery of the purchase-money, (11) unless pre-payment of the price was a *conditio sine qua non* of a valid sale, in which case, as observed before the court will enforce it. (12)

(1) *Gourlay v. The Duke of Somerset*, 19 Ves., 429 (431, 432).

(2) *Per Lord Hatherley, L. C., in Dinham v. Bradford*, L.R., 5 Ch., 519 (523).

(3) *Per Kay, J., in Hart v. Hart*, 18 Ch. D., 670 (687).

(4) *Limjibhai v. The Collector of Surat* (1877), B. P. J., 30.

(5) *Per Lord Esher, M. R., in Re Carue-Wilson and Green*, 18 Q. B. D., 7 (9) (wrongly) cited in *Shantaram v. Jamsetji*, 4 Bom. L.R., 212.

(6) *Blackie v. Clarke*, 15 Bear, 595 (601).

(7) *Shiblal v. Bhagwan Das*, I.L.R., 11 All., 244; *Mt. Rupa v. Bisambar*, 8 C.P.L.

R., 10; *Lakhmichand v. Kisan*, 14 C.P.L.R., 57; *Martindale v. Smith*, 10 I.J. Q. B., 155.

(8) *Lakhmichand v. Kisan*, 14 C.P.L.R., 57 (59).

(9) *Shiblal v. Bhagwan Das*, I.L.R., 11 All., 244.

(10) *Poonayya v. Muttu Goundan*, I.L.R., 17 Mad., 146; following *Narain Chunder Chuckerbutty v. Dataram*, I. L. R., 8 Cal., 597, F. B.

(11) *Sagaji v. Namker*, I. L. R., 23 Bom., 525; *Subrahmania v. Poovan*, I. L. R., 27 Mad., 28.

(12) *Dart's V. & P.* (6th Ed.), 256.

So where the parties intend that no title shall pass upon registration till the consideration-money has been paid and the deed delivered, the court will give effect to such intention.⁽¹⁾ But since registration is *prima facie* proof of intention to transfer the title, the party who alleges the existence of a collateral agreement must strictly prove it.⁽²⁾ But though under the section a transfer is complete although the price may not have been paid,⁽³⁾ still the vendee will not as a rule be entitled to possession without first paying the price,⁽⁴⁾ which remains a charge on the property in the hands of the vendee and may at any time, within the period prescribed by Article 132, Schedule II, of the Limitation Act, be recovered.⁽⁵⁾ But while the terms of the contract will be generally enforced, it is open to the parties in a suit for specific performance to urge such pleas as will in law negative the contract. Thus under section 28 of the Specific Relief Act, it is provided that specific performance of a contract cannot be enforced against a party thereto in any of the following cases:—

(a) "If the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of contract, as to be either by itself or coupled with other circumstances evidence of fraud, or of undue advantage taken by the plaintiff;

(b) "If his assent was obtained by misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

(c) "If his assent was given under the influence of mistake of fact, or misapprehension; provided that, when the contract provides for compensation in case of mistake, compensation may be made for mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced."

960. Although the term "price" has been nowhere defined, it is no doubt "Price" and used to denote consideration in the shape of money, or what "Value" distin- is its equivalent,⁽⁶⁾ for if the transfer is otherwise, it may be guished. either an exchange or a gift, but not a sale.⁽⁷⁾ Where money is changed for money or currency notes, it is an exchange and not a sale.⁽⁸⁾ The term "price" of a thing must be distinguished from its *value*, since while the former denotes its money value, the latter is used in a variety of senses, notably as denoting its worth or the general purchasing power. But the older economists made no discrimination between the two terms, and their indiscriminate use is observable in the section. Of course, in the sense that it is the consideration in the shape of money or money's worth, the term has often been used in senses widely different from its recognized sense in ordinary parlance. Even the consideration paid for a usufructuary mortgage with

(1) *Mauladan v. Raghunandan*, I. L. R., 27 Cal., 7; *Sarat Chandra v. Hari Prada*, 4 C. L.J., 338; *London Freehold, & Co v Baron Setfield*, (1897), 2 Ch., 608.

(2) *Sheonarain v. Darbari*, 2 O.W.N., 207.

(3) *Umedmal v. Davu*, I. L. R., 2 Bom., 547; *Mohun Singh v. Mt. Shib Kunwar*, 1 N.W.P.H.C.R., 85; *Goor Persad v. Nanda Singh*, *ib.*, 160; *Tatia v. Baboji*, I. L. R., 22 Bom. 176 (1893); *Sagaji v. Namker*, I. L. R., 23 Bom. 525; *Govindammal v. Gopalachariar*, 16 M.L.J.R., 524.

(4) *Mohun Singh v. Shib Kunwar*, 1 Agra, 95; *Umedmal v. Davu*, I.L.R., 2 Bom., 547. See S. 55 *post*, Comm.

(5) *Verchan v. Cumaii*, I. L. R., 18 Bom. 48.

(6) *Ariyapputhira v. Muthukumarasawmy*, 15 I.C., 343 (345).

(7) *E. v. Appava*, I L.R., 9 Mad., 141 (142); *Volkart v. Veltivelut*, I L.R., 11 Mad. (467); *Thiruvengudachariar v. Ranganath*, 13 M.L.J., 500.

(8) *E. v. Jogeshur*, I.L.R., 3 Cal., 382.

possession has been held to be comprised in the term as used in the *wajib-ul-arz* recording the right of co-sharers to pre-emption. (1)

961. Price when refunded.—If for any reason specific performance of a contract is refused, the vendee is entitled, according to equity and good conscience, to the refund of the consideration-money paid; (2) but where a contract for sale goes off by default of the purchaser, the latter cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. (3) "I do not say," observed Cotton, C.J., "that in all cases where this court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this court in declining, and which would require the court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it, so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser, which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract." (4)

962. When Sale must be registered.—After defining sale, the section proceeds to enact how a sale may be validly made. The effect of paragraphs 2 and 3 is to render registration compulsory in all sales of intangible property, and of tangible property of the price of Rs. 100 and upwards. The object of registration being primarily to give certainty to titles and to prevent the fraudulent fabrication of documents, its provisions are very strictly construed, and for that purpose the courts are empowered to go behind even a certificate of registration to see if it was registered by an officer duly empowered; and if it finds that the registering officer had no jurisdiction, it will refuse to receive it in evidence on the ground that it was not duly registered. (5) Where a document was presented for registration by the agent of the executant, who had died before its registration, and the registering officer registered it, it was held that the document could not be regarded as having been duly registered, the defect in its presentation being incurable, for the proper person to appear after the deceased executant was not his attorney whose powers lapsed with his death, but the attorney of the executant's representatives or assigns. "It is for those persons," observed their Lordships, "to consider whether they will or will not give to the deed the efficacy conferred by registration. The registrar could not be held to exercise the jurisdiction on him, if, hearing of the execution of a deed, he got possession of it and registered it, and the same objection applies to his proceeding at the instigation of a third party who might be a busy body." (6) A document relating to immoveable property which is situate partly in and partly outside British India may be registered in the district in which a portion of the property is situate. (7) In regard to its provisions for registration

(1) *Hulas Rai v. Ram Prasad*, I.L.R., 28 All., 454.

(2) *Alokeshi v. Hara Chand*, I. L. R., 24 Cal., 897.

(3) *Bishan Chand v. Radha Kishan*, I. L. R., 9 All. 489; following *Ex parte Barrell*. In re *Parnell*, 10 Ch., App., 512; *Howe v. Smith*, 27 Ch. D., 89.

(4) *Howe v. Smith*, 27 Ch. D., 89 (95) cited with approval in *Alokeshi v. Hara Chand*, I.L.R., 24 Cal., 897 (899).

(5) *Benimadhab v. Khativ Mondal*, I.L.R.,

14 Cal., 449; distinguishing *Ram Cocmar v. Khooda Newaz*, 7 C.L.R., 223; *Makhunlal v. Koondunlal*, 15 B.L.R., 228, P.C. (in which the registering officer had jurisdiction.

(6) *Mujib-un-nessa v. Abdul Rahim*, 3 Bom. L. R., 114 P. C.

(7) S. 28, Act III of 1877; But it will not necessarily affect property situate out of British India. *Gopal v. Annabhat*, I.L.R., 25 Bom., 60; *Hari Ram v. Sheo Dayal*, I.L.R., 11 All., 186, P.O.; overruling *Sheodyal v. Hari Ram*, I.L.R. 7 All., 590.

the section must be regarded as supplemental to the Indian Registration Act.⁽¹⁾ Section 3 of the Registration Act defines *immoveable property* to include "land, buildings, hereditary allowances, rights to way, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the earth, but not standing timber, growing crops, nor grass." And under section 17, all non-testamentary instruments which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property, are, so as to be valid, compulsorily registrable. As the Registration Act is in force in the Punjab, the provisions of this clause must apply to that province also.⁽²⁾ There is some difference between the definition of the term "immoveable property" as given in this Act⁽³⁾ (if definition it can be called) and that given in the Registration Act, for which, however reference must be made to the foregoing commentary. (§§ 61—71).

963. The registration of an instrument falling under the second clause is compulsory. Two cases have been, however, decided by the Allahabad High Court, which *prima facie* might be regarded as opposed to the requirements of the section. In the earlier case, the co-sharer of a village orally sold his share to a stranger for Rs. 300, in order to avoid the enforcement of the pre-emption clause of the *wajib-ul-arz* by the other co-sharers. On the other co-sharers bringing a suit for pre-emption, it was held by the majority of the Full Bench (Mahmud, J., dissenting) that, since the vendee had paid the purchase-money and had obtained possession to which he would have been entitled if he had instituted a suit for specific performance of the contract, the plaintiffs were entitled to pre-empt.⁽⁴⁾ This case has been, however, distinguished by the Madras High Court, which has held that in it the vendor and vendee having colluded to defraud, the pre-emptors could not take advantage of their own fraud.⁽⁵⁾ It may also be added that the right of pre-emption commences as soon as there is an attempt at sale.⁽⁶⁾ In a more recent case the majority of the Full Bench of the same Court has held, that in the case of a Sunni Muhammadan transferring certain immoveable property exceeding in value Rs. 100, under such circumstances as the price was paid and possession of the property delivered to the transferee, but no sale-deed executed, there was under the Sunni Mahomedan law complete transfer giving the right of pre-emption to the claimants.⁽⁷⁾ In this case, the learned judges observed that it was not the intention of the Legislature in passing this Act to alter directly or indirectly the Muhammadan law of pre-emption as it existed and was understood for centuries prior to the passing of this Act, by substituting for the sale referred to in that law, the "sale" coupled with the restriction of this section.⁽⁸⁾ If this view of the Allahabad High Court be accepted, it would follow that the term "sale" as understood in this Act has a different meaning to that given in the Mahomedan law. It appears, however, that without such ratiocination, the principle of pre-emption could have been supported by reasons given by the Madras High Court. Nevertheless the same

(1) Act III of 1877, see s. 4, *ante*.

(2) *Lehma v. Ganpat*, (1890), P. R., No. 115, F. B.

(3) S. 3, *ante*.

(4) *Janki v. Girjadat*, I.L.R., 7 All., 482, F. B.

(5) *Papireddi v. Narasareddi*, I. L. R. 16

Mad., 464.

(6) Elberling on Inheritance, &c., p. 302, cited in *Begam v. Muhammed Yakub*, I. L. R., 16 All., 344 (347), F. B.

(7) *Madho v. Burti Singh*, I.L.R., 16 All., 337, F. B.

(8) *Ibid*, at p. 351.

view was reiterated in other cases, and it was held that the definition of sale in the section is not necessarily exhaustive for all purposes. Thus under the Mahomedan Law of *Shafa* or Pre-emption, sale of a thing at a price to be fixed by another person is invalid, and hence such a sale would not give rise to a right for pre-emption unless the purchaser have possession of the thing sold, in which case the sale is deemed to be complete. ⁽¹⁾ In considering the question of pre-emption the Mahomedan law alone is to be applied, and hence it may happen that a sale may be completed under the section and yet incomplete under the Mahomedan law, and *vice versa*. ⁽²⁾ But apart from a sale considered in relation to pre-emption the section is, of course, held to be applicable to Mahomedans, as it is applicable to others regardless of caste and creed. ⁽³⁾ The necessary ingredients of a perfect sale under the Mahomedan law will be found fully discussed in treatises dealing with that branch of the law. ⁽⁴⁾

964. The question whether the transfer of property by a Mahomedan in consideration of a dower-debt is a sale or a gift has engaged the attention of the courts in several cases. In some of these, the transfer was held to be a gift requiring sanction to complete it. ⁽⁵⁾ But in view of the explicit provisions of this section and the view Mahomedan law takes of dower (§ 888) it appears to be clear that such a transfer is a sale and not a gift within the meaning of this section. ⁽⁶⁾

965. Although a registered document is, in cases of sales of the value of Rs. 100 and over, absolutely necessary, it does not thence follow that a vendee can under no circumstance acquire an indefeasible title to the property sold to him under a defective conveyance. The possession of a vendee under these circumstances must be regarded as adverse, and hence after the expiration of twelve years his title would necessarily become perfect. ⁽⁷⁾ But a title acquired by adverse possession is not a title acquired by sale, which, in order to confer an immediate legal title, must now conform to the provisions here enacted, without which there can be no completed sale, though there may be transfer of possession and payment of consideration, ⁽⁸⁾ that is to say, neither acknowledgment of the vendee's title by the vendor, nor receipt of price by him, nor delivery of possession can, in the absence of a valid conveyance, pass any title in the vendee whatever may be the outstanding equity in his favour. ⁽⁹⁾ In some cases the contrary has been no doubt held, ⁽¹⁰⁾ but these cases are founded on no intelligible principle, and if accepted, would have the effect of overriding the clear provisions of law. This is made clear by the wording of clause 2 which enacts the "only" mode of transferring property by sale. There is then no room for the acquisition of title to property by

(1) *Najm-un-Nissa v. Ajaib Ali*, I. L. R., 22 All., 343.

(2) *Begom v. Muhammad Yakub*, I. L. R. 16 All., 344, F. B.

(3) *Ghafuruddin v. Hanid Husain*, 10 A. L. J. 154.

(4) Baillie's Mahomedan Law of Sale p. 4; 3 Fatwas Alamgiri, p. 3 For the law of pre-emption—Baillie's Digest of Mahomedan Law, p. 477; Ameer Ali's Mahomedan Law, Chap. xxv, pp. 589, 611.

(5) *Khairoonissa v. Rawakan Jahan*, I. L. R., 2 Cal 184; *Muhamad Esuf v. Pattamsa*, I. L. R. 23 Mad. 70.

(6) *Ghulam Mustafa v. Hurmati*, I. L. R.,

2 All. 854; *Suba Bibi v. Balgobind*, I. L. R. 8 All. 178; *Abbas Ali v. Karim Baksh*, 13 C. W N. 160.

(7) *Nallamuthu v. Betha Naickan*, I. L. R. 23 Mad. 37.

(8) The contra held in *Dansi Seth v. Pandoba*, 12 C. P. L. R., 154, follows no intelligible principle and has been since dissented from in *Durgai v. Ajab Singh*, 15 C. P. L. R. 33.

(9) *Lalchand v. Lakshman*, I. L. R., 28 Bom. 466 (471).

(10) *E. g.*, in *Ram Baksh v. Mughlani*, I. L. R., 26 All. 266; *Karaha v. Mansukhram*, I. L. R. 24 Bom., 400.

estoppel, (1) compromise (2) or otherwise. (3) As the Privy Council remarked in a case in which evidence of transfer was furnished by several admissions, petitions filed in court and the mutation of names: "These are the transactions relied on by the defendant to prove the transfer under which he claims. It is not disputed that according to the law established at this time such a transfer could not be effected except by a registered deed." Then referring to the petitions admissions, and mutation of names they concluded: "But even if a complete change had been effected in these respects, it would at the utmost do no more than give a starting point for the law of limitation. It would not supply the conditions of the law of transfer." (4) In such cases there can be no estoppel *inter partes*, because there can be no estoppel in fraud of the statute. (5)

966. If, therefore, *A* intending to sell land to *B* for Rs. 110 put him in possession, and execute a deed of sale which, however, remains unregistered, and *A* thereupon sues *B* for recovery of possession, *B* cannot defend his possession on the ground of estoppel, (6) though, so long as he has the right to enforce the specific performance of his contract for sale he may, it is said, defend his possession by reference to that right, the rule being that a right that avails one to obtain possession is equally sufficient to defend it, (7) against which it might be urged that a mere contract for sale does not confer any right to possession in this country (8) though such a right would accrue to him if he has paid the purchase money, for his *status* being then that of a charge-holder, (9) he could retain possession as a mortgagee in possession till the usufruct from the property satisfies the charge. (10) But the case would, of course, be different, where relying upon these facts as evidence of ostensible ownership a third party acquires a title in which case the true owner is held estopped, (11) for in such cases there is infraction of no rule of law.

967. As regards the acquisition of title by adverse possession, it must be subject to the rule stated by Lopes, I.J., that "if a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed, though it did not operate to pass the land in question; and if he remain in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from what he would have taken if the property had passed by the deed." (12) So where *A*, a trustee, transferred the estate absolutely to *B*, and the latter, transferred it by deed to *C*, *C* could not acquire an interest in the property different from what he would have taken if the property had passed by the deed, and if *C*'s transfer fails, because *A* had no

(1) In *re Barrow*, 14 Ch. D. 432; *The Madras Hindu Ac. Fund v. Ragava*, I.L.R. 19 Mad., 200; *Kurri Veerareddi v. Kurri Bapireddi*, I.L.R. 29 Mad., 396 F.B.; *Jagabandhu v. Radha Krishna*, I.L.R. 36 Cal. 920; *Abdul Aziz v. Kanthu Mallick*, I.L.R. 38 Cal. 512 (515); *Trimback v. Hari Laxman*, I.L.R. 34 Bom. 575.

(2) *Tolewar Singh v. Bahori Singh*, I. L. R. 26 All., 497.

(3) *Immudipattam v. Periya Dorasami*, I. L. R. 24 Mad. 377 (384) P. C.

(4) *Id.* p. 384.

(5) *Kurri Veerareddi v. Kurri Bapireddi*, I.L.R., 29 Mad. 366, F.B., *Jagadbandhu v. Radha Krishna*, I.L.R., 36 Cal., 920; *Abdul Aziz v. Kanthu Mallick*, I.L.R., 38 Cal., 512; *Abbas Ali v. Karim Baksh*, 13 C. W.N. 160;

Trimback v. Hari Laxman, I.L.R. 34 Bom. 575.

(6) *Jagobundhu v. Radha Krishna*, I. L. R. 36 Cal., 920 *contra*, *Bansi v. Pandoba*, 12 C. P. L. R. 154.

(7) *Sheeram v. Lalma*, 13 C. P. L. R. 168.

(8) *Kurri Veerareddi v. Kurri Bapireddi*, I. L. R. 29 Mad., 396 (348) (F. B.); followed in *Zackaraya (Hajee) v. Chunnu*, 9 I.C. 55;

Pichammal v. A. Ponvambala, 15 I. C. 326.

(9) S. 55 (6); *Karalia v. Manekram*,

I. L. R., 24 Bom., 400.

(10) S. 72., 100.

(11) S. 41 *ante*; *Kandasami v. Nagalinga*,

I. L. R., 36 Mad. 564 (568).

(12) *Dalton v. Fitzgerald*, [1897], 2 Ch. 86 (93); followed in *Rajah Venkata v. Rajah Suranani*, I.L.R. 31 Mad., 321 (327).

transferable interest in the property, he could not claim a higher interest therein by the right of adverse possession.⁽¹⁾

968. The third clause of this section abolishes optional registration in the case of property valued under Rs. 100. Under this clause **Sale valued below Rs. 100.** a valid sale can be effected only (i) by a registered instrument: or (ii) by delivery of possession. Therefore, in a sale under Rs. 100, if the transaction was evidenced by a document not registered, the vendee may fall back upon his title by delivery of possession.⁽²⁾

969. No Sale.—A transfer made in compromise of a claim is neither a sale, nor a gift, nor an exchange, and no writing is necessary under the Act to validate it, though such a transfer may relate to immoveable property.⁽³⁾ Where it was found that the members of a joint Hindu family sold away arbitrarily certain lands belonging to their sister, and that they allowed her to take some of their own lands either in lieu of her lands sold by them or by way of compromise, it was held that the transaction was neither a sale, gift nor an exchange, and that it need not consequently be in writing registered.⁽³⁾ The criterion for the necessity of a document is what is expressed on the face of the document itself, and not what incidents may attach by custom to a transaction of the kind mentioned in it.⁽⁴⁾

970. What amounts to Delivery of the Property.—Delivery of property is said to take place when the seller places the buyer, or such person as he directs, in possession of the property. Possession may be actual or constructive. Actual possession may be delivered by going upon the land and making it over to the purchaser. Even then it is not necessary to walk over the whole of the land.⁽⁵⁾ Physical delivery of the property is in many cases impossible, as, for example, where the property sold is in the possession of tenants or lessees, in which case it has been held that the change of possession is sufficient, if it is such as the nature of the case admits of. Hence, delivery of the title-deeds is sufficient delivery.⁽⁶⁾ So where the vendor informs the vendee to collect rents from the tenants, or where the transferor holds property in trust for vendee, the fact being mentioned in the sale-deed,⁽⁷⁾ there is deemed to be sufficient delivery of possession for the purpose of law. And where the vendee is a minor or a lunatic, the vendor may hold the property in trust for him. So again, possession need not be formally made over where the buyer is already in possession.⁽⁸⁾ And if in consequence of the sale the purchaser obtains or enters upon possession, there is sufficient delivery of property, it being then unnecessary that there should be any formal making over of possession.⁽⁹⁾ Such a case may be conceived in a variety of circumstances, as where the purchaser was the tenant of the land or had been already put in possession of it in some other right, e.g., as a trustee or a mortgagee. If after the completion of sale, the vendor still continues to be in possession of the property, the transaction may be open to the comment that it was intended to be used only as a

(1) *Venkata Narasimha (Raja) v. Sure-nani Venkata (Raja)*, 1 I. L. R. 31 Mad., 321.

(2) *Rupa v. Bisumbhar*, 8 C. P. L. R., 1.

(3) *Tiruvengizachariar v. Ranganatha*, 13 M. L. J. R., 500.

(4) *Ramasamy v. Thirupathi*, 1 I. L. R., 27 Mad., 43.

(5) *Hanmanta v. Mir Ajmodin*, 7 Bom. L. R., 1104.

(6) *Man Bhari v. Naunidh*, 1 I. L. R., All., 40; *Harjivan v. Naran*, 4 B. H. C. R. (A. J.), 81; *Bank of Hindustan v. Prem-*

chand 5 B. H. C. R. (O. J.), 83; *Kallayani v. Narayana*, 1 I. L. R., 9 Mad., 267; *Wannathin v. Keykadath*, 6 M. H. C. R., 164; cf. *Motichand v. Fulchand*, 3 C. W. N., 116.

(7) *Sheolas v. Kubwul*, 3 S. D. A., 234 (313).

(8) *Bas Kushal v. Lakhma*, 1 I. L. R., 7 Bom., 452; *Jakechar v. Jawahir*, 1 I. L. R., 1 All., 311, F. B.; *Kunan v. Krishnan*, 1 I. L. R., 13 Mad., 824.

(9) *Gunga Narain v. Kali Churn*, 1 I. L. R., 22 Cal., 179; following *Makhan Lal v. Banku Behari*, 1 I. L. R., 19 Cal., 623.

blind. (1) But in cases in which the transfer of possession is not essential to effect a sale, as where it can only be effected by means of registered instrument, there should then be no occasion for such a presumption, (2) although it will always remain a question why the purchaser remained out of possession after the sale had been completed. Possession of an incorporeal right is sufficient, if it is made in such manner as would suffice for the transfer of a chose in action. (3) Under the Indian Contract Act "delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf." (4) Under this section delivery will be presumed under similar circumstances. The Code of Civil Procedure makes special provisions for delivery, (5) but they apply only to execution sales. (6)

Of course, where possession is constructively transferred to the vendee, it will not be such cogent evidence of notice as in the case of the transfer by actual possession. (7) Possession may be made to either the buyer or any one authorized by him to receive it.

971. Competition between Possession and registered Instrument :—

Is s. 50 of the
Registration Act
imperative ?

The competition between registered and unregistered instruments is not often possible under this Act read with section 50 of the Indian Registration Act. (8) But under the older Act such conflicts were very frequent. (9) Under this section, however, there may be competition between a registered instrument and possession, since both modes of sale are distinctly validated by this clause. It has been held that where the purchaser acquires under an unregistered sale-deed, but obtains possession, the former failing, he can fall back upon his title, by possession, which he will be allowed to prove irrespective of the sale-deed. (10) But where one purchaser acquires by a valid document, and the property is subsequently sold to another by delivery of possession, the former takes and the latter gets nothing, since the vendor having already disposed of his right, title and interest to the first purchaser, there remains no residue for him to sell to the second vendee. (11) And since under section 50 a registered deed has priority over an unregistered deed though accompanied by possession, it follows that the subsequent registered purchaser without notice will oust the prior purchaser even though in possession. (12) It might be urged that since possession is equivalent to notice, the subsequent purchaser must be deemed to have had notice of the prior sale. And indeed, this is the view which was at one time taken by the Calcutta High Court. (13) But it did not meet with the approval of the Full Bench of the same court, (14) in which it was held that the positive rule in favour of the priority of registered instrument made no exception in case of such holders with notice. In a subsequent case of the same court this part of

(1) *Sreenath v. Hweeprea*, 10 W. R., 449.

(2) *Gungahurry v. Raghubram*, 14 B. L. R., 307.

(3) See Mayne's Hindu Law, 5th Ed. (Reprint 1899), § 353; *Chellamma v. Subamma*, I. L. R. 7 Mad., 23; *Khursadiji v. Pestonji*, I. L. R. 12 Bom., 573.

(4) S. 90.

(5) Ss. 263, 264.

(6) *Narain v. Dataram*, I. L. R. 8 Cal., 611.

(7) *Moreswar v. Dattu*, I. L. R., 12 Bom., 569.

(8) Act III of 1877; now re-enacted as Act XVI of 1908.

(9) See S. 48 *comm.*

(10) *Sambhurbhai v. Shivalallas*, I. L. R., 4 Bom. 89; *Mt. Rappa v. Bisamber*, 8 C. P. L. R. 1.

(11) *Virabhadra v. Hari Rama*, 3 M. H. C. R. 38.

(12) *Fuzluddeen v. Fakir Mahomed*, I. L. R., 5 Cal. 342; *B. miraz v. Papaya*, I. L. R., 2 Mad. 46; *Moreswar v. Datta*, I. L. R., 13 Bom. 569.

(13) *Dinonath v. Auluck Moni*, I. L. R., 7 Cal., 753.

(14) *Narain Chunder v. Dataram*, I. L. R., 8 Cal. 597, F. B.

the ruling was pronounced to be only an *obiter dictum*.⁽¹⁾ The view therein laid down has since been made the subject of exhaustive comments by all the High Courts in India.⁽²⁾ The correct view seems to be the one laid down by Garth, C. J.,⁽³⁾ who held that although the mere fact of possession having been taken by a purchaser under an unregistered conveyance, is insufficient of itself to establish a good title to a property as against a subsequent registered purchaser, and is not conclusive evidence of notice as against him; yet, in the majority of cases, such possession is very cogent evidence of notice. (§§ 137-141). "Every man," says he, "when he buys a property, is *prima facie* supposed to go and look at it or make some enquiries about it; and if, when he makes such inquiries, he finds that somebody else is in possession, he ought to enquire how he came there; and if he finds that he is in possession under a conveyance from the owner, though the conveyance is unregistered, he is not justified in equity and good conscience in buying the property himself. If he chooses to buy under such circumstances, he runs the risk of losing his money."⁽⁴⁾

972. This view has, however, not been favoured in some cases of the other High Courts.⁽⁵⁾ Thus in an early Madras leading case it was held that the effect of registration was independent of notice.⁽⁶⁾ And this case was followed by many other cases of the same court,⁽⁷⁾ all overruled by a latter Full Bench decision⁽⁸⁾ in which it was observed that "the course of decision is, however, open to this objection, *viz.*, that transactions resting on documents which are optionally registrable and which are accompanied with or followed by possession are held liable to be superseded by a registered transaction, whilst oral agreements followed by possession are expressly saved by section 48 of the Registration Act." The court ultimately held the doctrine of notice applicable, and it distinguished the cases of the other High Courts when they did not tally with its own view on the ground that they were decisions on documents which were optionally registrable before the passing of the Transfer of Property Act. Such cases were held to have no application now on account of section 54 which virtually abolishes optional registration.⁽⁹⁾

973. The recognition of the doctrine of notice affords a basis for reconciling section 48 with section 50, for, in most cases, possession is a very cogent evidence of notice, if not notice itself. (§§ 137-141). The result is that, when the prior unregistered document was sufficient at the date of its execution to create a title to or

(1) *Bamasundari v. Krishna Chunder*, I. L.R., 10 Cal. 424.

(2) *Zackaraya v. Chunnu*, 9 I. C. 55 (56); *Bachcha Lal v. Hanuman*, 10 I. C. 233 (235); *Umesh Chunder v. Bag*, 18 I. C. 46 (47); *Tun Zan v. Maung Nyun*, 4 L. B. R. 26; *Maung Tun v. Maung Theit*, 8 I. C. 443; *Lal Beg v. Vishnuca*, 5 N. L. R. 82 (84).

(3) *Nani Bibee v. Hafizullah* I. L. R., 1 Cal. 1075.

(4) *Nani Bibee v. Hafizullah*, I. L. R., 10 Cal., 1075; followed in *Krishnamma v. Subanna*, I. L. R., 10 Mad., 170, F. B.

(5) *Nallappa v. Ibram*, I. L. R., 5 Mad., 73; *Narasimulu v. Somanna*, I. L. R., 8 Mad., 167.

(6) *Nallappa v. Ibram*, I. L. R., 5 Mad. 73.

(7) In *Kondayya v. Guruvappa*, I. L. R., 5 Mad., 189; *Madur v. Subbarayalu*, I. L. R.,

6 Mad., 88; *Muthanua v. Alibeg*, I. L. R., 6 Mad. 174; *Ramaraja v. Arunachala*, I. L. R. 7 Mad., 248; *Narasimulu v. Somanna*, I. L. R., 8 Mad. 167; *Kadar v. Ismail*, I. L. R., 9 Mad., 119; *Ramachandra v. Krishna*, I. L. R., 9 Mad., 495; all overruled by *Krishnamma v. Suranna*, I. L. R., 16 Mad., 148 F. B. 333.

(8) *Krishnamma v. Suranna*, I. L. R., 16 Mad., 148 F. B.

(9) See *Dinonath v. Auluck Moni*, I. L. R., 7 Cal. 753; *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 597; *Nani Bibee v. Hafizullah*, I. L. R., 10 Cal. 1073; *Bhalu v. Jokhu*, I. L. R., 11 C. J. 667; *Abool Hossein v. Raghunath*, I. L. R., 7 Cal. 70; *Shivram v. Genu*, I. L. R., 6 Bom., 515; *Dundaya v. Chenbasapa*, I. L. R. 9 Bom., 427; *Ram Aular v. Dhanauri*, I. L. R., 8 All., 540.

interest in immoveable property, or when possession was transferred under it, notice would be material as disclosing an intention to defeat a pre-existing right and that when such is not the case, notice would not be material because there was neither prior title nor interest to defeat. (1) That the Legislature does not regard the equitable doctrine of notice as altogether defunct is apparent from the Specific Relief Act, (2) and the Indian Trusts Act: (3) "The Legislature must be credited with consistency and unity of design, and we can hardly suppose that an equitable doctrine was deliberately recognized in the Specific Relief Act and Indian Trusts Act, but treated as defunct in the Registration Act, because not expressly mentioned therein." (4) As Wood, V. C., observed: "The conscience of a purchaser is affected through the conscience of the person through whom he buys; that person is precluded by his previous acts from honestly entering into a contract to sell; and, therefore, any one who purchases with the knowledge that his vendor is precluded from selling, is subject to the same prohibition as the vendor himself." (5) The intention of the Legislature in giving priority to registered deeds was certainly not to commit fraud, but its meaning was, that of the parties dealing fairly, priority should be given to him who had the registered instrument. (6) The principle applicable to such cases was stated with great lucidity by Lord Cairns in a case (7) which has since been followed with approval by all the Indian High Courts. He says:—"Your Lordships have been referred to the Act of Anne, which established a registry of deeds in Ireland. Any person reading over that Act of Parliament would, perhaps in the first instance, conclude that it was an Act absolutely decisive of priority under all circumstances, and enacting that, under every circumstance that could be supposed, the deeds first registered were to take precedence of a deed which, although it might have been executed before, was not registered till afterwards. But by decisions which have now well established the law, it has been settled that, notwithstanding the apparent stringency of the words contained in the Act, still, if a person registers a deed, and if, at the time he registers a deed, either he himself, or an agent whose knowledge is the knowledge of his principal, has notice of an earlier deed, which though executed, is not registered, the registration which he actually effected will not give him priority over that earlier deed. I take the explanation of those decisions to be that, inasmuch as the object of the statute is to take care that, by the fact of the deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier titles, the end and object of the statute is accomplished, if the person coming to register the deed has, *aliunde*, and not by means of the register, notice of a deed effecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected in a different manner, but effected as absolutely in respect to the person who thus comes to register, as if he had found upon the register notice of the earlier deed." (8)

974. If the purchaser obtains possession, the subsequent registered purchaser will have priority only if he is a *bona fide* purchaser without notice. Possession of the prior purchaser is good,

Conclusion. though not sufficient evidence of notice, according to the majority of the High

(1) *Krishnamma v. Suranna*, I.L.R., 16 Mad., 170 F.B.

(2) S. 27, Act I of 1877.

(3) S. 91, Act II of 1892.

(4) *Krishnamma v. Suranna*, I L R , 16 Mad., 170 (177), F. B.

(5) *Benham v. Kew*, J. & H. 702.

(6) *Per Lord Redesdale in Latouche v. Lord Dunsany*, 1 S. & L., 159.

(7) *Agra Bank v. Barry*, L.R., 7 E. & I. App., 135.

(8) *Per Lord Cairns in Agra Bank v. Barry*, 7 E. & I., App., 135; see also *Wyatt v. Barwell*, 19 Ves., 498; cited with approval in *Krishnamma v. Subanna*, I L.R., 10 Mad. 152; *Janki v. Kishen*, I.L.R., 16 All., 478; *Diwan v. Jadho*, I.L.R., 19 All., 145.

Courts.⁽¹⁾ It is, however, sufficient according to the Bombay High Court.⁽²⁾ Allahabad and Madras seem to follow Calcutta.⁽³⁾ Even in Bombay only actual and not constructive possession is held to be such notice.⁽⁴⁾ (§§ 137-141).

975. Where the vendor under an oral agreement to sell, makes over possession of the property to the vendee, the latter can maintain it as against the subsequent registered purchaser, even although he may not have paid his vendor the entire purchase-money.⁽⁵⁾

976. And where in a suit for specific performance the purchaser obtains a decree, in execution of which he obtains possession, the transfer is as complete as if made by a registered instrument,⁽⁶⁾ but it does not dispense with the execution of the sale-deed.⁽⁷⁾ So a petition of compromise filed in a criminal case by which a party thereto bound himself to pay enhanced rent and retain possession of the land for nine years was held to require registration,⁽⁸⁾ but it would have been, of course, otherwise if the same petition had been filed in the Civil court and followed up by the decree or order embodying its terms.⁽⁹⁾ In Bombay it has been held that as soon as the purchaser pays the consideration and obtains a decree for specific performance, the transfer must be regarded as complete.⁽¹⁰⁾

977. Contract for Sale.—In a contract for the sale of immoveable property, the vendor and purchaser bind themselves to sell and buy property. But such a contract alone is declared not to create any interest in or charge on the property. The right created is then only a right *in personam*, and may be enforced in Court. In this respect, therefore, there is the widest possible divergence between the English and Indian law. Under English law the moment the contract for sale is made, the vendor becomes the trustee for the purchaser in respect of the property sold. The purchaser is entitled to have the property preserved pending completion *in its existing state*, and the vendor would not only not be entitled as against the purchaser's desire to determine the existing tenancy, but if he did determine it, he would be liable to the purchaser for any loss thereby accruing.⁽¹¹⁾ But inasmuch as he is only a trustee in respect of the property contracted to be sold, he is not a trustee for the purchaser of rents accruing *before the time fixed for completion*, and he is entitled to such rents, and also to the crops and other produce of the soil taken in due course of husbandry.⁽¹²⁾ In India this clause declares against the applicability of these rules to a purchaser before the execution of his conveyance. Till then he acquires no right

(1) *Narain v. Dataram*, I. L. R., 8 Cal., 597; *Nani Bibee v. Hafizullah*, I. L. R., 10 Cal., 1073.

(2) *Dundaya v. Chenbasapa*, I. L. R., 9 Bom., 427.

(3) See §§ 128—136.

(4) *Mcreshwar v. Dattu*, I. L. R., 12 Bom., 569.

(5) *Palanji v. Selambara*, I. L. R., 9 Mad., 267; *Moidin v. Avaran*, I. L. R. 11 Mad., 263; *Fuzluddeen v. Fakir Mahomed*, I. L. R., 5 Cal., 342; *Dundaya v. Chenbasapa*, I. L. R., 9 Bom. 327; *Whympster & Co., v. Buckle & Co.* I. L. R., 3 All., 469.

(6) *Lokessur v. Purgun*, I. L. R., 16 Cal., 418; *Juggobundhu v. Ram Chunder Bysack*,

I. L. R., 5 Cal., 584.

(7) *Papiraddi v. Narasareddi* I. L. R., 16 Mad., 464 (465).

(8) *Braj Mohini Das v. Kedhar Nath*, 8 C. L. J. 90.

(9) *Id.*, p. 91.

(10) *Dhondiba v. Ramchandra*, I. L. R., 5 Bom., 554.

(11) *Rafferty v. Schofield*, [1897], 1 Ch., 937.

(12) But before payment of the purchase-money his position is said to be something between that of a trustee and a mortgagee, *Tysaght v. Edwards*, 2 Ch. D., 506; *Shaw v. Foster*, L. R., 5 H. L., 321 (338).

in rem, and the vendor continues to be as before, the full owner of his property. But though this is true, the purchaser has in reality something more than a mere personal right—a subject which will have to be considered shortly. (§§ 986, 1000-1005.)

978. A contract for sale, to be valid, must be a completed legal contract.

What amounts to a contract for sale. Where, therefore, it falls short of it, the parties acquire no rights and incur no liabilities. The question as to what constitutes a valid contract is one which properly belongs to the domain of contracts and not to subjects dealt with here, and reference for that purpose must therefore be made to the Contract Act. Only a short synopsis of the subject as it relates to sale of land will, therefore, be here attempted.

979. A contract to be binding must consist of an offer and its acceptance. Where the plaintiff telegraphed "Will you sell us Bumper Hall Pen? Telegraph lowest cash price." And the defendant telegraphed in reply: "Lowest price for Bumper Hall Pen £900," and then the plaintiff telegraphed; "We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title-deed in order that we may get early possession," to which no reply was sent. The plaintiff having sued as on a concluded contract for its specific performance, the question was whether there was a contract. And it was held by Lord Morris, who delivered the judgment of the Privy Council, that there was no contract: "The first telegram asks two questions. The first question is as to the willingness of L. M. Facey to sell to the appellants; the second question asks the lowest price and the word "telegraph" is in collocation addressed to that second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L. M. Facey stating this lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L. M. Facey as binding him in any respect, except to the extent it does by its terms: *viz.*, the lowest price. Every thing else is open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L. M. Facey." (1)

980. The contract may be oral or in writing, and if in writing, it does not require registration. (2) But such an agreement, though it is admissible for the purpose of proving the contract, cannot be used so as to affect the land, (3) *i.e.*, it cannot be used to show that the ownership has passed from the vendor to the purchaser. But an agreement or receipt expressed in such terms as would have operated as a conveyance if registered, may still be used for the purpose of proving the agreement of payment of consideration, although it may be rejected as a conveyance for want of registration. (4) Thus, when an agreement ran as follows:—"I have received from you Rs. 100 as earnest at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, the same are due to be paid to me within one month from this day, when you will get the deed or document made in your favour . . . on these terms this informal bargain-paper having been written, is agreed to and delivered:"—it was held that "the right given by the agreement was merely a right *in personam*, and the agreement was admissible

(1) *Harvey v. Facey*, [1893], A. C., 552 No. 174.
(555).

(2) Indian Registration Act (III of 1877), s. 17 (h); *Pichikala v. Ramu*, 12 M.L.T. 262; *Girjanand v. Nathu Ram*, (1905), P. L. R.

(3) *Harmasji v. Keshav*, I.L.R., 18 Bom. 13.

(4) *Adakkalam v. Theathan*, I. L. R., 12 Mad., 505; *Kunan v. Krishna*, I. L. R., 13 Mad., 324.

in evidence to show the contract entered into for another conveyance, though not as a conveyance itself." (1) "It is," said West, J., "in terms a conveyance, i.e., an instrument translativ of ownership, and the argument that this was not its character, I thought it not admissible. I could not consider it as in its purport nothing more than an agreement to convey; it purports itself to convey. But that principal purpose failing, the secondary one becomes the principal, and the document might, I think, be used to ascertain what the formal and final conveyance ought to be. It is because it is made inoperative for its primary purpose that it becomes admissible for its secondary purpose—admissible not to prove a transaction itself changing ownership, but one giving a right to such a transaction by way of conveyance." (2) This case has been followed in other cases. (3) But in a case where the *Kararnama* ran as follows:—"As my father S is dead, it has been arranged that I should succeed to his estate . . . Part of this estate at Vagoda, consisting of a house, fields, cattle and a cart, has been given into your possession for use and enjoyment. The reason thereof is that you have undertaken to pay Rs. 450 found due on an adjustment of *khata* from my father to G. I am unable to pay off this debt and so you have been put into possession of this property. I shall pass to you a sale-deed in respect of this property, and shall transfer the fields to your name from the year 1888-89: " it was held that since the document of itself declared a right and created as between the parties to it a charge in the nature of a mortgage, it could not be admitted for want of registration. It was not a document which merely created a right to demand another document. It of itself created a right, and the mention of an intention to execute a deed of sale made no difference. (4) For the same reason a receipt which stated that the plaintiffs had no longer any interest in the property, and that they would execute a new sale-deed was rejected in a subsequent case by the same High Court. (5) And the Calcutta High Court has held that a written agreement to mortgage, which might, if registered, create an equitable mortgage, cannot be admitted for that purpose for want of registration. (6)

981. Similarly it has been held in England that, where the effect of a document in equity was to effect a conveyance, it is inadmissible unless engrossed with proper stamp. (7) The criterion for determining whether a particular document is an agreement or a conveyance generally is whether all the conditions of the contract were fulfilled when the document was drawn up. If for example, the purchase money is paid and possession given, and there remains nothing to be done, the document may well be looked upon as being intended for a conveyance. If, on the other hand, some material conditions remain unfulfilled, it may be presumed that the agreement was really intended

(1) *Burjorji v. Muncherji*, I.L.R., 5 Bom., 143; followed in *Hira Singh v. Narain Goud*, 10 C. P. L. R., 107; *Harmasji v. Keshav Purshotam*, I. L. R., 18 Bom., 13; *Partab Chundar v. Mohendra*, I. L. R., 17 Cal., 291 P. C.

(2) *Burjorji v. Muncherji*, I. L. R., 5 Bom., 151, 152.

(3) *Chunilal v. Bomanji*, I.L.R., 7 Bom., 312, 316; *Bengal Banking Corporation v. Mackertich*, I.L.R., 10 Cal., 318; *Adakkalam v. Theathan*, I.L.R. 12 Mad. 505; *Nagappa v. Devu*, I. L. R. 14 Mad., 55; *Hormasji v. Keshav Purshotam*, I.L.R. 18 Bom., 13.

(4) *Vani v. Bani*, I.L.R., 20 Bom., 558; To the same effect *Parash Ram v. Ganpat I.*

L.R., 21 Bom., 538; *Valaji v. Thomas*, I.L.R., 1 Bom., 190; *Ramasami v. Ramasami*, I.L.R., 5 Mad., 115 (117); but cf. s. 17 (v), Indian Registration Act (Act XVI of 1908) which would, however, exclude a document which of itself creates &c., a right, though it may also reserve a right to obtain another document.

(5) *Parashram v. Ganapat*, I. L. R., 21 Bom., 538; see also *Gunga Narain v. Kali Churn*, I.L.R., 22 Cal., 179.

(6) *Bengal Banking Corporation v. Mackertich*, I.L.R., 10 Cal., 315.

(7) *Commissioner of Inland Revenue v. G. Angus & Co.*, 23 Q.B.D., 579.

to be used as such, and no more.⁽¹⁾ In all such cases oral evidence is invariably admissible to shew what was the subject-matter of the contract,⁽²⁾ and what was the real nature of the transaction which took place between the parties.⁽³⁾

982. The effect of the inadmissibility of a document for want of registration is that transactions committed to writing therein cannot be otherwise proved and are wholly inoperative,⁽⁴⁾ since a written agreement has the effect of displacing all unwritten contracts relating to the same matter.⁽⁵⁾ No oral evidence can be given to prove them. And this is so, whether the transaction may have taken place before,⁽⁶⁾ or since the passing of the Evidence Act.⁽⁷⁾ Such documents may, however, be used to establish a right to moveable property, as, for example, refund of the consideration paid.⁽⁸⁾

983. Time for Completion.—The question whether in a contract of sale, time is regarded as of the essence of the contract, has so far as regards this country, been decided by legislation.⁽⁹⁾ in conformity with the present rule in England, obtaining since the passing, of the Judicature Act, 1873.⁽¹⁰⁾ Prior to this Act while at law the time fixed for completion was of the essence of a contract, equity regarded the question from a different standpoint, and, except, in the case of unreasonable delay, relieved against or enforced specific performance, notwithstanding a failure to conform to the dates assigned by the contract either for completion, or for any of the steps towards completion, if it could do justice between the parties.⁽¹¹⁾ Now, however, the question is reduced to one of intention, but in construing which, regard must be had to the express stipulation or circumstances which inevitably point towards it. But the mere stipulation as to the time of delivery does not necessarily make time of the essence of the contract.⁽¹²⁾ Where time has been made of the essence of the contract by express agreement, there can be then no question but that it would be so regarded, unless it has been enlarged or waived by subsequent agreement or conduct of the parties amounting to waiver.⁽¹³⁾ So there was held to be such a waiver where the parties continued negotiations as to title

(1) *Ibid*, at p 593.

(2) *Plant v. Burne*, (1897), 2 Ch., 281.

(3) *Preo Nath v. Madhu Sudan*, I.L.R., 25 Cal., 603; *Ranjibun v. Oghore Nath*, ib., 401.

(4) Sec. 49, Indian Registration Act s. 91 of the Evidence Act.

(5) *Jiraj v. The Norwich Assurance Co.*, 5 Bom. L.R., 863.

(6) *Rahmatulla v. Sariatula*, 1 B. L. R., 58, F.B.; *Krishna v. Mahomed*, 1 N.W.P., 148, F.B.; *Shankar v. Kishun*, 1 B.H.C.R.; (A.C.), 76.

(7) S. 91, Evidence Act.

(8) *Thandavan v. Valliamma*, I. L. R., 15 Mad., 336.

(9) S. 55, Indian Contract Act (IX of 1872).

(10) 36 & 37 Vict., C. 66, S. 25 (7), amended by 38 & 39 Vict., C. 77, S. 10. In this respect there has been a change in the course of decisions in England—prior to the Judicature Act 1873, 36 & 37 Vict., C. 66, S. 25 (7); amended by 38 & 39 Vict., C. 77, S. 10, an

express stipulation as to time was regarded as of the essence of the contract, *in law*, it being assumed that parties meant what they said (*Marshall v. Powell*, 9 Q.B., 779), but the view in equity was to ignore the mere form apart from "the substance of the contract." *Tilley v. Thomas*, L.R., 6 Ch., 61 (67), in other words, apart from anything to show that the parties *had reason* to intend time to be of the essence of the contract it was not so regarded.

(11) *Tilley v. Thomas*, L.R. 6 Ch., 61 (67); *Noble v. Edwards*, 5 Ch. D., 378.

(12) *The Institution Bank Ltd. v. Kandhaya Lali* 13 O.C. 143; 6 I.C. 1011 (a case of the sale of goods, but the rule is more applicable to sale of immovable property)—In case of sale of goods stipulations as to time are still *prima facie* to be regarded as essential *Reuter v. Sala*, 4 C.P.D., 239 (249); *Bowes v. Shand*, 2 App. Cas., 455; 7 Halesbury's Laws of England, p. 413, S. 853.

(13) *Cuts v. Thodey*, 13 Si., 206; *Nokes v. Lord Kilmurray*, 1 De., G. & S., 444.

after the day fixed for completion.⁽¹⁾ Express stipulations of this nature must, however, be strictly construed, and so a stipulation that time shall be of the essence of the contract in respect of certain matters, *e.g.*, the delivery of objections to the title, raises a presumption that it is not to be essential as regards the other matters, *e.g.*, the completion of the purchase.⁽²⁾ But although time may not originally have been of the essence of the contract, it may be so made by a notice subsequently given by either party, but in which case the question would always be, whether having regard to the circumstances of the case, the time allowed was a reasonable one, and which must be judged of as at the time when the notice was given.⁽³⁾ The question 'what is a reasonable time' is naturally one dependent upon a variety of circumstances which have all to be taken into consideration.

984. Such intention would, for example, be implied or inferred from the

When time is material.

circumstances, which point to urgency or where the property is of a wasting character or of a fluctuating value.

So where the premises sold are liable to gradual deterioration, or where the vendor has to incur fresh liabilities by retaining them, an option to purchase under a right of pre-emption must be exercised within the prescribed limit.⁽⁴⁾ So upon the sale of a public house as a going concern, time is usually regarded as of the essence of the contract.⁽⁵⁾ So the fluctuating value of the property may alone show that time was to be of the essence of the contract: as upon the agreement for the sale of foreign stock,⁽⁶⁾ or of a mining lease,⁽⁷⁾ or of a reversion, which may become an estate in possession during the delay, and the sale of which generally evidences immediate want of money⁽⁸⁾ or a life annuity, or life-estate which may be determined by the death of the *cestui que vie*.⁽⁹⁾ So where the property sold is of a wasting character, as for example, a lease-hold for a short unexpired term,⁽¹⁰⁾ or where the vendors are a fluctuating body,⁽¹¹⁾ time would be regarded as essential. The purpose for which the property is bought may also furnish a reason for the time being so regarded as where the purchaser has brought the property for his residence or for some other immediate purpose.⁽¹³⁾

Apart, however, from these considerations, the mere fact that time is fixed for completion of the sale, or a promise is made to deliver possession on a certain day would not be deemed to be of the essence of the contract,⁽¹⁴⁾ but gross

(1) *Hipwell v. Knight*, 1 Y. & C., 401; *Webb v. Hughes* L.R., 30 Eq., 281.

(2) *Wells v. Maxwell*, 32 Beav., 408.

(3) *Webb v. Hughes*, L.R., 10 Eq., 281; *Crawford v. Toogood*, 13 Ch. 3d., 183; *Mhd. Ikramull v. Walkie*, 11 C.W.N., 946 P. C. Three day's notice is too short (cf. *Reynolds v. Nelson*, 6 Mad., 18, explained in Sugd., p. 268, 279). So a week's notice within which the vendor was required to prove a disputed legitimacy was held insufficient (*King v. Wilson*, 6 B., 124); so where more time was obviously required (*Wells v. Maxwell*, 32 B., 408; *McMurry v. Spicer*, L.R., 5 Eq., 527), Three weeks (in *Green v. Sevm*, 13 Ch. D., 589); and five weeks (in another case *Crawford v. Toogood*, 13 Ch. D., 159); and six weeks in a third case *Pegg v. Widen*, 16 B., 239) were held to be too short. Each case has of course to be decided upon its own peculiar circumstances.

(4) *Brooke v. Garrod*, 2 D. & Jo., 62 (66).

(5) *Costake v. Till*, 1 Rus., 376; *Day v. Lukhe*, L.R., 5 Eq., 336; *Claydon v. Green*, L.R., 3 C. P., 511; *Cowles v. Gale*, L.R., 7 Ch., 12.

(6) *Dolorot v. Rothschild*, 1 S. & S., 590.

(7) *Machryde v. Weekes*, 22 Beav., 533.

(8) See *Newman v. Rogers*, 4 Br. C. C. 391., and cases cited in *Dart V. & P.* (6th Ed.), 484.

(9) See *Withy v. Cottle*. T. & R., 78; *Dart V. & P.* (6th Ed.), 484.

(10) *Hudson v. Temple*, 29 Beav., 536 (543).

(11) *Carter v. Dean of Ely*, 7 Sim., 211.

(12) *Gedge v. Duke of Montrose*, 26 Beav. 45; *Tilley v. Thomas*, L. R., 3 Ch., 61; *Webb v. Hughes*, L. R., 10 Eq., 285.

(13) *Wright v. Howard*, 1 S. & S., 190.

(14) *Tilley v. Thomas*, L. R., 3 Ch., 61; *Patric v. Milner*, 2 C. P. D., 342; *Boeh v. Wood*, 1 J. & W., 419.

negligence in fulfilling the contract involving delay would entitle the other party to throw up the contract.⁽¹⁾

985. An intention not to regard time as essential may be inferred from a variety of circumstances. An agreement to pay interest

When time is immaterial.

during delay evidently discloses such an intention.⁽²⁾ But time becomes very immaterial, where the property is sold in

order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive for the purchase-money.⁽³⁾ And where a written offer was verbally accepted, and the contract was a one-sided one, time was held to be of great importance if the party accepting it was guilty of delay.⁽⁴⁾ Want of due diligence in not compelling the other party to complete the purchase would however, be construed as against him, for it is the duty of every purchaser to actively press his vendor to complete the conveyance,⁽⁵⁾ and even to give him notice of his intention to insist on his strict rights, and if he is even disposed to give his vendor more time, all subsequent communications should be expressed to be without prejudice to the notice of rescission, and should take the shape of mere negotiations for a fresh agreement.⁽⁶⁾ In an agreement made by the purchaser with the vendor it was expressly and unconditionally provided that on his failure to pay the consideration-money and complete the purchase by the date fixed, it should be open to the vendor to sell the property to a third person; the purchaser having failed to perform the agreement, the vendor sold the property to a third party, and sued the purchaser for recovery of damages calculated on the difference between the price at which he had agreed to purchase and the price at which the property was ultimately sold. It was held that a suit was maintainable without a notice to the defendant calling upon him to fulfil his part of the contract, and giving him notice that on his failing to do so, he would sell the property.⁽⁷⁾ Where the purchaser has entered into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depend on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract has expired, and considerable further time may be required to make a good title.⁽⁸⁾ Where from the death of the purchaser or other circumstances the due fulfilment of the contract within time has become impossible, the vendor has the option of rescinding the contract.⁽⁹⁾ Where purchase-money is payable by instalments, a breach in non-payment would, ordinarily, be regarded as a penalty to be relieved against. So in a case the vendor had contracted to sell to the vendee his lands in British Columbia for a price to be in certain instalments at specified dates stipulating that time was to be of the essence of the contract, and that in case of default of punctual payment of any one instalment, the past payments were to be forfeited, and the contract rendered null and void the vendor being at liberty to resell the land. The purchaser made default in the payment of the second instalment, and whereupon the vendor claimed to retain the payments being himself free from the contract, but the Privy Council held the clause to be penal "for the penalty, if enforced according to the letter of the agreement became more and more severe

(1) *Roberts v. Berry*, 3 De M. & G., 289; *Tilley v. Thomas*, L. R., 3 Ch., 61.

(2) *Bodington v. Great Western Ry. Co.*, 18 Jur., 144.

(3) *Popham v. Eyre*, 2 Sch. & Tef., 604, cited in *Sugd. v. P.* (14th Ed.), 262.

(4) *Williams v. Williams*, 17 Beav., 213.

(5) *Williams v. Glenton*, L. R., 1 Ch., 200.

(6) *Dart, V. & P.* (6th Ed.), 491. v. *Slade*, 7 Vest., 25; *Wood v. Bernal*, 19 Ves., 220.

(7) *Tukun Singh v. Hanuman*, 7 O. W. N., 108.

(8) *Sugd. v. P.* (14th Ed.), 265; *Seton*

(9) *Bowles v. Rogers*, 6 Ves., 95.

as the agreement approached completion, and the money liable to confiscation becomes larger.”⁽¹⁾

If no time be fixed for completion, the purchaser should ordinarily pay interest on the purchase-money from the date of the contract, unless it was improperly not received by the vendor.⁽²⁾ But failure to specify the time within which the contract of sale is to be performed is not sufficient to defeat its specific performance.⁽³⁾

986. Rights and Liabilities under Contract for Sale.—Although a contract for the sale of immoveable property is declared not to create any interest in or charge on the property, still such a contract on many points differs from contracts of other kind. For one thing, it gives one the right of enforcing specific performance, which may avail against all subsequent transferees with notice.⁽⁴⁾ The right thereby created is ordinarily both assignable and devisable,⁽⁵⁾ and the purchaser acquires in the property as from the date of the contract an insurable interest.⁽⁶⁾ It cannot be avoided owing to the death, bankruptcy or subsequent disability of either party,⁽⁷⁾ unless it has been so stipulated. And while such a contract may under certain circumstances be rescinded, it may, on the other hand, be enforced by a suit for specific performance or damages or both : the rule of law in such cases being as follows “ Unless and until the contrary is proved, the court shall presume that a breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.”⁽⁸⁾ The question when such a contract may be rescinded or specifically enforced belongs to the domain of law which has been dealt with in another enactment,⁽⁹⁾ and only a short summary will, therefore, be here attempted.

987. A contract for the sale of land may like any other contract, fall through on account of coercion, fraud, misrepresentation,⁽¹⁰⁾ undue influence,⁽¹¹⁾ mutual mistake⁽¹²⁾ illegal or immoral object or consideration⁽¹³⁾ failure or want of consideration⁽¹⁴⁾ and uncertainty⁽¹⁵⁾ in addition to which it may be avoided on account of waiver, rescission, release, merger, failure of condition, want of title or material defect in title⁽¹⁶⁾ and fraudulent preference.⁽¹⁷⁾

The court may refuse specific performance even though the contract is neither void nor voidable. Such was held to be the case where the defendant

(1) *Kulner v. British Columbia Orchard Lands Ltd.*, [1913], A.C. 319 (325); following *Re Dagenham Dock Co. L. R.*, 8 Ch. 1022; *In Hunter v. Daniel*, 4 Hare 420 (432, 433); the point arose but was not decided as the default was found to have been waived by acceptance of the overdue instalment.

(2) *Ex parte Manning*, 2 P. Wms., 410; *Savile v. Draac*, [1903], 1 Ch., 781 (793).

(3) *Ullsperger v. Meyer*, (1906), 2 L. R. A. (N. S.), 221.

(4) S. 40, ante.

(5) *Atcherley v. Vernon*, 10 Madd., 518 (528).

(6) *Edwards v. West*, 7 Ch. D. 858; *Rayner v. Preston*, 18 Ch. D., 1. Where the contract is personal, it may not be assigned, e. g., where the purchaser promises to sell for a consideration obtained from the vendor's own earnings. *Uthandi v. Ragavachari*, I.L.

R., 29 Mad. 307.

(7) *Winged v. Lefebury*, 2 Eq. Ca. Abr., 32; *Bennett v. Lord Tankerville*, 19 Ves. 179.

(8) S. 12 Expl. Specific Relief Act (Act I of 1877).

(9) Ch II & IV, Specific Relief Act (I of 1877).

(10) S. 19, Indian Contract Act.

(11) *Ib.* S. 19A.

(12) *Ib.* S. 20.

(13) *Ib.* Ss. 23, 27, 28, 30.

(14) *Ib.* S. 25.

(15) *Ib.* S. 21 (c); see S. 8 comm. 25 Halsbury's Laws of England, p. 424, s. 741.

(16) Ss. 12, 18, 19. Specific Relief Act (Act I of 1877).

(17) Provincial Insolvency Act (Act III of 1907; but all other contracts and transfers are valid. *Ib.* Ss. 36, 38.

agreed to sell his land to the plaintiff who thereupon promised to hush up a miscellaneous departmental proceedings against the defendant. The Court held that it was impossible to say that the agreement was opposed to public policy, because there was nothing to show what was the complaint against the defendant, still as the object of consideration of the agreement was to burke an inquiry ordered by a Judge into the official conduct of one of its subordinates, the court was justified in refusing its specific performance.⁽¹⁾

988. A purchaser may rescind the contract if the vendor had no valid

Want of titles. title on the day fixed for the performance of the contract, or when the performance was offered, ⁽²⁾ since the vendor cannot compel the purchaser to wait on the chance that the former may acquire the property. ⁽³⁾ Even if the purchaser gives the vendor a few days grace, it does not deprive him of his right to rescind the contract on that ground afterwards. ⁽⁴⁾ The Court will not force a doubtful title upon an unwilling purchaser. ⁽⁵⁾ No title offered by the head of a Hindu family, or a family, in which, whether in fact joint or not, claims are put forward by members to the property as ancestral, could be good enough to be forced on an unwilling purchaser, unless all the co-parceners concurred. ⁽⁶⁾ Where the contract for sale provided for its rescission in the event of the purchaser's solicitor not approving of the title, and the solicitor did not advise the sale, the Court gave effect to the covenant holding that as the objection raised by the solicitor to the title was neither unreasonable nor made in bad faith, and as it could not be met without evidence being gone into, the purchaser was entitled to throw up the contract. ⁽⁷⁾

989. Material Misrepresentations.—With regard to misrepresentation, a somewhat nice distinction is made in England between an executed and an executory contract, or, in other words, between a completed sale and a contract for sale. For while in the former case the Court of Equity would not decree rescission unless the misrepresentation was not only not innocent but was also fraudulent in contemplation of a Court of Law⁽⁸⁾ in the latter case of an executory contract before completion the Court of Equity recognizes the right to rescind it before completion even on the ground of innocent misrepresentation, the reason being that a man is not to be allowed to get benefit from a false statement however innocently uttered.⁽⁹⁾ Misrepresentation may relate to the misdescription of property or to other matter relating thereto. Where it affects the description, the purchaser may repudiate his contract in the following cases: (i) Where the property described is not identical with that intended to be sold, as where the vendor intending to sell *A* described it as *B* in which case the purchaser may throw up the contract although *B* resemble *A* in description and may be in every way more valuable.⁽¹⁰⁾ (ii) So again, the right of the purchaser will be the same if a material part of the property, is non-existent or unascertainable. ⁽¹¹⁾ (iii) Where the misdescription materially affects the enjoyment: as while the particulars stated restrictions against only certain

(1) *Gobinda. Nanda Kumar*, 18. C.W.N. 689 (691).

(2) *Ahmedbhoy v. Sir Dinsha Petil*, 11 Bom. L.R. 545 (560).

(3) *Smith v. Butler*, [1900], 1 Q.B. 694.

(4) *Cohen v. Mq BaChit*, 14 I.C. 811.

(5) *Ahmedbhoy v. Sir Dinsha Petil*, 11 Bom. L.R. 545 (605).

(6) *Ib.* p. 586.

(7) *Ahro v. Promotho*, 18 C.W.N. 568.

(8) *Wilde v. Gibson*, 1. H. L. C. 605; *Money v. Jorden*, 5 H. L. C. 185; *Hart v. Swaine*, 7 Ch. D., 42; *Brett v. Clowser*, 5 Ch D., 376; *Brownlie v. Campbell*, 5 App. Cas. 925; *Joliffe v. Baker*, 11 Q. B. D., 255.

(9) *Per Jessel, M. R.*, in *Redgrave v. Hurd*, 20 Ch. D., 1 (12); *The Reese River & Co. v. Smith*, L. R., 4 H. L., 64.

(10) *Leach v. Mullett*, 3 C & P. 115.

(11) *Robinson v. Musgrove*, 2 Mo. & R., 92.

specified trades being carried on upon the premises, it appeared that in reality several other trades were forbidden,⁽¹⁾ or that there was a right of way over a land sold as "a first-rate building plot of ground."⁽²⁾ So where there was a covenant or an easement materially restricting the user of the land,⁽³⁾ as that there was an under-ground watercourse which third parties had liberty to open on payment of damages,⁽⁴⁾ or that some one had a right to use the kitchen of the tenement sold,⁽⁵⁾ or where a manufactory in a town sold as "well supplied with water" was served only by a Water Works Company upon payment of a heavy annual rate.⁽⁶⁾ (iv) Where the property does not possess the interest contracted to be sold, as where a lease is sold as freehold⁽⁷⁾ or an underlease is sold as an original lease⁽⁸⁾ or where on the sale of the residue of twelve-and-a-half years of a term nothing was said of an option reserved in the lease to determine it after it had run for five years,⁽⁹⁾ or where property described as freehold is subject to undisclosed restrictive covenants.⁽¹⁰⁾ (v) Where there is serious misdescription as to the quantity which cannot be adequately compensated as where the land is found to contain only half the acreage given but it is otherwise if the deficiency in area is small, in which case pecuniary compensation would appear to be the only relief available to the purchaser.⁽¹¹⁾ But this is by no means an inflexible rule, for there may be cases where, having regard to the purport for which the purchase was made or from other circumstances, even a trifling diminution in quantity may entitle the purchaser to avoid the contract. The mere statement in the particulars that the quantity stated was "more or less;" or "by estimation," or even stronger words would not deprive the purchaser of his remedy if a right thereto otherwise exists.⁽¹²⁾ And a seller knowing the true quantity would not be allowed to practise a fraud, by stating a false quantity, with the addition of such words.⁽¹³⁾ (vi) Where the misdescription is of such a nature that compensation cannot be estimated; "as where on the sale of a reversion, expectant on the decease of A in case he should have no children, his age was described as 66 instead of 64,"⁽¹⁴⁾ or as where on the sale of a wood, the particulars erroneously stated that the average size of the timber approached 50 feet, the number of trees not being stated⁽¹⁵⁾ or as where the particulars stated the premises to be in the joint occupation of A and B, as *leesses*, when in fact A was only assignee of the lease, and B was a mere joint occupier;⁽¹⁶⁾ or as where the right to coal under the estate was shown to be in other parties, and no means existed for determining its value;⁽¹⁷⁾ or as where property was described as 'now or late in the occupation of H. R. and others, and it was in fact subject to leases for lives at low rents which were not disclosed.'⁽¹⁸⁾

(1) *Flight v. Booth*, 1 Bing., N.C., 370.

(2) *Dykes v. Blake*, 4 Bing., N.C., 463.

(3) *Nottingham Brick Co. v. Butler*, 17 Q. B. D. 778.

(4) *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

(5) *Heywood v. Mallasien*, 25 Cl. D. 857.

(6) *Leyland v. Illingworth*, 2 De F. & J. 248.

(7) *Browns v. Fenton*, 14 Ves., 144; *Upportan v. Nicholson*, L. R. 6 Ch., 486.

(8) *Madely v. Booth*, 2 De G. & S., 718; *Camberwell Building Society v. Holloway*, 18 Ch. D., 754; *In re Brefus and Master's contracts*, 89 Ch. D., 110; *In re Deighton and Harris's Contract*, [1898], 1 Ch., 458.

(9) *Weston v. Savage*, 10 Ch. D. 786;.

(10) *Phillips v. Caldeleugh*, L. R., 4 Q. B. 159.

(11) *Arnold v. Arnold*, 14 Ch. D., 270 (283).

(12) *Sugd.*, 884.

(13) *Sugd.*, 28, 325.

(14) *Sherwood v. Robins*, M. & M., 194; and see *White v. Cuddon*, 8 C. & F., 792.

(15) *Lord Brooke v. Routhwaite*, 5 Ha. 298.

(16) *Ridgway v. Gray*, 1 M. & G., 199; but see *Grissell v. Peto*, 2 S. & G., 39; *Farebrother v. Gibson*, 1 D. & J., 603.

(17) *Smithson v. Powell*, 10 L. T. (Q. S.), 104.

(18) *Dart*, 157, 158, citing *Hughes v. Jones*, 3 De. F. & J., 307.

990. Venial Misrepresentations.—Turning now to the other vitiating misrepresentations it may be premised that a minor vendor misrepresenting himself to be of full age and thereby inducing the purchaser to enter into a contract with him cannot be afterwards permitted to rescind the contract on the ground of his minority, provided that he has been guilty of express misrepresentations, and of a kind to naturally deceive the person to whom it is made.⁽¹⁾ Such a representation would in fact amount to fraud on the purchaser of which the vendor could not afterwards take advantage. But the same result would not ensue if there has been anything short of express misrepresentation. A mere implied misrepresentation is wholly insufficient. Again, in order to affect a contract a misrepresentation must be a misrepresentation of fact, and not a mere opinion, such as, for example, a puffing praise describing a renewable freehold as nearly equal to freehold,⁽²⁾ or a house of mean character as a desirable residence for a family of distinction.⁽³⁾ Such statements are no doubt misleading and are divided by a narrow line from those misstatements which are a sufficient answer to a suit for specific performance; but so long as they are merely expressions of opinion and not of ascertainable and independent facts they are not sufficient to entitle the purchaser to rescind from his contract. But a misstatement as to a fact, as that the property has been valued by a surveyor at a certain sum upon the faith of which the purchaser contracted,⁽⁴⁾ or that a specified rent was paid for the property,⁽⁵⁾ stands upon a different footing and entitles the purchaser to rescind the contract. But an assertion that a larger specified price was offered by a third party is a mere puff and is usually so understood, but if the purchaser has agreed to pay a higher price on the faith of that statement, he is entitled to rescind the contract as soon as he is made aware of its falsehood.⁽⁶⁾ A misstatement may be as much made by *suppressio veri* as it may be by *suggestio falsi*. So where a man is under duty to disclose, and remains silent leading another to infer that there was nothing to disclose, he is guilty of fraud as effectually as if he had articulately uttered it.⁽⁷⁾ Such a duty is cast upon the vendor if there has been any material change in the property since the date of the contract,⁽⁸⁾ as where there has been a change in the directorate on the faith of which shares had been applied for. In fact, it is the duty of the vendor to apprise the purchaser of any change which may have operated on the mind of the purchaser.⁽⁹⁾ Indeed, in this respect even a stranger is not out of the reach of law, for if he had induced the purchaser to enter into the contract on account of his own misrepresentations, he will be compelled to make them good, failing which he will be mulcted in damages.⁽¹⁰⁾ But it would appear that such misrepresentations must be tainted with fraud to be actionable.

991. So again, the purchaser is equally liable if he in any way misleads the vendor. For in the words of Lord Selbourne: "Every purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and of course to abstain from all deceit, whether by suppression of truth or suggestion of falsehood. But inasmuch as a purchaser is, generally speaking, under no antecedent obligation to communicate to his vendor facts which may influence

(1) *Ex parte Jones*, 18 Ch. D., 109, (121) see §§285—288 under S. 7, where the subject is more fully discussed.

(2) *Fenton v. Browns*, 14 Ves., 144.

(3) *Magennis v. Fallon*, 2 Moll., 587.

(4) *Buxton v. Lister*, 3 Atk., 386; *Atwood v. Small*, 6 O. & F., 292.

(5) *Wilson v. Fuller*, 3 Q.B., 68.

(6) *Buxton v. Lister*, 3 Atk., 383 (387); 26

E.L.R., 1020 (1022).

(7) *Brownlie v. Campbell*, 5 App. Cas., 935 (950).

(8) *In re Anderson's Case*, 17 Ch. D., 373, followed in *In re Scottish Petroleum Co.*, 23 Ch. D., 413 (435).

(9) *Davies v. London & Provincial Marine Insurance Co.*, 8 Ch. D., 469.

(10) *Pulsford v. Richards*, 17 Beav., 95.

his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of these facts, would be necessarily or naturally or probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is sufficient ground for setting aside a contract, if the vendor was in fact so misled. A man is presumed to intend the natural or necessary consequences of his own words and acts, and the *evidentia rei* would, therefore, be sufficient without other proof of intention. If the vendor was not in fact misled, the contract would not be set aside; because a *dolus* which neither induced nor materially affected the contract is not enough."⁽¹⁾ Such would be the case, if the party aggrieved had tested the accuracy of the statements made to him.⁽²⁾ A purchaser who shies off bidders at an auction by making depreciatory remarks with a view to secure a good bargain for himself cannot compel his vendor to sell if the latter chooses to avoid the contract.⁽³⁾ On the other hand, he is not liable for having made depreciatory comments on the property to the vendor, nor is he bound to disclose to the vendor any fact enhancing the value of the property, *e.g.*, the existence of a mine.⁽⁴⁾

992. Mistake.—Besides misrepresentation, mistake is in certain cases also a good ground for rescission. Thus if the auctioneer has knocked down the property at an undervalue owing to a *bona fide* mistake on the part of the vendor in giving him authority, the contract cannot be specially enforced.⁽⁵⁾ But no relief can be granted for an inadvertent mistake in omitting to insert a term in the contract⁽⁶⁾ or a term as to the legal consequences of the contract⁽⁷⁾ or as to the purpose for which the property may be used.⁽⁸⁾ But "rescission of a contract cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made."⁽⁹⁾ A contract may be rectified on the ground of mistake and it may then be specifically enforced.⁽¹⁰⁾ But in order to afford a ground for rectification, the mistake must be shown to have been mutual, for if the mistake is unilateral, the utmost the court can do is to declare that there has been no contract, because the parties have never been at one.⁽¹¹⁾ At a sale by auction of landed property on November 18th, 1901, the defendant bid for one lot by mistake for another, and it was knocked down to him. On discovering his mistake, he refused to sign the contract, whereupon the auctioneer signed it as his "agent." The printed particulars, conditions, and annexed form of contract had been prepared for a sale on October 17th, 1901, which was postponed till November 18th, but by inadvertence the original date, though altered in the particulars, remained unaltered in the conditions and form of contract. It was held that there was no contract within the Statute of Frauds, nor any *consensus ad ulem* to support an action by the vendor for specific performance.⁽¹²⁾ But in exceptional cases, the courts would not hold a man to his

(1) *Coakes v. Bousell*, 11 App. Cas., 232 (235).

(2) *Murlidhar v. Matru Mal*, 4 I. C. 389 (391).

(3) *Howard v. Hopkyns*, 2 Atk., 371, 26 E. L. R., 624.

(4) *Fox v. Harvey*, Jac. 178; cf. *Phillips v. Homfray*, L. R. 6 Ch. 770 (779).

(5) *Day v. Well*, 3 Beav., 220.

(6) *Parker v. Taswell*, 2 D. & J. 559.

(7) *Powell v. Smith*, L. R., 14 Eq., 85.

(8) *Mildmay v. Hungerford*, 2 Vern., 243.

(9) S. 8. Specific Relief Act (I of 1877).

(10) *Olley v. Fisher*, 34 Ch. D., 367; *Gulab-bai v. Dayabhai*, 10 B. H. C. R. 51.

(11) *May v. Platt*, [1900], 1 Ch., 616, observing on *Harris v. Pepperell*, L. R., 5 Eq., 1; *Garrard v. Frankel*, 30 Beav. 445; *Paget v. Marshall*, 28 Ch. D., 255; *Hunsraj v. Runchordas*, 7 Bom. L. R., 319.

(12) *Van Praagh v. Everidge*, [1903], 1 Ch., 443.

bargain, if it would otherwise be a hardship amounting to injustice.⁽¹⁾ Parol evidence is admissible to prove mistake, which must, however, be clearly established,⁽²⁾ with reference to the circumstances anterior to or contemporaneous with the contract,⁽³⁾ and there may be cases in which even evidence of subsequent acts may be material.⁽⁴⁾ The purchaser who has paid money under a mistake has a lien on the property.⁽⁵⁾

993. It is usual and customary for the purchaser to make a deposit as a **Earnest-money.** part of the price agreed upon. Such a deposit being not merely a part payment but also an earnest of the performance of the contract is forfeited if the amount be not unreasonable,⁽⁶⁾ and the purchaser at any time fail to comply with the conditions.⁽⁷⁾ But where there is no valid or enforceable contract, or the vendor is not carrying out his part of the contract, he is bound to return the deposit.⁽⁸⁾ He is only entitled to retain it in pursuance of an express stipulation,⁽⁹⁾ or in the event of the purchaser refusing to perform the contract, and even then the court may relieve against its forfeiture if the purchaser can put the vendor in the same situation as he would have been in, had the contract been performed at the time agreed upon.⁽¹⁰⁾ On the other hand, if the vendor's title is in any way defective, the purchaser may throw up the contract and recover back his deposit, since the right of the vendor to the benefit of the deposit is by way of *solatium* for the loss of his bargain, and it implies that so far as he is concerned, he has the right to and is able and willing to execute the conveyance, which goes off only through the default of the purchaser.⁽¹¹⁾ Where, however, the vendor has to return the deposit, it may be ordered to be refunded with interest, if it appears to have been improperly withheld.⁽¹²⁾ Otherwise the vendor may resell the property and after making allowance for the deposit, if any received, recover the deficiency by way of damages from the purchaser,⁽¹³⁾ or may without reselling recover damages for breach of the contract. But if on resale the property fetches more than it had been agreed to be sold for, the purchaser cannot claim the surplus, for having once violated the contract, he cannot claim under the contract. ⁽¹⁴⁾

994. Sale at an undervalue is no blot upon the purchaser's title. "A man who speculates in land means always to get as much profit as he can. If, by his superior skill, he foresees that he can make an advantageous profit by working, cultivating, and improving a farm, certainly if it is worth his while he can do that, and it would be quite worth the while of anybody buying from

(1) *Tamplin v. James*, 15 Ch. D., 215; *Preston v. Luck*, 27 Ch. D., 497; *Stewart v. Kennedy*, 15 App. Cas., 75; cf. S. 36, Specific Relief Act (I of 1877).

(2) *Marquis of Breadalbane v. Marquis of Chandos*, 2 M. & C., 711; *Clay v. Rufford*, 14 Jur., 803; *Earl of Darvel v. London Chatham & Dover Ry.*, L.R., 2 H.L., 43.

(3) *Earl of Bradford v. Earl of Romney*, 30 B., 431.

(4) *Minto v. Taylor*, 8 Ha., 56.

(5) *Meddison v. Chapman*, 1 J. & H., 470; *Parkinson v. Hanburry*, L.R., 2 H.L., 1; *Cooper v. London Brighton, &c., Railway Co.*, 4 Ex. D., 88.

(6) *Manian v. The Madras Railway Co.*, L.R., 29 Mad. 118.

(7) *Ex parte Barrel*, L.R., 10 Ch., 512; *Best v. Hamand*, 12 Ch. D., 1; *Howe v. Smith*,

27 Ch. D., 89; *Soper v. Arnold*, 35 Ch. D., 5, 384; *Collins v. Stimson*, 11 Q.B. D., 405; *Buriorji v. Jamshed*, 15 Bom. L.R., 405; *Natesav. Appavu*, 3 I.C. 941 (943); *Roshan Lal v. Delhi Mills*, I.L.R., 36 All. 169 (169).

(8) *Rasiklal v. Chandra Bhusan*, 10 I.C. 525 (526); *Roshan Lal v. Delhi Mills*, I.L.R., 33 All. 166 (169).

(9) *Raghunath v. Chandra Pertab*, 17 C.W.N., 100.

(10) *Vernon v. Stephens*, 2 P. Wms., 66; *Moss v. Mathews*, 3 Ves., 279.

(11) *Want v. Stallibrass*, 8 Ex. D. 175 (180).

(12) *Turner v. Marriott*, L.R. 3 Eq., 744.

(13) *Noble v. Edwards*, 5 Ch. D., 378 (388), *Hinton v. Sparkes*, L.R., 3 C.P., 161; *Soper v. Arnold*, 35 Ch. D., 384.

(14) *Ex parte Hunter*, 6 Ves., 97.

him to pay him whatever in their respective judgments the land is worth, without considering what the then vendee gave for it himself."⁽¹⁾ Gross inadequacy of consideration, may however, be in itself sufficient evidence of fraud, while the fact is always relevant for that purpose, though ordinarily, it is not regarded as conclusive proof of *mala fides*.⁽²⁾

995. In the absence of an express reservation, all legal incidents accompany the property and on transfer pass to the purchaser,⁽³⁾ and a refusal by or inability of the vendor to transfer them may, subject to the rules before discussed, be a good ground for avoiding sale by the purchaser.⁽⁴⁾ For, since a transfer by sale implies the transfer of ownership which on the principle *cujus est solum ejus est usque ad cælum*⁽⁵⁾ constitutes enjoyment of all rights above and below the land, it follows that if the vendor has no title to an underground cellar,⁽⁶⁾ or to approaches to a house or land,⁽⁷⁾ the contract would be held to be voidable at the option of the purchaser. So it was laid down that the defect was fatal if on a sale of groundrents, the vendor was unable to confer the right of re-entry and distress.⁽⁸⁾ But in certain cases the right of the purchaser may be limited by the purpose for which he has purchased the property. A sale of land to a Railway Company would be construed as not including the minerals,⁽⁹⁾ stones or limestone quarries.⁽¹⁰⁾ It is, therefore, essential that all the rights or liabilities in the nature of easements, such as rights of way, or water, or common, or any other right which is a burthen upon the estate, should be explicitly notified to an intending purchaser, for though such non-disclosure may not of itself avoid the contract, it will form an important factor in guiding the determination of the court.⁽¹¹⁾ Matters, however, which are of general notoriety in the neighbourhood need not be disclosed.⁽¹²⁾

Title-deeds relating to the property have been aptly called the sinews of the land.⁽¹³⁾ They must be shown to the intending purchaser so as to enable him to investigate the title for himself, and to satisfy himself as to its character.

996. Sale by Auction.—Generally speaking, there is no difference between a sale by private treaty and a sale by auction. But, since in the latter case, the intervention of an auctioneer becomes usually necessary, his rights and liabilities become germane to the discussion and may be here set out. An auctioneer is an agent for both the vendor and the bidders at the time he is holding the auction. His authority may, however, be revoked at any time before the property is knocked down,⁽¹⁴⁾ so that if the vendor has withdrawn his authority, the purchaser cannot bind him even though he may have bid in ignorance of it.⁽¹⁵⁾ The implied authority of an auctioneer does not include an authority to warrant title or quality.⁽¹⁶⁾ His authority

(1) *Noble v. Edwards*, 5 Ch. D., 378 (390); *Kilaru v. Polvarapu*, 13 M.L.T., 521.

(2) *Yumola Pershad v. Nokhlal*, 6 W.R. 30 (33).

(3) S. 8, *ante*; *Cato v. Thompson*, 9 Q.B.D., 616; *Skull v. Glenister*, 16 O.B. (N. S.), 81.

(4) *Pope v. Garland*, 4 Y. & O., 403.

(5) "He who has the land has rights thereon even up to the sky," See §§ 333, 334 279, *ante* where the maxim is cited and explained.

(6) *Whittington v. Corder*, 16 Jur., 1034.

(7) *Stanton v. Tattershall*, 1 S. & G., 529; *Denne v. Light*, 3 Jur. (N. S.), 627.

(8) *Langford v. Selmes*, 3 K. & J., 220.

(9) In England it has been enacted by the Lands Clauses Consolidation Acts.

(10) *Dixon v. Cal. Rail Co.*, 5 App. Cas., 820. See as to sale by a Railway Co. for building purposes, *Bird v. Eggleton*, 29 Ch. D., 1012.

(11) *Oldfield v. Round*, 5 Ves., 508.

(12) *Wake v. Hall*, 8 App. Cas., 195.

(13) *Co.-Litt.* 6a.

(14) *Blagden v. Bradbear*, 12 Ves., 466.

(15) *Mausser v. Back*, 6 Ha., 443.

(16) *Payne v. Lord Leconfield*, 51 L. J. Q. B., 624.

is limited to describing the property truly, to represent its actual situation, and, if he thinks fit to represent its value. (1) The authority given to an auctioneer cannot be delegated by him to another, nor can he at any time either before or after the sale vary the contract. (2) He has no right to accept a bid from the vendor, and a purchaser may mulct him in damages if he errs in this respect. (3) He may receive the deposit or the purchase-money, and if the sale is for cash, if he gives credit, it is at his own risk, (4) and the vendor can compel him to pay the money. (5) Neither the vendor nor the auctioneer is bound to accept a cheque in payment even of a person in credit, much less of a pauper. (6) But if a cheque given in payment by the auctioneer is dishonoured, the loss would fall upon the purchaser. (7) Until the sale is completed, he keeps the money as a stake-holder, and which he cannot pay out except with the mutual consent of both the vendor and the purchaser, (8) and in case of a dispute he may file an inter-pleader. Such an occasion may arise where the auctioneer has innocently conveyed the vendor's misrepresentations to the purchaser, or the same property has been resold by the vendor upon the alleged default of the first purchaser. An auctioneer's commission varies, but five per cent. is the usual rate, two and-a-half per cent. being allowed for sums exceeding Rs 5,000. He may, however, forfeit it if the sale is defeated by his negligence, and he may even have to pay damages if he negligently misdescribes the property. (9) An agent to sell property who has sold the property but received a secret profit from the purchaser must not only account for that profit to his principal, but forfeits his commission to which he might be otherwise entitled. (10) The vendor may provide for a reserved bidding or fix a reserved price, which, according to the English statute on the subject, must, however, have been previously announced. (11)

997. Measure of Damages.—The party aggrieved by a breach of the contract to transfer land may sue for specific performance, or damages or both. (§ 1002). A stipulation as to the payment of a sum as liquidated damages, or of a penalty being ordinarily intended merely as security for performance, is no bar to a suit for specific performance. (12) Indeed, in granting specific relief the Courts are guided by the principle that damages do not afford adequate relief, and this is invariably to be presumed in contracts relating to land. (13) And in granting specific relief the court has jurisdiction to assess and award damages to the party injured, either in addition to, or in substitution for the primary relief. If however, the plaintiff omits to claim one or the other relief, his subsequent suit therefor would be barred. The benefit of an obligation due on a contract for sale is transmutable and on death of the parties is transmitted to their heirs.

998. In a suit for damages affirming the contract, the purchaser may recover all legitimate expenses incurred in connection with the investigation of title, search, or the like, as well as the cost of preparing a conveyance, interest on his deposit

(1) *Mullens v. Muller*, 22 Ch. D., 194 (199).

(2) *Cockrain v. Irlam*, 2 M. & S., 301; *Callin v. Bell*, 4 Camp., 183.

(3) *Warlow v. Harrison*, 1 E. & E., 295.

(4) *Williams v. Millington*, 1 H. Bl., 81 (85); *Wiltshire v. Sims*, 1 Camp., 258.

(5) *Sugd.*, 48.

(6) *Johnston v. Boyes* [1899], 2 Ch., 73.

(7) *Bond v. Warden*, 1 Coll., 583.

(8) *Dart.*, 205.

(9) *Hibbert v. Bayley*, 2 F. & F., 48.

(10) *Andrews v. Ramsay & Co.* [1903], 2 K.

B., 635.

(11) *Sale of Land by Auction Act*, 1867 (80 & 31 Vict., c. 48). Prior to this statute there was a considerable conflict between the rules of law and equity. See *Thornett v. Haines*, 15 M. & W., 371 (372).

(12) *Howard v. Hapikins*, 2 Atk., 371; *Darley v. Whitaker*, 4 Dr., 184; *Koch v. Streuter* (1906), 2 L.R.A. (N.S.), 210.

(13) S. 12, *Specific Relief Act* (Act I of 1877); as to the reason of this rule see *Story's Eq. Jur.* (2nd Eng. ed.), § 746.

and the residue of his purchase-money if lying idle. (1) But he cannot recover expenses incurred prior to the contract, *e.g.*, the costs of a survey or the expenses of raising the purchase-money, or those incurred in expectation of the contract being completed. In England he cannot recover damages merely for the loss of his bargain, except in case of wilful default (2) or unreasonable omission to complete the title by taking some definite step in the vendor's power, as for example, procuring consent of a third party necessary to convey the estate (3) or unless the contract is shown to be infected with the vendor's fraud, (4) but this is not the law in this country, where the vendee's right to damages is governed by section 73 of the Indian Contract Act, (5) under which the same principle regulates the measure of damages, whether they relate to contracts dealing with land, or those relating to commodities. (6) Ordinarily, such damages would represent the difference, if any, between the contract price and the market value at the date of breach. This rule places the liability of the vendor for a breach of contract on a higher level than the English rule under which apart from fraud, wilful act or illegal omission, the vendor does not appear to be liable for damages, even though he may have been guilty of a breach of contract. So in England no case for damage can arise if the vendor had agreed to sell, though in fact he had no title, if he *bona fide* believed that he had a good legal title. So a title defective in law of which the vendor was ignorant is not sufficient to take the case out of the rule. (7) In this respect in England a contract relating to land forms an exception to the generality of the rule as to damages for breach of contract. In other respects there is no difference. (8) But the exception, it should be noted, applies only to the breach of a contract, and ceases to apply after conveyance, *e.g.*, to the breach of a covenant for quiet enjoyment in conveyance, when the damages assessed would be a full compensation to the plaintiff for that which he has lost, and not limited to the amount actually paid by him. (9) Where the vendor having entered into a contract for sale, declined to complete it; meanwhile the property was acquired under the Land Acquisition Act, and compensation paid to the vendor. The measure of damages for the aggrieved party was held to be the difference between the contract price and the compensation allowed. (10) So a vendor who has stipulated to give vacant possession is bound by his agreement, failing which, he may have to pay damages in the nature of compensation. So if the property has deteriorated since the date of the contract (11) or the tenants have left, (12) the vendor is liable to compensate the purchaser. (13) And where the vendor through no fault of his own fails to make good his title to the property sold, and the vendee refuses on that account to purchase the property, but claims compensation, it has been held on the lines of the English cases that

(1) *Hanstip v. Padwick*, L. R., 5 Ex., 615; *Richardson v. Chasen*, 10 L. R., 10 Q. B., 756; *Hodges v. Lord Litchfield*, 1 Bing. (N. C.), 492; *Sherry v. Oke*, 3 Dow., 349 (361).

(2) *Eugell v. Fitch*, L. R. 4 Q. B. 659.

(3) *Day v. Singleton*, [1899], 2 Ch. 320.

(4) *Bain v. Fothergill*, L. R., 7 H. L., 158 (183); following *Phurneau v. Thornhill*, 2 W. Bl., 1078, which has been held not to be the law here—*Ranchhod v. Mannohan Das*, I. L. R., 32 Bom., 165.

(5) *Ranchhod v. Mannohan Das*, I. L. R., 32 Bom. 165.

(6) *Nagardas v. Ahmed Khan*, I. L. R., 21 Bom. 175 (185); *Ranchhod v. Mannohan Das* I. L. R. 32 Bom., 165 (170, 171).

(7) *Pounsett v. Fuller*, 17 C. B., 660; ex-

plained per Denman, J., in *Bain v. Fothergill*, L. R., 7 H. L., 158 (183).

(8) *Noble v. Edwards*, 5 Ch. D., 378.

(9) *Lock v. Furze*, L. R. 1 C. P., 441 (452); but the obiter is no longer law. See *Bain v. Fothergill*, L. R., 7 H. L., 158. *supra*.

(10) *Nabin Chandra v. Krishna*, 38 Cal. 458 (466).

(11) *Royal Bristol, &c., Society v. Romash*, 35 Ch. D. 390 (398).

(12) *Jaques v. Millar*, Ch. D. 153 (159); followed in *Royal Bristol, &c., Society v. Romash* 35 Ch. D., 390 (396).

(13) *Phillips v. Silvester*, L. R. 8 Ch., 173; followed, in *Royal Bristol, &c. Society v. Romash* 35 Ch. D., 390 (397).

the purchaser is entitled to compensation, but only to the extent of the actual expenses incurred, and not for the loss of his bargain. (1) But where one party induces another to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. (2)

999. The vendor is entitled to rescind a contract for sale for the same reasons as would suffice to avoid any other contract. Special damages may be recovered where the vendor can be shown to be in fault or unwilling to incur expense in making good his title. The purchaser can enforce his contract not only against the vendor himself, but also against the other transferees with notice (3) or subsequent purchasers. (4) So while the contract to give the first refusal does not create any interest in land, still where in contravention of the contract, the owner agrees to sell the land to a third person who has knowledge of the contract, he may be restrained from carrying out the contract, by an injunction and by a declaration of the plaintiff's right of pre-emption. (5)

1000. Equitable Rights under Contract.—A notice of the contract of sale must be notice of an existing obligation. When a transferee hearing of a contract is also informed that the time for performance has long passed without anything being done, a fair inference may be drawn that the right has been waived or discharged. (6) A person suing for specific performance for sale has only a cause of action against his vendor. Subsequent purchasers, claiming under an adverse title, cannot be made parties to a suit for specific performance; for if it were otherwise, the court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed. (7) But where the plaintiff sues on the averment that the subsequent transfer is a mere *benami* transfer, resorted to in concert with the vendee to defeat his rights, there is then really one cause of action against the two persons (the two being identical), and they may both be impleaded in the same suit. (8)

Where the parties have only entered into a contract for sale, and the vendor thereafter resiles therefrom, the obvious course for the purchaser is to sue for specific performance of the agreement. If he omits to sue for it and only claims possession, he could not afterwards be allowed to sue for the former relief, which would be barred by section 43 of the Code. (9) And such a plea in bar of a suit may even be taken in argument even though it had not been raised in pleadings. (10)

(1) *Pitamber v Cassibai*, I. L. R. 11 Bom. 272; following *Phureau v. Thornhill*, 2 W. Bl. 1078; *Brain v. Fothergill*, 7 L. R. 7 H. L. 158 held *Engell v. Fitzh.* 4 Q. B. 659 inapplicable.

(2) *Partah Chunder Ghose v. Mohendranath*, I. L. R. 17 Cal.; 291 P. C. cf. *Hopc v. Walter* (1899), 1 Ch. 879.

(3) *Hurnandan v. Jawad Ali*. I. L. R. 27 Cal. 463. S. 91 of the Indian Trusts Act (Act II of 1882).

(4) S. 27 (b) of the Specific Relief Act (Act I of 1877).

(5) *Manchester Ship Canal Co v. Manchester Racecourse Co.* (1901), 2 Ch. 37; following *Jumley v. Wager*. 1 De M. & G. 604.

(6) *Ramaswami v. Chinman*. 11 M. L. J. R. 132.

(7) *Tasker v. Small*, 3 My. & Cr., 33; *De Houghton v. Money*, L.R., 2 Ch., 164 (170); *Luckumsey v. Fazulla*, I. L. R., 5 Bom., 177; *Mokund Lall v. Chotay Lall*, I. L. R., 10 Cal., 1061 (1068).

(8) *Per Mitter, J.*, in *Mokund Lall v. Chotay Lall*, I. L. R., 10 Cal., 1061 (1069) (distinguishing *De Houghton v. Money*, L. R., 2 Ch. 1661; *Luckumsey v. Fazulla*, I. L. R., 5 Bom., 177; *Joy Govind v. Goureeproshad*, 7 W. R., 201 (*per Peacock, C. J.*, at p. 202); followed in *Fergusson v. Government*, 9 W. R. 158; *Naoraji v. Rogers*, 4 B. H. C. R., 1 (9).

(9) *Rangayya v. Nanjappa*, I. L. R., 25 Mad. 494 (503), P. O., now o. 2 r. 2. Act V of 1908.

(10) *ib.*, p. 496, P. C.

1001. While the proviso provides that a contract of sale does not of itself create any interest in or charge on the property sold, still it

Right to retain possession.

has been held that where the contract is followed up by something more, as for example, transfer of possession and payment of the whole of the purchase-money, then the mere fact that the transfer-deed has not been executed and registered would not prevent some interest in the property from passing to the transferee. Thus in a case where under a contract of sale with respect to certain fields, possession was delivered to the vendee, and the whole of the purchase-money was paid to the vendor, but the transfer was not effected, as the necessary conveyance had not been executed, and subsequently a judgment-creditor of the vendor sought for a declaration that the fields were liable to be attached and sold as the property of the judgment-debtor, it was held that the judgment-debtor was nothing more than a bare trustee and had no attachable interest in the property. (1) Similarly in another case it was laid down that an unregistered agreement of sale accompanied with possession is entitled to priority over a registered deed of sale subsequently executed. (2) With reference to these cases it may be observed that in so far as they purport to hold that a valid title may be made *aliunde*, they are in direct conflict with the section, and cannot be held to be sound in view of the sale as understood in this country, though according to the English view which regards the vendee as the equitable owner of the estate as from the date of the contract (3) the case might be otherwise. (§§ 942, 960). Where the same property was mortgaged to two creditors, and one of them instituted a suit and put the property to sale and thereafter the second purchaser also had the same property sold, it was held that nothing passed by the second sale. "It is clear," said Parsons and Ranade, JJ., "that the properties were only charged once under the deed, and therefore they could only be sold once, so that the person, who first bought any of them must be held to be entitled to it. Had the provisions of the Transfer of Property Act, section 85, been observed, there could have been no such thing as a second suit or a second sale. As it is, Sorabji having been allowed to sue alone and the portion of the property now in suit having been sold by him alone, we must hold that the other creditors acquiesced in his conduct, and their remedy will be against him, if he has obtained more money than he was proportionately entitled to out of the charge. The charge, however, to which the property was made liable by the deed, must be held to have been liquidated by its sale, and there was no second charge upon it that could be recovered from it by any other of the creditors." (4) A person put in possession under a contract for sale was, however, held entitled to resist his ouster by a subsequent vendee under a registered sale deed, if only on the strength of his charge for the purchase money paid by him. (5)

1002. As regards the right of the vendor to recover damages for breach of contract by the purchaser, his rights are generally similar.

Vendor's remedy. He may either sue the purchaser for specific performance or only for recovery of damages for breach of contract, in which case he can recover only the damages actually sustained by the breach of contract, (6) or

(1) *Karalia v. Mansukhram*, I.L.R., 24 Bom., 400; distinguishing *Harmasji v. Keshav*, I. L. R., 18 Bom., 13; *Ram Bakshi v. Mughlani*, I. L. R., 26 All. 266; dissented from in *Lalchand v. Lakshman*, I.L.R., 28 Bom., 466, cf. S. 55 (6) (b), *post*, & S. 91. Indian Trusts Act (Act II of 1882).

(2) *Hari Keshav v. Hira Chima*, 2 Bom. L.R., 110; see also *Karbaisappa v. Dharm-*

appa, *ib.* p. 223.

(3) *Edward v. West*, 7 Ch. D., 858; *Lalchand v. Lakshman*, I.L.R., 28 Bom. 466 (471).

(4) *Pranivandas v. Ishwardas*, 2 Bom. L. R., 30.

(5) *Puccha Lal v. Kunj Behari* 19 C.W. N. 445; but see *Kurri Veerareddi v. Kurri Bapireddi*, I. L. R. 29 Mad. 336 F.B.

(6) *Laird v. Pim*, 7 M. & W., 474.

again, he may sue for specific performance with compensation, in which case the court will be guided by the rules of equity laid down in the Specific Relief Act. (1) Of course, it is desirable, but by no means necessary, that the plaintiff suing for specific performance should expressly ask for the alternate relief for refund of his deposit, for if the Court refuses the one relief it is competent to it to grant the other relief, though it had not been expressly prayed for. (2) The specific performance of a contract otherwise proper to be so enforced cannot be dispensed with merely because the vendor had agreed to pay a certain sum in case of non-performance. (3) This is in accordance with the English rule of equity that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done. Ordinarily, therefore, it is no answer to a claim for specific performance that the vendor had stipulated for the payment of a certain sum in case of default. Whether the sum so stipulated is itself recoverable depends upon whether it is a penalty or liquidated damages. (4) If the sale goes off through the defect of title in the vendor, he cannot sue him for use and occupation, since no contract can arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation. (5) But if the purchaser continues in possession, after the contract is clearly abandoned, he will be liable in respect of such subsequent occupation. (6) But before its abandonment, the purchaser holds as a tenant-at-will and cannot be ejected without notice, (7) but his subsequent possession is that of a trespasser liable to be determined without notice. (8) But such possession is capable of being protected against a subsequent transferee with notice; and as between two claimants with even equities, the prior purchaser may hold up his possession as a shield against his adversary. And as against the vendor himself the purchaser may, it is said, protect his possession so long as his right to specific performance is not barred by holding the vendor estopped from ejecting him on the ground that having let him into possession of the property in pursuance of the contract, he could not evict him, and thus repudiate his contract. (9) Indeed, the view, that a person having merely the benefit of a contract of sale, may defend his possession of the property against the rightful owner by reference to that contract, is the outcome of a legal system which recognizes the existence of legal and equitable ownership. In this country, where such a distinction is unknown, there is no room for the engrafting of an equity on to an enactment which would be even inconsistent with its terms. But this is at best a doubtful equity that can no longer be enforced after the right to specific performance is barred. (10) The right of the purchaser to retain possession must be distinguished

(1) Ss. 14-17 (Act I of 1877).

(2) O. 7, r. 7, Civil Procedure Code; *Raghu-nath Sahai v. Chandra Protap Singh*, 15 I. C. 268; Citing *Ibrahim Bhai v. Fletcher*, I.L.R., 21 Bom. 827; *Alakashi v. Harachand*, I. L. R. 24 Cal. 897; *Amena Bibi v. Udil Narain*, I.L.R. 31 All., 68 P.C.; *Parangadam v. Perumtoilla*, I. L. R., 27 Mad. 380; *Howe v. Smith* 27 Ch. D., 89.

(3) S. 20, Specific Relief Act (Act I of 1877).

(4) S. 74, Indian Contract Act (Act IX of 1872); *Law v. Local Board*, [1892], 1 K. B., 127 (139) in which the law is historically treated *per Kay*, L. J., pp. 133-136.

(5) Sugd., 179; *Kirilland v. Pounsett*, 2 Taunt., 145.

(6) *Howard v. Shaw*, 8 M. & W., 118.

(7) *Doe v. Stanion*, 1 M. & W., 700.

(8) *Markey v. Coote*, 10 Ir. R. (C.L.) 149.

(9) *Beqam v. Mhd. Yakub*, I. L. R., 16 All., 344 (358) F.B.; *Ram Baksh v. Mughlani*, I.L.R., 26 All., 266 (269); *Immudipattam v. Periya Dorasami*, I.L.R., 24 Mad., 377 (384), P.C.; *Ittappan v. Parangodan*, I.L.R., 21 Mad., 291; *Puchha Lal v. Kunj Behari*, 18 C.W.N. 445; *Sheoram v. Lalman*, 13 C.P.L. R., 163; *contra in Kurri Veerareddi v. Kurri Bipireddi*, I. L. R., 29 Mad., 336 (344). F.B.; *Achutan v. Koman*, 13 M. L. J. R., 217; *Lalchand v. Lakshman*, I. L. R., 28 Bom., 466. In the Madras Full Bench case (29 Mad., 336 (348)) the dictum of the P. C., to the contrary is pronounced to be *obiter*.

(10) *Jeyram v. Ganpati*, 17 C. P. L. R., 19.

from his right to take it in pursuance of his contract, which alone gives him no right to take possession.

1003. The party complaining of a breach of contract is bound to show that he was ready to fulfil his own engagements, and if he sues the other party for specific performance, he must tender what is due from him. If the party aggrieved be the purchaser, he must tender a conveyance ⁽¹⁾ and the price with interest, and if the vendor, he must shew that he was ready and willing to execute the conveyance. ⁽²⁾ In a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding upon him inasmuch as it is not binding upon the plaintiff. ⁽³⁾ On the other hand, a right to specific performance may be set up by way of defence. ⁽⁴⁾ Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. ⁽⁵⁾ Subsequent events do not, except in the cases provided for in the next section, vary a contract once fairly completed. In a suit for specific performance, the court may allow the plaintiff to amend his plaint so as to make it include a claim for the refund of the earnest-money, though it was not asked for until a late stage of the case. Indeed, it is open to the court to determine the right to specific performance of a contract, or in the alternative, to a return of the earnest-money, and the plaintiff should not be driven to a separate suit for the recovery of his deposit. ⁽⁶⁾ Where a decree based upon a compromise directs that one party should execute a conveyance in favour of another within a stated time after the decree, the proper course for the parties is then to proceed regularly as if a decree for specific performance was made. ⁽⁷⁾

1004. In the absence of an agreement to the contrary, it is the duty of the purchaser to prepare and tender the sale-deed duly stamped at his own expense. ⁽⁸⁾ In the case of mutual and concurrent agreements, the plaintiff must shew his readiness to perform his part of the agreement before he can compel the other party to perform his part. Thus, where by a memorandum of agreement *A* agreed to sell to *B* certain lands, therein described, and all the mines, beds and veins of coal, etc., under the same, at a certain price, and *B* agreed to purchase from *A* all coal that he might from time to time require at a fair market price, it was held that the two covenants were concurrent and that *A* could not sue *B* for not taking the coal without averring performance or a readiness to perform his part of the contract. ⁽⁹⁾ The question whether the two agreements were concurrent and mutually interdependent, of course, depends upon their character and the intention of the parties.

1005. The Contract is indivisible.—A contract for the sale of land is indivisible, and a man who has his option whether he will affirm it, must elect either to affirm or disaffirm it altogether: he cannot adopt that part which is for his own benefit and reject the rest. "He cannot blow hot and cold." ⁽¹⁰⁾

(1) *Knight v. Crockford*, 1 Esp., 190; *East London Union v. Metropolitan Railway Co.*, L. R., 4 Ex., 309.

(2) *Thames Haven Co. v. Brymer*, 5 Ex., 711.

(3) *Ahmedabad Municipality v. Sulemanji*, 5 Bom. L. R., 592.

(4) *Began v. Muhammad*, I. L. R. 16 All., 344, F. B.; *Illappan v. Parangodan*, I. L. R., 21 Mad., 291; *Sheokaran v. Lalman*, 13 C. P. L. R., 165.

(5) *Revel v. Hussey*, 2 Ball. & B., 287; *Barclay v. Wainright*, 14 Ves., 66.

(6) *Ibrahimbhai v. Fletcher*, I. L. R., 21 Bom. 827, F. B.

(7) *Hare Krishna v. Priya Nath*, 10 C. W. N., 345.

(8) S. 29 (c), Indian Stamp Act (Act II of 1899). *Stephens v. De Medina*, 4 Q. B., 422. See the subject further discussed under S. 55 (1) (d) post.

(9) *Bankart v. Bowers*, L. R., 1 C. P., 484 (489).

(10) *Smith v. Hodson*, 4 T. R., 211; *Fakiray v. Gadigaya*, I. L. R., 26 Bom., 88 (94).

1006. Stamp required for a Conveyance.—The proper stamp-duty on a sale-deed is regulated by the Indian Stamp Act.⁽¹⁾ The amount payable on a conveyance is properly calculated on the consideration set forth therein, and not on the intrinsic value of the property conveyed.⁽²⁾ And "in the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage-money, or money charged together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale: provided that where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage."⁽³⁾ But in a suit for cancellation and delivery of a deed, the plaintiff is at liberty to value the claim in any way he likes, and the court has no power to revise the valuation in the absence of any rule framed by the High Court for the purpose.⁽⁴⁾

1007. Limitation.—The period of limitation prescribed for the enforcement of a contract for sale, is fixed at three years reckoned from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused,⁽⁵⁾ and a suit for compensation for the breach of a contract is either six⁽⁶⁾ or three years⁽⁷⁾ according as the contract is or is not registered. A mere recital in the sale-deed that the consideration had been paid cannot be construed as a contract in writing, to pay the consideration-money, so as to enlarge the period of limitation to six years.⁽⁸⁾ But where a sale-deed embodied the contract for sale which preceded the actual sale, the longer period may apply even though the sale-deed contained an acknowledgment that the consideration had been paid, when in fact it had not been paid.⁽⁹⁾ And it seems that a document executed and given by a vendor of property to his purchaser and registered, acknowledging payment of a sum of money on account of the price, and providing that the balance should be paid within a certain date has been construed to be "a contract in writing," within the meaning of Article 116 of the Limitation Act, even though it be not signed by the purchaser.⁽¹⁰⁾ The suit to enforce the vendor's lien is governed by Article 111 and not by Article 152 of the Limitation Act.⁽¹¹⁾ In certain cases, Article 132 may have to be called into requisition. In this connexion, it has to be noted that the word "purchaser" bears a far wider import in the English law than it does in Indian law, as in the language of the Conveyancing Act, it comprises not only a purchaser properly so called, but also "a lessee or mortgagee or an intending purchaser, lessee or mortgagee or other person who for valuable consideration takes or deals with property."⁽¹²⁾ In other words, the term is extended in its

(1) Act II of 1899, Sch. I, Art. 23.

(2) Indian Stamp Act (1899), Sch. I, Art. 23. References under Stamp Act (1879), I. L. R., 20 Mad., 27; I. L. R., 20 Bom., 432; I. L. R., 23 Cal., 283; see also *Shantappa v. Subrao*, I. L. R., 18 Bom., 432.

(3) S. 24, Expl. Indian Stamp Act (Act II of 1899). In re *Nirabai*, I. L. R., 29 Bom. 203; Reference No. 12 of 1905; 3 L. B. R., 205 F., B. (If the vendee transfers to his vendor by way of mortgage an interest in the property sold, the transfer deed is chargeable with the full amount of duty.)

(4) *Guruvajamma v. Venkatakrishnama*, I. L. R., 24 Mad., 34; *Samiya v. Minammah*, I. L. R., 23 Mad., 490, followed in *Mad. Unrep. C. M. A.*, No. 77 of 1903.

(5) Art. 113, Sch. II, Indian Limitation Act (Act XV of 1877).

(6) *Ib.*, Art. 116.

(7) *Ib.*, Art. 115.

(8) *Seshachala v. Varada*, I. L. R., 25 Mad., 55 (59).

(9) *Ib.*, following *Avuthala v. Dayumma*, I. L. R., 24 Mad., 233.

(10) *Ib.*, following *Ambalavana v. Pandaram*, I. L. R., 19 Mad., 52; *Kotappa v. Vallur*, I. L. R., 25 Mad., 50.

(11) *Avuthala v. Dayumma*, I. L. R., 24 Mad., 233.

(12) S. 2 (viii), Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., C. 41); *Willoughby v. Willoughby*, 1 L. R., 397 (402); *Dolphin v. Aylward*, L. R., 4 H. L., 486; *Lister v. Turner*, 5 Hars. 291; *Manavikrama v. Ammu*, I. L. R., 24 Mad., 471 (488), F. B.

application to mean persons who obtain possession of property by any means *except by descent*.⁽¹⁾ And in this artificial sense, the word has been held to have been used in Article 134 of the Indian Limitation Act.⁽²⁾

1008. Apart from limitation, delay is sometimes spoken of as disentitling

Laches. a plaintiff to his remedy of specific performance.⁽³⁾ But there is no reason for refusing specific performance on the mere ground of delay, though delay may be suggestive of waiver in which case, the relief is refused not because of the delay, but because of waiver. Delay may, however, be material in cases where the other party has been put in a situation, in which it would not be reasonable to place him, if specific performance is decreed.⁽⁴⁾ A contracted with B for the purchase of some property paying instalments. Having paid all but the last instalment, A disappeared, and B the price in could not trace his whereabouts. B thereupon entered upon the property. Some time after A re-appeared and claimed specific performance of his contract and damages. The first court held that A's conduct amounted to repudiation of his contract. But reversing this decision, it was held by the Court of Appeal that the conduct of A did not amount to repudiation and that therefore he was entitled to damages though he could not claim specific performance.⁽⁵⁾

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold ;

Rights and liabilities of buyer and seller.

(1) The seller is bound—

- (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not aware, and which the buyer could not with ordinary care discover ;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(1) Litt. S. 12, Co. Litt. 18b, *Will's R. R.* (18th Ed.), 67, 211.

(2) *Manavikraman v. Ammu*, I. L. R., 24 Mad., 471 (483), F. B.; *Gurdeo Singh v. Chandrilla Singh*, 5 C. L. J. 64.

(3) *Mokund Lall v. Chitay Lall*, I. L. R. 10 Cal., 1061; *Barkhurdar v. Haji*, 7 I.C. 568 (570).

(4) *Lindsay Petroleum Co., v. Hurd*, L. R., 5 P. C., 221 (239); *Jamnadas v. Atmaram*, I. L. R., 2 Bom., 133; *Kissen Gopal v. Kally Prosanno*, I. L. R., 33 Cal., 633 (636, 637); s. 22 (1), Specific Relief Act (Act I of 1877).

(5) *Cornwall v. Henson*, [1900], 2 Oh., 298; overruling *Cornwall v. Henson*, [1899], 2 Oh. 710.

- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same :

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer, that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

Provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of the greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer or by any of the other buyers, as the case may be, at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and

undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer ;
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest ;
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs ; provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;
- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;
- (d) where the ownership of the property has passed to the buyer as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

- (a) where the ownership of the property has passed to him, to the benefit of any improvements in, or increase in value of, the property, and to the rents and profits thereof.
- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against

the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him for a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

1009. Analogous Law.—The provisions of this section closely correspond with those of the Indian Contract Act, which are noted below. The section is in most part founded upon section 7 of the English Conveyance Act of 1881, which, so far as it relates to the subject under notice, runs as follows:—

7. (1). In a conveyance, there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons if more than one, to whom the conveyance is made as tenants in common, that is to say:—

On conveyance for value by beneficial owner. (A) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed, to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made.

And any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person, who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value.

And that, freed or discharged, from, or otherwise by the person who so conveys, sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value.

And further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under, any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required; (in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage). (1)

1010. Of course, the covenants here implied have no application unless the transaction is one of sale as defined in section 54. If a document creates an interest in land and brings it within the provisions of the Indian Registration Act, it would not carry with it these covenants unless it also constitutes a transfer under the Act in which statutory covenants are implied. (2) For instance, a license to cut trees from the owner's forest on payment of a royalty, being neither a sale, mortgage or a lease within the contemplation of the Act, there can be no implied covenants, *e.g.*, a covenant for quiet enjoyment. (3)

1011. Principle.—This section is founded upon what has been before termed—natural justice. From the date the relationship of buyer and seller is established, the parties acquire reciprocal rights, and are both bound to protect the interests of each other. Perhaps this will be more apparent from the analytical exposition of the section in the following form:—

SELLER'S.

LIABILITIES.

(1) To disclose to the purchaser any material defect in the property (omission to disclose which is fraudulent). (1) (a).

And to answer relevant questions relating to the property or title thereto. (1) (c).

(2) To produce his title-deeds for inspection and deliver them upon payment of price. (1) (b).

And to execute a conveyance on payment or tender of price. (1) (d).

(3) Between contract and sale to take care of the property like a trustee. (1) (e).

And to deliver possession of it on completion of sale. (1) (f).

And to establish his saleable interest therein. (3), (3).

(4) To pay rents and redeem it from incumbrance, if any. (1) (g).

RIGHTS.

If any portion of the price remains unpaid —he has a charge upon the property sold for the balance. (4) (a).

He is entitled to receive rents and profits before completion of sale. (4) (a).

(1) 44 and 45 Vict., C. 41, S. 7. (1) (A); Clause (B) similarly deals with covenants on conveyance of leaseholds for value by beneficial owner; (C) with those on mortgage; (D) with covenants on mortgage of leaseholds; (E) on settlement; and (F) on con-

veyance by trustee or mortgagee; *Basaruddi v. Enajuddi*, 2 O.W.N. 221 (223).

(2) *Mammikkutti v. Pushakkal*, I. L. R., 29 Mad., 353 (357).

(3) *Ib.*, p. 356.

BUYERS.

LIABILITIES.

(1) To disclose any fact materially enhancing the value of the property unknown to the seller (omission to disclose which is fraudulent). (5) (a).

(2) To pay its price at the time and place of completing the sale. (5) (b).

(3) To bear any loss arising from destruction or depreciation from the date the property passes to him; (5) (c).

And pay any incumbrance charge or rent from the date the property passes to him. (5) (d).

RIGHTS.

If price is paid beforehand, he has a charge on the vended property. (6) (b).

If the seller refuses to convey, he has a similar charge for the earnest paid and costs if any, incurred in a suit for specific performance. (6) (b).

To receive all rents and profits from the date of sale (6) (a).

1012. It will be observed that by these rules no party to the contract can take unfair advantage of the other party's ignorance. And since the contract is based upon conditions to be mutually fulfilled, it is assumed that if parties do not contract themselves out of this section, they must be held to be subject to its rules which are based upon equity and good conscience. This section, however, is by no means exhaustive, for there are other circumstances under which a sale is void or voidable. Thus, in a case of fraud, the transaction may be set aside at the instance of the party defrauded. And if the buyer purchases in ignorance of his title to the property, he is entitled to cancel the sale and recover his purchase money. (1)

1013. It will be observed that the parties are described in the section as buyer and seller even prior to the completion of sale. The term purchaser would thus appear to have been used as denoting a person who has entered into a contract of purchase although it has not been completed by conveyance or transfer. (2) The relations of the parties at this stage are defined in clauses (1) (a) to (g) and clauses (4) and (5), while in some other clauses, the same terms are used to define their relations under the conveyance.

1014. Meaning of Words.—“*In the absence of a contract to the contrary*” implies the existence of a contract the terms of which are *inconsistent* with any specified provision of the section (3) A superadded contract does not affect the operation of the statutory rights and duties. “*The buyer and seller:*” The terms are used in the first clause (1) (a)—(g) in the sense as denoting persons who have entered into a contract for sale. They develop into full transferees in clauses—(2), (3) and (6), “*Rules . . . or such of them as are applicable to the property sold,*” but not *mutatis mutandis*.

The meaning of words used in clauses (1) to (6) will be found discussed in the ensuing commentary.

1015. Rights under Express Contract.—The section is professedly inapplicable to cases in which all or some of the terms of a sale have been expressly stipulated, but as before remarked, in order to exclude the operation of these

(1) *Bingham v. Bingham*, 1 Ves. S. 126.

(2) *Bombay Tramways Co. v. Bombay Municipal Corporation*, 4 Bom. L. R., 384

(405).

(3) *Webb v. Macpherson*, 1. L. R., 31 Cal., 57 (72). P. C.

statutory provisions, the contract, covenant or agreement must be inconsistent with the continuance of the right, (1) that is, the express covenant must be so clearly inconsistent with the statutory rules as to lead to the inference that it had been made to qualify the generality of the law. In the latter case, the section becomes inapplicable *pro tanto*. But in order to exclude the operation of the statutory liability, the express stipulation must be clearly and unambiguously expressed. As Knight Bruce V.C. observed, "when a vendor sells property under stipulations which are against common right and places the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself" (2) Moreover, in order to exclude the statutory covenant, the stipulation must be clearly inconsistent with it. Such would be the case where the vendor stipulates for payment of the purchase money before the Registering officer which would supersede payment in accordance with clause 5 (a) of this section. (3) So where the sale was made in consideration of a sum of money, part of which was paid down, the balance being payable with interest by annual instalments, for which the purchaser had executed an agreement, and the question was, whether in view of this agreement the vendor could still claim a charge on the property declared in clause 4 (a). The High Court held that the express contract had the effect of extinguishing the charge, but the Privy Council held that inasmuch as the contract made was not inconsistent with the retention of the charge, it did not have that effect: "In their Lordships' opinion, there is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge." (4) In construing an express contract entered into between parties it is always a question of intention to be collected from the language used with reference to the surrounding circumstances. (5) And the rule is not different where the transferor is the Crown, for in the words of Westropp, C. J., "upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject." (6) So "when a vendor sells property under stipulations which are against common right, and places the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." (7) (§§ 336-347). It need scarcely be added that the rules applicable to the construction of a statute are widely different (§§ 4-9). So where the vendor covenanted for title, and contracted to indemnify the vendee against any loss caused by

(1) Cf. *Expressum facit cessare tacitum*. what is expressed makes what is silent to cease; *Webb v. Macpherson*, I.L.R., 31 Cal., 57 (72), P.C.: *Jiwraj v. The Norwich Assurance Co.*, 5 Bom.L.R., 853.

(2) *Seaton v. Napp*, 2 Coll., 556 (562) 63 E. R. 862; cited and followed in *Digambar v. Nishabala*, 8 I.C. 91 (95).

(3) *Vythinatha v. Bheemachariar*, 8 I.C. 804.

(4) *Per Lord Davey in Webb v. Macpherson*,

I.L.R., 31 Cal., 57 (72) P.C.

(5) *Conservator v. Nagardas*, [1875], B.P. J., 230; *Re Antaji*, I.L.R., 18 Bom., 676; *Dadoba v. Collector*, 3 Bom.L.R., 603 (620).

(6) *Conservator v. Nagardas*, [1875], B.P. J., 230; *Dadoba v. Collector*, 3 Bom.L.R., 603 (620).

(7) *Per Knight-Bruce, V.C.*, in *Seaton v. Napp*, 2 Coll., 556; followed in *Dadoba v. Collector*, 3 Bom.L.R., 603 (618).

himself his heirs and representatives or from any one, and the vendee was dispossessed by a pre-emptor, the vendor was bound by his covenant to make good the loss so caused to his vendee. There is, of course, nothing unlawful in a stipulation for refund of purchase money if the purchaser be dispossessed by Government. ⁽¹⁾

1016. Where the Government sold a plot of land to a purchaser stipulating that it would be assessed at the rate of nine pies per square yard per annum, the rate so fixed could not be enhanced thereafter on the ground that the enhancement was, or would be justifiable by an Act regulating it, nor will the Government be heard to say that the contract must be construed to be subject to the incidents of the Act, or that the purchaser must have known that there was an Act to regulate land assessment. And so, where the purchaser was explicitly informed by the Collector that the assessment would be at a certain rate without even hinting that it would be liable to enhancement in the future, the fact that the deed of sale was expressed to be "subject to the payment of taxes, rates, charges, assessments leviable or chargeable in respect of the premises, or anything for the time being thereon," does not justify the Government in raising the assessment. Such a view is justified both on the ground of the collateral contract as well as of estoppel, as creating and encouraging in the purchaser as a reasonable man the belief that having paid its full value, the land would not be re-assessed. ⁽²⁾ And even in the case of an area encroached upon, the levy of the maximum rate in respect of the encroached area would preclude its enhancement. "The Collector could have either removed the encroachments and resumed the land, or proceeded under the section. ⁽³⁾ When adopting the latter alternative, he proposed that the plaintiff's father should retain possession of the plot upon payment of five times the value of the land and five times the ordinary land revenue and a fixed amount as annual ground-rent, and the plaintiff's father was allowed to remain in possession under it, there was a proposal and there was an acceptance amounting to a contract by which the Government and the plaintiff are bound." ⁽⁴⁾

1017. In another case, the plaintiff negotiated with the defendant's agent for the purchase of a house to carry on his preparatory school for boys. The defendant's agent was aware of the purpose for which the house was required and informed the plaintiff, in answer to an inquiry on this point, that there were no restrictions preventing the house from being used for that purpose. The plaintiff asking to see a deed of covenant of 1851, subject to the provisions of which the house was to be sold, was told that it contained nothing that would interfere with the carrying on of a school. The plaintiff thereupon entered into a contract for the purchase of the house. The deed of conveyance of 1851 after prohibiting certain offensive and noisy trades and business, provided that there should not be carried on "any trades and business or occupation whatsoever whereby any unwholesome or offensive or disagreeable smell or gas or unwholesome, or offensive or disagreeable matter, deposit, or fluid or any injurious or offensive or disagreeable noise, or nuisance shall, or may be collected, occasioned, caused or made." The plaintiff on coming

(1) *Vagadhu v. Haddu Maharanna*, 1 M.W. N. 502; 7 I.O. 870.

(2) *Dadoba v. Collector*, 3 Bom. L. R., 603 (615); *Jethabhoy v. Collector*, 1. L. R., 25 Bom., 714 (745).

(3) Refers to S. 26 of Bom. Act II of 1876

(Bomay City Land Revenue Act) which provides for charging an encroacher with five times the value of the land and fixing an assessment at five times the usual rate.

(4) *Jethabhoy v. Collector*, 1. L. R., 25 Bom., 714.

to know this, declined to complete his purchase and demanded the return of his deposit. This being refused, he brought an action for rescission of the contract and for recovery of his deposit with interest. It was held that the covenants could not be limited to trades or business *ejusdem generis* as those previously specially mentioned, and that although the agent's representation may not have been fraudulent and might have been caused by the agent wrongly construing the deed or making a legal mistake, the contract was liable to be rescinded.⁽¹⁾ A mortgagee assigned his mortgage-deed in favour of his creditor, with the covenant that he shall not be liable for any defect in the claim so transferred or for any sums of money that may not be recovered. The assignee sued on the mortgage, but withdrew his suit on discovering that it had been attested by only one witness instead of two witnesses as required by law.⁽²⁾ He then sued the mortgagee-assignor for a declaration that the contract of assignment was void and for a return of the consideration. But his suit was dismissed on the ground that the assignor was sufficiently protected by his covenant.⁽³⁾ It was said that as the covenant referred to any defect "in the claim transferred" and not merely in the title of the vendor, it included such a legal defect as was afterwards discovered in the claim though at the time of the assignment, both parties were under a mistake as to the requirement of law rendering the mortgage inoperative and void. But where the vendor, after declaring that he had made no gift, etc., of the property, and that if on account of any such encumbrance, any damage was sustained by the purchaser, the vendor would indemnify him, adding that if damage was sustained from any other cause, he would not be liable, the court held it to be insufficient to negative the operation of the statutory covenant.⁽⁴⁾ So, on the other hand, where the vendor covenanted for title and contracted to indemnify the vendee against any loss from himself, his heirs, and representatives, or from any one, and the vendee was dispossessed by a pre-emptor, he was held entitled to compensation under his covenant.⁽⁵⁾

1018. A collateral contract is always admissible to elucidate the deed if it is silent or professedly inexhaustive.⁽⁶⁾ Thus in the case above noted, the taxes which are "leviable or chargeable" being not specified, the evidence of a collateral agreement was rightly admitted.⁽⁷⁾ But such a case is quite distinguishable from that in which oral evidence is sought to be admitted to contradict the written deed. So, no evidence is admissible to shew that a deed of sale was really meant to be a deed of gift and not a deed of sale.⁽⁸⁾

Where the language of an instrument is clear, the court cannot allow parties to rectify it by adding some words, which would qualify its meaning. Thus where the vendor conveyed "all estate, term and interest" in a certain

(1) *Wanton v. Coppard*, [1899], 1 Ch., 92; following *Tod Heally v. Benham*, 40 Ch. D., 80.

(2) S. 59 post.

(3) *Sada Kavaur v. Tadepally*, I.L.R., 30 Mad., 284 and dissenting from the *Madras Deposit and Benefit Society Ltd. v. Oonnammalai Ammal*, I.L.R., 18 Mad., 29; following *Tafaluddi v. Mahar Ali*, I.L.R., 26 Cal., 78.

(4) *Digambar v. Nishihala*, 8 I. C. 91 (95).

(5) *Khonmon Bibi v. Shah Mali*, (1908), P. R. No. 111; *Guroprasad v. Narendra*, 1 I. C. 361 (362); *Hira Lal v. Bansidhar*, 2 I. C. 262.

(6) S. 4 (a) proviso 2 and ill. (g) (h) Indian Evidence Act (Act I of 1872); *Ambica Prasad v. Galstaun*, 18 C. W. N. 326; *Khetsidas v. Shib Narain*, 9 C. W. N. 178.

(7) *Dadoba v. Collector*, 3 Bom. L. R., 603 (621); following *Bank of New Zealand v. Simpson*, [1900], A. C., 182; *De Lassab v. Guildford* [1901], 2 K. B., 213.

(8) *Rahiman v. Elahi Baksh*, I. L. R., 28 Cal., 70; distinguishing *Shewab Singh v. Asgur Ali*, 6 W. R., 267; *Walee Mahomed v. Kumur Ali*, 7 W. R., 428; *Lala Himmat Sahai v. Flewhellen*, I. L. R., 11 Cal., 486.

land, shown red in the conveyance, and the purchaser afterwards found that the vendor had no interest in that portion of the land, and claimed damages for breach of covenant for title, the vendor's contention that he had conveyed what interest *if any* he had in the lands, and that he was not liable in damages if he happened to have no right was negatived, nor was his prayer for the rectification of the instrument by the insertion of those words conceded. It was further laid down that so long as the conveyance was clear and definite as to the lands conveyed, it was not open to the vendor to prove that the purchaser had notice of the diminution in their quantity. (1)

1019. Of course, this only applies to cases in which there is nothing in the context to indicate a different construction. Thus the words "should any one put forward a right or claim, or cause obstruction or hindrance, or make a quarrel or disturbance in connection with this watan land, I and my heirs and representatives are to answer for the same," especially when preceded by the words reciting that possession had been already made over to the vendee must not be construed to import more than a covenant for quiet possession which would necessarily come into operation only when the purchaser is evicted after he has been once put in possession. (2) No doubt, a clause is often inserted that possession has been made over, even in transfers where the vendor had no possession to give, but the insertion of the clause is important in determining what the parties really intended, namely, whether the covenant made was for title or for quiet possession, for if the parties had intended that the seller was to be answerable for the purchaser's failure to recover possession from the trespasser, he would not state in the deed that possession had been already given. (3)

1020. An express covenant excluding the operation of the section could not be made so as to exclude the equitable rights of the vendee. Such a covenant, even if made, would be relieved against. Thus, in a recent English case, certain property of which measurements and boundaries were described, belonging to the defendant was put up to sale. The particulars of sale contained a condition that "the property is believed and shall be taken to be correctly described in the particulars as to quantity or otherwise, and if any error, mistake, misstatement or omission in the particulars be discovered, the same shall not annul the sale nor shall any compensation be allowed by the vendors to the purchaser in respect thereof. The plaintiff purchased it at the auction, signed the particulars and paid a deposit. It was subsequently found out that there was defective title to nearly one-fourth of the land sold, and the plaintiff asked for a return of the deposit and rescission of the contract. The defendant contended that by virtue of the terms of the particulars, the plaintiff was not entitled to either relief, and that he was entitled to claim specific performance. It was held that specific performance could not be ordered, and that the plaintiff was entitled to rescind the contract and to have the deposit returned. (4)

1021. It is quite usual in Indian conveyancing to acknowledge the receipt of consideration before it is actually paid, and it may be a question whether such a

(1) *May v. Platt*, [1900], 1 Ch., 616; following on the question of notice—*Cato v. Thompson*, 9 Q.B.D., 616; *Page v. Midland Ry. Co.*, [1894], 1 Ch., 11. As to parol variation, *Woolam v. Hearn*, 7 Ves., 211; *Davies v. Fitton*, 2 D. & W., 225, cited.

(2) *Ardeshtir v. Vajesang*, 3 Bom. L. R., 190 (197); following *Nagardas v. Ahmed Khan*, 1 L.R., 21 Bom., 175.

(3) *Ardeshtir v. Vajesang*, 3 Bom. L. R., 190 (197).

(4) *Jacobs v. Revell*, [1900], 2 Ch., 858.

statement estops the party who makes it. (1) Certain it is that if the statement has remained unchallenged for long after completion of the transaction, it will not be allowed to be controverted. So, consideration is presumed in a document twenty years old. To inquire into consideration in such a case would only be to invite the fabrication of evidence. (2)

1022. A purchaser cannot be compelled to pay interest for delay under a condition that the purchaser in default shall pay interest on the remainder of his purchase-money, if the delay is shewn to have been occasioned by the default of the vendor. Damages may be recovered by a purchaser from his vendor for delay in completing the purchase, if the delay is occasioned by default of the vendor, and not in consequence or want of, or defect in title or in consequence of conveyancing difficulties, but by reason of the vendor not having used reasonable diligence to perform his contract. (3) If the parties stipulate that the purchaser should get the rents and profits after payment of the purchase-money, the covenant would be given effect to, otherwise the purchaser would only get rents and profits as from the date of completion of sale. (4) The name of the purchaser should be clearly given in the conveyance, but if it is not, it does not thence follow that the sale would not take effect.

1023. Court Sale how far different.—There is the widest possible difference between a voluntary sale and a sale by court, as in execution of a decree. (§§ 1064, 1065). Such sales must, however, be distinguished from those held by the authority or with the sanction of the Court, as where it authorizes a trustee or receiver to sell the property. (5) In the one case, the sale is made by the Court, and it confirms it and issues a sale certificate whereas in the other case the seller is the trustee or the receiver, and the court merely sanctions it acting under its statutory powers. In such cases, the trustee or receiver is merely the sole agent of the owner and conveys only such title as the owner possessed in the property. He himself warrants nothing except that he himself has not incumbered the property, and the owner, unless he joins in the sale cannot be held liable upon any implied covenants, as he himself was no party to it. (6) In such cases, all that the vendee purchases is the right title and interest of the owner as at the date of the sale. Similarly, in execution-sales, the law is that when the judgment-debtor has a saleable interest, however small, the purchaser buys at his own risk, and there being no warranty that the property will answer to the description given of it, the purchaser is entitled to no relief, if it does not correspond to the description. (7) But if there be a total failure of consideration, as when the judgment-debtor has no saleable interest whatever in the property, the sale will then be set aside, and the purchaser may obtain a refund of his purchase-money. (8) But, if the judgment-debtor had a saleable interest however small

(1) It does not enlarge limitation under Art. 116 of the Limitation Act., *Seshachala v. Varada*, 1 L. R., 25 Mad., 55 (59); *Kotappa v. Vallur*, I.L.R., 25 Mad., 50.

(2) *Rahim Baksh v. Rahim Baksh*, [1901], P.L.R., No. 44.

(3) *Jones v. Gardiner*, [1902], 1 Ch., 191.

(4) *Empress Spinning and Weaving Co. v. Athaides*, 7 Bom. L.R. 845.

(5) The distinction between Court sales i.e. those made by the Court and those made under it is recognized by Fletcher, J. in *Gulam Hossein v. Fatima Begum*, 6 I. C. 300; dissenting from *Minetunnessav. Khatoonnessa*, I.L.R. 21 Cal., 479 in which Sale, J.

appears to have overlooked the distinction.

(6) *Darb*, vendors and purchasers (7th ed.) 569; *Williams*, vendor and purchaser (2nd ed.) 657; 25 Halsbury's laws of England. § 996, pp. 463, 464.

(7) *Sonatan Das v. Mohiram*, I. L. R., 28 Cal., 235 (237); *Sundara v. Venkatavaradar*, I.L.R., 17 Mad. 228.

(8) *Sonaram v. Mohiram*, I.L.R., 28 Cal., 235 (237); *Shanto Chandra v. Nain Sukh*, I.L.R., 23 All., 355; *Mhd. Rahmatullah v. Bachu*, 2 A.L.J.R., 244; *Sumer Chand v. Wahid Husain*, 3 A.L.J.R. 819; *Rustomji v. Vinayak*, 12 Bom.L.R., 723 (729).

if the property, the auction-purchaser must abide by his bargain and cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest. (1) The only thing sold in an execution-sale is the right, title and interest of the judgment-debtor as these existed at the date of the sale, and, of course, subject to all equities then existing. (2) The plea of purchase without notice affords him no protection. (3) An auction sale, even after it is confirmed may be set aside for fraudulent concealment of a material particular. And so it has been held that though a purchase which has received sanction of the court will not be set aside on slight grounds, still, if the sanction of the court was obtained by misrepresentation or by the withholding of material information, or if the information obtained is misleading, the court will treat such misrepresentation or withholding as fraud, and will act accordingly. (4) And it is immaterial that the vendee had accepted the title after full inquiry, or that he had paid the full purchase-money. (5) But apart from fraud, an auction-purchaser is not entitled to even compensation for a deficiency in area, though he is entitled to a corresponding abatement of rent. (6) A purchaser of a dwelling-house at a Registrar's sale accepted the conditions of sale, whereby he was required to furnish requisitions and objections, if any, within a fortnight after delivery of the abstract (and in this respect, time was of the essence of the contract) and he was not entitled to call for any other documents except those abstracted for, or for the originals of documents of which the vendor had only copies, and was to accept the title, as shewn in the abstract of title. By the abstract it was represented to the purchaser that he was purchasing the entire sixteen annas of the house and premises. The purchaser accepted the title as shewn in the abstract and paid the balance of the purchase-money into court without reserving any right to object to the title. He then applied to be discharged from such purchase and for leave to withdraw the purchase-money from court on the ground that he had subsequently discovered that only an eight-twelfth share of the house had been sold to him, and that he had been misled into making the purchase by the misrepresentations contained in the conditions of sale and the abstract of title. It was held that although there was no fraud on the part of the vendor, he knew or had the means of knowing that the sixteen annas share of the property could not be sold, and on the purchaser's allegations, the court would not enforce the contract. (7) But a clear and definite statement by an auctioneer at the time of sale verbally correcting a material misdescription in particulars, disentitles the purchaser to enforce specific performance with compensation for that misdescription even if he had not heard that statement. (8) Again, a sale-certificate being subject to the maxim "*falsa demonstratio non nocet*," (9) any error therein occurring has not the effect of vitiating the sale. In case of doubt, a sale-certificate and order must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree

(1) *Shanto Chandra v. Nain Sukh*, I.L.R., 23 All., 355; *Mhd. Rahmatullah v. Bachu*, I.L.R., 27 All., 537.

(2) *Sobhagchand v. Bhaichand*, I. L. R., 6 Bom., 193 (202); *Magantal v. Shakra*, I. L.R., 22 Bom., 945; *Peer Mahomed v. Mhd. Ebrahim*, I.L.R., 29 Bom. 234.

(3) *Peer Mahomed v. Mhd. Ebrahim*, I.L.R., 29 Bom., 234 (239).

(4) *Boswell v. Coakes*, 27 Ch. D., 424 (454); *Atmaram v. Balkrishna*, 7 Bom.L.R., 653.

(5) *Upendra Nath v. Obhoy Kali Dasse*, 5

C.W.N., 593 (599); *M'Culloch v. Gregory*, Kay & Johns, 286.

(6) *Doyal v. Anrita Lal*, I.L.R., 29 Cal., 370; distinguishing *Kissory Mohan v. Kali Charan*, 1 C.W.N. 106.

(7) *Upendra Nath v. Obhoy Kali Dasse*, 5 C.W.N., 593.

(8) *Manser v. Back*, 6 Hare, 443; *Hare & O'Moris's Contract*, [1901], 1 Ch., 93.

(9) *Goodtitle v. Gibbs* 5 B & C 718; *Tribboondas v. Krishnaram* I.L.R. 18 Bom. 283. *Bhayaalal v. Dwarka*, 15 C.P.L.R., 163.

under which the sale took place, as well as the proceedings leading up to it. (1) With regard to the date when a sale is deemed to be complete, it has been held in Madras that it is deemed complete at the date of the purchase, and not at the date of its confirmation by the court, (2) but a different view has been taken in Allahabad, where the purchaser's title is held to date from the date of the certificate. (3) And a similar rule prevails in England, where the sale is considered as complete only from the date of the sale certificate. (4) But with respect to involuntary sales, the law and procedure in England is on many points widely divergent. (5)

1024. Although a mortgagee selling the mortgaged property in exercise of his power of sale is not a trustee for the mortgagor, (6) still since he sells what is not his own property, the statutory covenants here set out are not necessarily implied, in such a sale. (7) The only covenant that is implied is that the mortgagee has done nothing to incumber the property mortgaged to him: for the rest, *caveat emptor*. (8)

1025. Seller must Disclose material Defects.—Under the old English rule, the seller was, in the absence of warranty or active deceit, under no obligation to the purchaser to disclose to him any defects patent or latent in his title or property, the purchaser being presumed to take care of himself and to satisfy himself as to the property he was purchasing: *caveat emptor*; *qui ignorare non debuit quod jus alienum emit*. (9) This rule was in some cases said to refer only to patent defects. (10) It was in course of time confined within still narrower limits, till the exceptions made to it grew so many as "well nigh to eat up the rule." (11) Any how, its application was still further curtailed by the passing of the Conveyancing Act. (12) And this section may be said to have reduced its importance to a vanishing degree. (13)

1026. "Material Defects."—Adverting now to the covenants which

law fastens upon the contract of parties, the first clause enjoins on the seller the duty of informing the purchaser of any "material defect" in the property of which the seller is, but the purchaser is not cognizant, and which defect the purchaser could not have for himself discovered. A similar duty is cast upon the purchaser to disclose to the buyer any fact enhancing the value of the property of which he is, but the seller is not cognizant. (14) Strictly speaking, the vendor is bound *in foro conscientiæ* to acquaint the purchaser with all defects, but law does not take such a stringent view of the vendor's obligation, but only visits with its penalty a vendor guilty of non-disclosure of material defects in the property. But even then his liability is not unqualified, for it is conceded that he is not bound to disclose defects which the purchaser could have with ordinary care discovered for himself.

(1) *Akhoy Kumar v. Bejoy Chand*, I.L.R., 29 Cal., 813.

(2) *Ahamad v. Raman*, I.L.R., 25 Mad., 99, F. B.

(3) S. 316, Civil Procedure Code; *Amir Kazim v. Darbari*, I.L.R., 24 All., 475 (476); *Gobind Ram v. Tulsi Ram* (1887), A.W.N., 217; *Premchand v. Purnima*, I.L.R., 15 Cal., 546.

(4) Sugd., 101; *M'Culloch v. Gregory*, 2 Eq. R., 108.

(5) As to which see Sugd., 93 (Ch. III.)

(6) S. 69 Comm.

(7) *Suliman v. Palaneappa*, (1910), 3 Bur. L.R. 29; 8 I.C. 605.

(8) For the incidents of such sale generally see S. 69 Comm. post.

(9) Hole, 99; Let a purchaser beware, who ought not to be ignorant that he is purchasing the right of another;" This rule was applied, for example, in *Keats v. Earl of Cadogan*, 10 C. B., 591; *Cook v. Waugh*, 2 Giff., 201.

(10) *Lowndes v. Lane*, 2 Cox, 363.

(11) *Eichholz v. Bannister*, 34 L.J.C.P. 105.

(12) 44 & 45 Vict., C.41.

(13) *Basaruddi v. Enajuddi*, 2 C. W. N., 222.

(14) S. 55 (5) (a).

Now, since defects known as *patent* defects, are susceptible of such a discovery, it follows that the vendor is not bound to acquaint the purchaser with them. (1) But a vendor aware of *latent* defects is bound to disclose them to the purchaser. And by "material defects" in the clause, it is no doubt intended to convey such defects as are so described in the English law, according to which defects may be either patent or latent. To the former class belong such defects as may be discovered by ordinary vigilance on the part of the purchaser; as, for example, the existence of an open footpath over the property (2) or the ruinous state of buildings, while latent defects are such as the greatest attention would not enable the purchaser to discover: (3) as, for example, the existence of defects in a ship's bottom when sold afloat. (4) In England, and it would appear under this clause also, the vendor must disclose all latent defects in the property even although he may have stipulated to sell it *with all faults*. (5) And he cannot get rid of his liability by referring the purchaser knowingly to an ignorant agent, for he would be bound by a fraudulent registration of a fraudulent conveyance by his agent. (6) Where the purchaser was referred to an ignorant agent who innocently denied the existence of defects, the House of Lords ruled the contract to be voidable at the option of the purchaser. (7) If a vendor has been guilty of fraud within the meaning of section 17 of the Indian Contract Act, by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase-money. Such a case does not fall within the exception to section 19 of the Contract Act. (8) In such a case the purchaser may, at his option, sue to recover only damages. (9) Misrepresentation on the part of the seller is equally fatal. (10) Thus, where the purchaser informed the vendor of his object in buying, and the vendor kept silent as to the unsuitability of the property for the purpose, it was held that his silence being as eloquent as words were equivalent to misrepresentation. (11). And it amounts to the same thing if the vendor acquiesces in the self-deception of the purchaser, although the latter might, with reasonable care or inquiry, have disabused his mind of the false impression. But in such a case, the want of proper caution may be evidence to show that the vendor was not under the belief that the purchaser was deceived. (12)

1027. The term "material defect" includes in this clause not only defect

Material defect includes defect in title.

in the state, but also in the title. (13) And this is in accordance with section 7 of the English Conveyancing Act. (14) The seller is bound to disclose to the buyer the defective title under which he may hold the property, and

(1) See §§ 1030, 1031.

(2) *Grant v. Munt*, G. Goop., 177; *Keates v. Earl Cadogan*, 10 C. W., 591; *Ashburar v. Sewell*, [1891], 3 Ch., 405. But not a right of way. *Turner v. Moon* [1901], 2 Ch., 825; *The Great Western Ry. v. Fisher*, [1905], 1 Ch., 316 (321).

(3) *Sugd.*, 838; *Dart.*, 101.

(4) *Mellish v. Motteux*, Pea. N.P., 156.

(5) *Schneider v. Heath*, 3 Camp., 506; *Bighhole v. Walters*, *ib.*, 156.

(6) *National Exchange Co. v. Drew*, 2 Macq., 108 (145); *Mullem v. Müller*, 22 Ch. D., 194.

(7) *Dart.*, 103.

(8) *Morgan v. The Government of Baidara-*

bad, 1.L.R., 11 Mad., 419.

(9) *Gajapathi v. Alagaa* 1.L.R., 9 Mad., 89.

(10) *Edwards v. Wickwar*, 1 Eq., 403; *Re Marsh and Earl Granville*, 24 Ch. D., 11 (17).

(11) *Brownlie v. Campbell*, 5 App. Cas., 925 (950).

(12) *Dart.*, 104, 105.

(13) *Essa Suleman v. Dayabhai*, 1.L.R., 20 Bom., 522; *Basruddi v. Enajuddi*, 1.L.R., 25 Cal., 258; *Peares Mohun v. Abdool*, 7

W. R., 258; *Basruddi v. Enajuddi*, 2 C. W.N., 222 (223); *Specific Relief Act (I of 1877)*

ss. 17 & 18; *Krishnan v. Kannan*, 1.L.R., 21 Mad., 8.

(14) 44 & 45 Vict., C. 4, set out in 1009 ante.

his omission to do so would be fraudulent. Thus, where the seller conceals from the buyer the existence of a decree upon the house sold, the latter was held entitled to the damages claimed, the seller's non-disclosure being deemed under this section to be fraudulent.⁽¹⁾ So, if the property sold is subject to such a covenant or easement as may materially diminish its enjoyment, the court will refuse specific performance against the purchaser.⁽²⁾ Indeed, it is distinctly laid down in the second paragraph that the seller shall be deemed to contract with the buyer that the interest which he professes to transfer subsists, and that he has power to transfer the same. It is the duty of the vendor to inform the purchaser if the property is incumbered⁽³⁾ or is held on a lease by another person, which may postpone his immediate enjoyment. So, if the property is subject to a right of way or other easements, it is his duty to disclose it.⁽⁴⁾ Any fact calculated to keep the purchaser in ignorance of the real state of the property is a defect for which the vendor is liable. In this respect, this clause corresponds with section 150 of the Indian Contract Act, which lays down a similar rule derived from the Roman law,⁽⁵⁾ where the rule is thus stated: "The seller must suffer the sale to be rescinded, or give compensation in the option of the buyer, if the thing sold has faults (unknown to the vendor) that interfere with the possession and enjoyment of it."⁽⁶⁾ If the seller knows of the faults and conceals them, he is guilty of bad faith (*dolus*), and is liable even for consequential damage."⁽⁷⁾

1028. But, where misdescription of property does not affect the essence of the contract, the sale will not as a rule be annulled, but adequate compensation will alone be awarded. Where a house was sold with the kitchen attached, but no kitchen was in fact attached to the house, it was held that the absence of a kitchen detracted from the value, and comforts of a residential house, but that at the same time the misdescription was not of sufficient importance to justify annulment of the sale.⁽⁸⁾ As a rule, the question what misdescription will be sufficient to annul the sale is one of fact and depends upon the view of the court as to the importance of the misdescription.⁽⁹⁾ And while the court is not reluctant to refuse to specifically enforce a contract misdescribed or tainted with misrepresentation, it is loth to rescind it after its completion, unless a case of misrepresentation and fraud is clearly made out, or an error in *substantibus* sufficient to annul the whole contract is clear.⁽¹⁰⁾

1029. The vendor of a leasehold property is bound to disclose the existence of onerous and unusual covenants, or at least afford the purchaser an opportunity of inspecting the leases, which liability is not discharged by a stipulation in the lease that "the vendor's title is accepted by the purchasers." A lease so made still postulates the disclosure of onerous and unusual covenants, and the non-disclosure of which would entitle the purchaser to rescind the contract and to have the deposit returned with interest.⁽¹¹⁾

(1) *Gajapathi v. Alagia*, I.L.R., 9 Mad., 89.

(2) *Heywood v. Malladien*, 24 Ch. D., 357.

(3) *Contra* laid down by Aikman J. in *Bishan Das v. E.* 2 A.L.J. 268. (270) is, (submitted) obviously incorrect.

(4) *Great Western Ry. v. Fisher*, [1905], 1 Ch., 316; *Turner v. Moon*, [1901], 2 Ch., 825.

(5) *Hunter's Roman Law*, p. 498.

(6) *Dig.* 19, 1, 13, 146.

(7) *Dig.* 19, 1, 13, see *Hunter's Roman Law*, p. 498.

(8) *Administrator-General v. Aghore Nath*, 6 C.W.N., 873; O.A., reversing *Administrator-General v. Annoda Frosad*, 4 C.W.N., 504.

(9) *Fawcett v. Holmes*, 42 Ch. D., 150; *Administrator-General v. Aghore Nath*, 6 C.W.N., 873 (875).

(10) *Baslingapa v. Virupaxapa*, 5 Bom. L. R., 392; following *Brownlie v. Campbell*, 5 App., Cas., 916 (937).

(11) *In re Hædicke and Lipskin's Contract*, [1902], 2 Ch., 666.

The clause only refers to the liability of a vendor who stands in no fiduciary relation to his purchaser. Where it is so, there may be *uberrima fides* as in a transaction between co-partners for the sale by one to the other of a share in the partnership business, it being then the duty resting upon both the vendor and purchaser to let each other know all material facts with reference to the partnership assets and not to conceal information in his exclusive possession.⁽¹⁾ Non-disclosure of such information may lead to avoidance of sale which may be set aside at the instance of the party from whom the information was withheld.

A defect in title will render the vendor liable to damages independently of any fraud on his part.⁽²⁾ In this respect, the law is the same in England, where it is not necessary to aver fraud to obtain damages for the conveyance of defective title.⁽³⁾

1030. The seller being bound to disclose only such defects as "the buyer could not with ordinary care discover," and having regard to the definition of notice given before (§§103—170), it follows that the seller is relieved of his duty in this respect in cases where the buyer could have with ordinary care discovered the defects himself (§ 1026). For the purpose of bringing the buyer within this exception, it is necessary to shew that either from the nature of the property or from any other circumstance, the seller was in a position to learn about the defects he had inquired. Thus, in the case of a legacy, it is the duty of the buyer to inquire, whether it is free from all claims in respect of the testator's estate,⁽⁴⁾ and in the case of an equitable estate, whether it is free from incumbrance.⁽⁵⁾ But, where the purchaser has little or no time to complete inquiries, he cannot be estopped on the bare ground of his negligence, especially when the vendor has contributed to it.⁽⁶⁾

The covenant for title need not be embodied in the sale-deed. All the terms which the law implies being regarded as a part of the written contract, a suit for damages would fall under Article 116 of the Limitation Act and not under Article 115.⁽⁷⁾

1031. But while the buyer is entitled to be apprised of the material defects in the property offered to him, and in default to certain remedies, these vary in accordance with the discovery made before or after the conveyance of the property to him. It is settled that where the purchaser discovers defects in the property before it is conveyed to him, he can either rescind the contract,⁽⁸⁾ or successfully resist a suit for specific performance.⁽⁹⁾ Where, however, the defect is not such as to materially diminish enjoyment of the property, sections 14 to 17 of the Specific Relief Act provide for both specific performance and compensation. If the property sold is incumbered, the purchaser may compel his buyer to redeem it before conveyance.⁽¹⁰⁾ Grant of specific relief being

(1) *Madderford v. Austwick*, 1 Sim., 89; *Law v. Law*, [1905], 1 Ch., 140 (157).

(2) *Essa Suleman v. Dayabhai*, I.L.R., 20 Bom., 522, and cases above cited; Sugd., 5.

(3) *Waddell v. Wolf*, 9 Q.B., 515; *Mostyn v. The West Mostyn Coal, &c., Co.*, 1 Q.P.D., 145; *Nottingham Brick Co. v. Butler*, 16 Q.B.D., 778.

(4) *Noble v. Brett*, 24 Beav., 499.

(5) *Bridge v. Beaulon*, L.R., 3 Eq., 664.

(6) *Babaji v. Forest Officer*, (1887), B. P. J., 23.

(7) *Krishnan v. Kannan*, I.L.R., 21 Mad., 8.

(8) *Hyde v. Warden*, 3 Ex. D., 72; *Reeve v. Berridge*, 20 Q.B.D., 523.

(9) *Caballero v. Henty*, L.R., 9 Ch., 447.

(10) Specific Relief Act (I of 1877), s. 18 (c).

discretionary with the court, it may be granted or refused according to the circumstances of each case.⁽¹⁾

If the buyer discovers material defects *after the conveyance*, he will have to make out a stronger case for setting it aside. In one case, it was held that nothing short of a fraud will entitle him to do so.⁽²⁾

1032. As to mere laudatory expressions used by a vendor with reference to

his property, the modern rule is the rule of the civil law—*Puffing praise*. "*Simplex commendatio non obligat*."⁽³⁾ So that mere puffing advertisements and laudatory expressions, such as that an estate, sold as a renewable leasehold, is "nearly equal to freehold,"⁽⁴⁾ that a house of mean character is "a desirable residence for a family of distinction," or that land, in fact imperfectly watered "is uncommonly rich water-meadow land," will not, however objectionable they may be in point of morality, render the contract voidable by the purchaser, although their tendency would doubtless be to indispose the court to enforce specific performance at the suit of the vendor.⁽⁵⁾ Where the purchaser is aware that the vendor's laudatory statements are false, and yet enters into a contract, the maxim "*caveat emptor*" would apply. Thus, where the purchaser acquired a coal-mine stated to be standing on a fine vein of coal, and the purchaser knew that it had been worked and was almost exhausted, the maxim was held applicable.⁽⁶⁾ Similarly, where the vendor assured the purchaser that a person had bid a particular sum for the estate, in consequence of which the purchaser was induced to raise his bid and was deceived in the value, it was held that an action for deceit could not be maintained.⁽⁷⁾ Nor can a purchaser detain any relief against a vendor for false affirmation of value; for value consists in judgment and estimation, in which men may differ.⁽⁸⁾

Where the defects concealed are not *material*, but are trifling, the contract cannot be absolved, as for example, where the house being declared to be tenantable, it was found to have some boards or joists rotten, or some panes of glass broken.⁽⁹⁾

1033. Seller must produce his Title-deeds —Title-deeds relating to

property have been aptly called the sinews of the land,⁽¹⁰⁾ and must be shewn to the intending purchaser so as to enable him to investigate the title for himself and to satisfy himself as to its character. But the vendor is not bound to exhibit his deeds unasked, but on the purchaser calling for them, he is bound to produce not only the deeds in his possession but also those which he can procure. "A prudent purchaser, says Dart, "will enquire for the title-deeds, and demand a satisfactory explanation if any of them are not forthcoming. His omission to make such an enquiry may perhaps fix him with notice of an equitable mortgage by deposit."⁽¹¹⁾ But while the vendor is under liability to produce them for inspection by the seller or anyone on his behalf, he is not bound to *deliver* them to him before completion of the sale.⁽¹²⁾ In England, however, while this is no doubt true, the vendor is bound to deliver a copy of the abstract which he has to prepare at his own

(1) *Ib.*, s. 18.

(2) *Brownlie v. Campbell*, 5 App. Cas. 949.

(3) A mere commendation creates no obligation—*Dowd* 85.

(4) *Fenton v. Browne*, 14 Ves., 144.

(5) *Dart*, p. 110.

(6) *Colby v. Gadsden*, 34 Bing., 416.

(7) *Sugd.*, 2.

(8) *Duckenfield v. Whichcott*, 2 Ch. C. 204.

(9) *Sugd.*, 384.

(10) *Co. Litt.*, 6a.

(11) *Dart*, p. 520.

(12) *Sugd.*, 29.

expense, for even though he may be otherwise willing to deliver his title-deeds for inspection, the purchaser is not bound to wade through them ; and may insist upon an abstract. (1) But such a practice does not obtain, and cannot be insisted upon in India. Where the estate is held in undivided shares, the owner of any share may compel his co-sharer in possession of the deeds to produce them for the satisfaction of his purchaser. (2) The deeds may be produced at the vendor's own residence, and if they are elsewhere required by the purchaser, he must bear the expenses of all journeys incidental to such production. (3) If the seller refuses to produce his title-deeds for inspection, the purchaser may compel him to do so through the Court. But the vendor's liability in this respect is only confined to the production of only those documents which affirmatively evidence the vendor's title, and does not extend to those not in his possession, and which are required to negative mere possibilities. (4)

1034. Of course, this statutory duty of the vendor to produce his title-deeds for examination may be superseded by a stipulation between the parties dispensing with their production. (5) This clause based on the English rule (6) is far from exhaustive. It does not state where the deeds are to be produced, at whose expense, and how far is their non-production vital to the contract. As regards the place, it is the rule in England for the vendor to produce them at his own residence (7) or upon or in the vicinity of the property, or in London where the title-deeds are ordinarily lodged with the town solicitors. (8) No such practice, however, obtains in India. The vendor may perform his obligation by procuring the purchaser an inspection of them, at the residence of any third person, provided the purchaser's expense is not thereby increased. And the purchaser could not object to attend at several places, if they were within a reasonable distance. But, if they are not available within that distance, the seller is then bound to pay for the additional expense of the journey. (9) The deeds required to be produced must be the original deeds and not the copies ; but where the originals are not available as in the case of wills and records, the seller must then produce certified copies or extracts as the case may require. In the case of a crown grant, it would appear to be sufficient if the seller informs the purchaser where it may be seen. (10)

1035. A seller holding an undivided share may compel the other shareholder to produce the deeds for the purchaser's inspection. (11)
Who must give inspection. A mortgagee in possession of the deeds is equally bound to afford inspection (12) to the mortgagor who may take copies of or make extracts therefrom, so long as he has the right of redemption. But where the deeds have been deposited with a solicitor who acquires a lien upon them, he is not bound to show them to or at the instance of his client

(1) *Ib.*, 407.

(2) *Lambert v. Rogers*, 2 Mer., 490 ; *Burton v. Neville*, 2 Cox, 242.

(3) Contract Act, 1881, s. 3 (6).

(4) *Dart.*, 627.

(5) *Re Jonson & Tustin*, 30 Ch. D., 42.

(6) S. 3 (6) Conveyancing Act, 1881.

(7) *Sugd.*, 429.

(8) *Sugd.*, 429.

(9) *Hughes v. Wynne*, 8 Sim., 85.

(10) *Sugd.*, 431, *Dart.* 472.

(11) *Thorpe v. Holdsworth*, L. R., 7 Eq., 139 (150).

(12) S. 16, Conveyancing Act, 1881 ; prior to which, however, the mortgagee was under no such obligation. *Sparks v. Montriou*, 1 Y. & C., 103 (107), in which Lord Kenyon advised a mortgagee to put his deeds into a box and sit upon it, until the money was put into his hands.

unless the lien is removed.⁽¹⁾ A mortgagee has no right to retain the mortgaged-deed or keep a copy thereof on redemption.⁽²⁾ The vendor of mortgaged property must then be able to produce the mortgage-deed in token of its having been satisfied, and a purchaser who relying thereupon purchases the property as unincumbered, may be protected against any claim which the mortgagee may make on the basis of the deed which he had negligently suffered the mortgagor to retain with him.

In case of dispute, the courts in England are armed with power to compel the production and inspection of documents,⁽³⁾ and the same power may, it is conceived, be exercised by the courts in this country.

1036. A mere omission to call for and inspect deeds is ordinarily not equivalent to constructive notice to a subsequent transferee who has acted *bona fide*, but if the abstention from inquiry amounted to wilful blindness, as where it was not made, in order that the fact of the deposit might not be disclosed, notice would then be naturally imputed.⁽⁴⁾ But apart from this, in a struggle for priority, a prior inequitable mortgagee is in no way better off than a subsequent purchaser, for while the latter has obtained a conveyance without the deeds, the former had obtained the deeds without the conveyance.⁽⁵⁾ But the omission to inquire is still a factor in determining priority,⁽⁶⁾ inasmuch as it may be evidence of a design, inconsistent with *bona fide* dealing,⁽⁷⁾ which, taken along with other circumstances may lead to a presumption of notice.

1037. A few observations on the proper inspection of deeds may here be appended. In England, and the Presidency towns in this country where the English form of conveyancing is prevalent, an abstract of the title is prepared to enable an intending purchaser to investigate the vendor's title. Where this is done, all that remains is to verify the abstract and see that nothing material has been omitted, and that the documents are correct, as execution, attestation, stamps and registration, and that there are no indorsements as that the executants had denied execution or receipt of consideration of any other fact casting a cloud on the title. The deeds should invariably be read through, for the purchaser would be affected with notice of their contents, and may be bound by any covenants contained therein.

1038. Vendor bound to answer relevant Questions.—This clause is taken from Dart's work on vendor and purchaser,⁽⁸⁾ which however gives a fragmentary statement of the vendor's liability to prepare a correct abstract, particulars and conditions which are the necessary accompaniment of a sale. Unless the parties have agreed otherwise, the vendor is bound to answer all relevant questions put to him in respect of the property which he has contracted to sell or the title thereto. But the purchaser's omission to ask questions does not relieve the vendor of his liability to disclose material defects. Thus, where a dwelling-house and office were

(1) Cf., *Sheffield v. Eden*, 10 Ch. D., 291.

(2) S. 60, para. 1, *post*.

(3) S. C., Order 31 of 1883; Cf 25 & 26 Vict. C. 89, s. 115 as to the power of the Chancery Court under the Companies Act, 1862.

(4) *Whitbread v. Jordan*, 1 Y. & C., 303, which was a case of wilful abstention from inquiry and has been so explained; *Manners*

v. Mew, 29 Ch. D., 725; and the cases therein cited.

(5) *Sudg.*, 767; *Manners v. Mew*, 29 Ch. D., 725.

(6) *Ratcliffe v. Barnard*, L. R., 6 Ch., 652.

(7) *Agra Bank v. Barry*, L. R., 7 H. L. 195.

(8) *Dart.*, p. 167.

put up for sale by auction under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature, and the printed particulars made no mention of any easement, or of any claim to an easement, and as the result of evidence, it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forbore to make inquiries and in the auction-room said that he had heard of some such claim, but had no definite information about it, whereupon the auctioneer told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again. But it was held that the conditions were misleading and the statements in the auction-room insufficient to put the purchaser on enquiry; and the vendor's suit for specific performance was accordingly dismissed, and the repayment of the deposit by the purchaser with interest was decreed. (1) The questions asked by the purchaser must be specific and direct, and not merely vague and general. Thus, for example, the seller is not bound to answer a general question like the following:—"Is there to the knowledge of the vendors or their solicitors any settlement, deed, fact, omission, or any incumbrance affecting the property not disclosed by the abstract?" (2)

1039. But it should be remembered that whatever statement the vendor makes, will be strictly construed against him. Where the purchaser inquired whether a good and marketable title could be made, and the vendor replied that a good title could be made under the existing conditions the statement was construed to be sufficiently specific to hold the purchaser to his bargain. (3) Where, however, the contract has been reduced into writing, no parol evidence *dehors* the document can be admitted, as between the parties to the contract. (4) But, the defendant to a suit for specific performance is not precluded from giving evidence of any particular statement made by the other party and which had influenced his contract. (5) The seller is bound to acquaint himself with the peculiarities and incidents of his property in order to avoid material misdescription, for his omission in this respect will be inexcusable. A misdescription of boundaries or of the restrictions to the enjoyment of property, as for example a right of common, or of sporting, or a right to dig mines, may entitle the purchaser to rescind the contract. So, again, the vendor must be careful to state the covenants or other burthens on the property. And common prudence dictates that there should not be any error as to the conditions of the sale, as to whether the sale, if by auction, is without reserve, and whether the vendor reserves the right to withdraw any lots from sale.

In England, the vendor ordinarily delivers to the purchaser a copy of the abstract of title to the lot purchased by him, but the observance of this practice cannot be insisted on in India. Instances have been already given of cases in which the vendor's misdescription or omission would be fatal to the contract. (§§ 1067—1068).

1040. The only questions which the vendor has to answer must be (a) relevant, and must relate to (b) the property or (c) the title thereto. In England, all questions relating to the title sixty years back would be relevant, but no such artificial limit

What questions are excluded.

(1) *Heywood v. Mallalieu*, 25 Ch. D., 357.

(2) *In re Ford and Hill*, 10 Ch. D., 365.

(3) *Hyde v. Dallaway*, 4 Beav., 606.

(4) S. 92, Indian Evidence Act.

(5) *Dart.*, p. 125.

has been placed upon the investigation of the vendor's title. At the same time, it is inconceivable that the vendor should be held liable to assist the purchaser in investigating the title beyond that period, if the root of the title goes so far back. The vendor must show every document that forms a link in the chain of titles, (1) but he is under no obligation to answer questions of an inquisitorial nature, if they do not relate to the property or the title. Again, the vendor may by stipulation as to title exclude all inquiry relating thereto. But such stipulations must be clear and unequivocal. (2) So, where the vendor stipulated that he would convey such title as he had received from A, (3) or that his title should be accepted without dispute, (4) or that it should not be inquired into, or that the purchaser should accept such title as the vendor has, or that the sale was of "all his right, title, and interest, (5)" in all of which cases, the clause would cease to apply. But a condition that the title should commence with a deed of a certain date, and that no earlier or other title should be required or inquired into by the purchaser, was held by Fry, J., not to preclude the purchaser from insisting on an objection to the prior title, which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. (6) Such a condition, observed Fry, J., "precludes the purchaser from doing two things: first, from making any requisition on the earlier title, and secondly, from making any inquiry into it. It does not preclude the vendor from disclosing or admitting some blot on his title about which the purchaser does not inquire. (7) As a rule, if the facts are fully disclosed, their legal effect need not be stated. (8) The purchaser may again be precluded by his own conduct from complaining of a blot on his title, if he has rushed into the transaction without previous inquiry, or having had an opportunity, has failed to avail himself of it, in which case, he has to thank himself if he is entrapped: *qui vult decipi, decipiat*. (9) So, where the conditions on the face of them purport to give only a holding title, the purchaser on being relieved from them is not entitled to have more than a good holding title. (10) But in placing an embargo upon inquiry, the vendor cannot ask the purchaser to assume that which the vendor knows not to be true, for the utmost that can be asked of the purchaser is that he shall assume something of which the vendor knows nothing. (11) Hence a condition of sale is bad, as misleading, (a) if it requires the purchaser to assume what the vendor knows to be false; (b) if it states that the state of the title is not accurately known when in fact it is known to the vendor. (12)

1041. The court always regards with jealousy conditions thwarting reasonable inquiry into title, and in some cases, it may even break through the conditions on the ground of fraud, if it is satisfied that the vendor had brought a title to market, with a condition that the purchaser shall accept it. (13) The

(1) *In re Stanford, &c., Contract*, [1900], 1 Ch., 287.

(2) *Seaton v. Mapp*, 2 Coll., 556 (562); followed in *Motivahoo v. Vinayak*, 1 L. R., 12 Bom., 1 (17); *Haji Mahomed v. Musaji*, 1 L. R. 15 Bom., 667.

(3) *Wilmot v. Wilkinson*, 6 B. & C., 506.

(4) *Duke v. Barnatt*, 2 Coll., 337.

(5) *Tweed v. Mills*, L. R., 1 C-P., 99 (45).

(6) *Smith v. Robinson*, 13 Ch. D., 148 (151).

(7) *Smith v. Robinson*, 13 Ch. D., 148 (151) (152); following *Waddell v. Wolfe*, L. R., 9 Q. B., 515; *Jones v. Watts*, 43 Ch. D., 574, *In re Cox and Neve's Contracts*, [1891], 2 Ch.

109; *Mancherji v. Narayan*, 1 B.H.C.R., 77.

(8) *Smith v. Watts*, 4 Dr., 338.

(9) "Let him be deceived who wishes to be deceived."

(10) *In re Banister*, 12 Ch. D., 113 (143); *Smith v. Robinson*, 13 Ch. D., 148; *Rosenberg v. Cook*, 8 Q. B. D., 162.

(11) *Per Jessell M. R.*, in *In re Banister* 12 Ch. D., 131 (143).

(12) *Ib.*, (143) *In re Sandbach and Edmonston's Contract*, [1891], 1 Ch., 99.

(13) *Per Parker V. C.*, in *Eume v. Bentley* 5 Da. G. & S., 527.

ordinary condition of sale giving the vendor a power of rescission applies only where he has some title, and not where he has none. (1)

1042. A condition requiring the purchaser to assume a certain fact, *e.g.*, the death of A, intestate and without heirs, is not misleading if the vendor really believes the fact, although the fact to be assumed is absolutely necessary to the vendor's title. Nor is it necessary to explain in the condition the particular defect which the condition is intended to cover. (2) So, if the purchaser bought property under a strict condition of sale that he should not make any objection as to the intermediate title between a certain lease and the assignment of it, but should assume that the assignment vested a good title in the assignees, and it being afterwards discovered by the purchaser that there was a vital defect in the intermediate title, and that the assignees had no title to the property, it was held that the purchaser was bound by the condition and could not recover his deposit, but that as the vendor could not give a holding title to the purchaser, the court would, in the exercise of its discretion, refuse to decree specific performance of the contract, and would leave the parties to their remedies at law. (3) But on the other hand, when on a sale of a plot of freehold described in the particulars of sale as containing 5a or 26p, the vendor could only shew good title to a part of the property containing 4a. 3r., the purchaser was held entitled to rescind the contract in spite of the following condition: "The property is believed and shall be taken to be correctly described in the particulars as to quantity and otherwise, and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." (4) Where the vendor sold land as "thirty six acres of land," but which was afterwards found to contain forty-two acres, the vendor could not insist on the purchaser to buy or pay for more than the acres purchased. (5)

1043. The least that the vendor has under any circumstance to shew is a good holding title. (6) Where the validity of the sale depends upon the concurrence of the son of the vendor, or the presence of circumstances constituting necessity, and the vendor fails to obtain the concurrence, or the purchaser obtains actual notice of the absence of justifying necessity, the title is one which will not be forced on the purchaser. (7) The giving of vague and indefinite information where the vendor had the means of obtaining precise and definite information does not exonerate him from his liability to the purchaser. (8) The vendor may, however, validly limit the time for objections to the title, or for rescinding the contract, (9) but this restriction only applies to objections that are apparent on the abstract and do not call for extended research. It does not apply where there are grave objections to the title, or where there is no title at all, (10) or where

(1) In *re Deighton & Harris's Contract*, [1898], 1 Ch., 458; In *re Wallis & Barnard's Contract*, [1899], 2 Ch., 515 (520); In *re Hughes & Ashley's Contract*, [1900], 2 Ch., 595 (602).

(2) In *re Sandbach & Edmondson's Contract*, [1891], 1 Ch., 99.

(3) In *re Scott & Alwares's Contract*, [1895], 2 Ch., 603; discussed in *re Wallis & Barnard's Contract*, [1899] 2 Ch., 515 (520); In *re Hughes & Ashley's Contract*, [1900], 2 Ch., 595 (602).

(4) *Jacobs v. Revell*, [1900], 2 Ch., 858.

(5) *North v. Percival*, [1898], 2 Ch., 128.

(6) *Sazby v. Thomas*, [1891] W.N. 28; *Belamy v. Debenham*, [1891], Ch., 412.

(7) In *re Verrell's Contract*, [1903], 1 Ch. 65.

(8) *Heywood v. Mallalieu*, 25 Ch. D., 357; *Nottingham Brick Co. v. Butler*, 16 Q. B. D., 778.

(9) *Blackburn v. Smith*, L. R., 2 Ex., 783; but in *Hardman v. Child*, 28 Ch. D., 712, Pearson, J., animadverted upon the extension of the condition to objections to conveyance.

(10) *Ward v. Dickson*, 5 Jur., N. S., 698; *Motivahoo v. Vinayak*, I. L. R., 12 Bom., 1.

through the vendor's fraud or misrepresentation, the defect could not be discovered. (1) In short, such a condition would only be upheld in the case of frivolous, or unreasonable inquiry on the score of expense or for some other sufficient reason. (2)

1044. The plea of the purchaser as to non-disclosure may be met by the vendor by shewing that the former had clear notice of the state of the title before he entered into the contract, (3) or that he might have discovered it by inquiry (4) (§§ 119, 123, 124). "But if the contract expressly provides that a good title shall be shewn, then, inasmuch as a notice by the vendor that he could not shew a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title." (5) It is *prima facie* the duty of a vendor to disclose all that is necessary to protect himself, and not the duty of a purchaser to demand inspection of the vendor's title-deed before entering into a contract. Where, therefore, on a sale of leaseholds by auction, the particulars and conditions of sale contained no statement as to the nature of the covenants in the lease, which were in fact onerous, nor any notice that the lease was open to inspection at the office of the vendor's solicitors or elsewhere, it was held that the purchaser was not affected with constructive notice of the covenants, and that he had not had a fair opportunity of inspecting the lease, and was therefore not bound to complete the contract. (6)

1045. Execution of Conveyance.—The duty of the vendor to execute a conveyance when the buyer tenders it for execution is in accordance with the English rule. (7) It is to be noted that, on completion of the sale, it is the duty of the purchaser to prepare the conveyance and of the vendor to execute it. (8) This clause is silent as to which party is to bear the cost of conveyance, but it would appear that this clause being a reproduction of a similar clause in the English Conveyancing Act, 1881, the expenses incidental to it, would, here, as in England, be borne by the purchaser. For this duty is enjoined on the purchaser, and presumably the party charged with a duty must perform it himself or pay for its performance by another. So it is expressly provided by the Indian Stamp Act (9) that in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne by the grantee of a conveyance. And it may be presumed that the party who bears the expense of stamp is also liable to pay for its engrossment and registration. For as stated by Jessel, M. R.: "An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct." (10) It is, for instance, within his competence to require the vendor to convey in parcels by separate conveyances at one and the same time, if the

(1) *Nelthorpe v. Holgate*, 1 Coll., 203; *Price v. Macauley*, 2 De., M. & G., 347

(2) *Greaves v. Wilson*, 25 Beav., 290.

(3) *Mancharji v. Narayan*, 1 B. H. C. R., 77.

(4) *Peto v. Hammond*, 30 Beav., 495; *Morland v. Cook*, L. R., 1 Eq., 252 *Patman v. Harland*, 17 Ch. D., 353.

(5) *Per Fry, J.*, in *In re Gloag & Miller's Contract*, 23 Ch. D., 320 (327); *Page v. Midland Ry. Co.*, [1894], 1 Ch., 11; *Ardeshtyr v. Vajesing*, I. L. R., 26 Bom., 693, *Manishanker v. Ram Krishna*, 6 Bom., L. R., 832; *Ram*

Chunder v. Dwarka Nath, I. L. R., 16 Cal., 330 (342); *Pathoo Lal v. Radhika*, 3 N. W. P. H. C. R., 106.

(6) *In re White & Smith's Contract*, [1896], 1 Ch., 637.

(7) Sugd., 240, 241; *Dart.*, p. 570.

(8) *Muthia v. Kasivari*, 12 I. C., 78 (79)

(9) S. 29 (c), Indian Stamp Act (II of 1899). The same provision was made in S. 29 (c) of the old Stamp Act (I of 1879)

(10) *Egmont (Earl of) v. Smith*, 6 Ch. D., 469 (474).

purchaser requires him to do so and pays for the conveyances to be so executed. (1) But, while the purchaser has to pay for the preparation of his conveyance, he is not bound to pay for the expense that may be necessary to obtain concurrence of all necessary parties other than the vendor, such as mortgagees or incumbrancers which must be paid for by the vendor. (2) The draft of the conveyance should, before its execution, be sent to the vendor or his advisers for perusal. If the draft, after its acceptance by the vendor, is in any way altered, it should be communicated to the other party before conveyance. (3) The conveyance must be executed not only by the vendor, but also all other person whose concurrence is necessary to give to the purchaser undisputed title. (4) Persons are often made parties to a conveyance so as to affect them with notice of its contents and to preserve indisputable evidence of notice. (5) The vendor need not execute a conveyance unless the purchaser pays or tenders the purchase-money. The time and place of payment or tender would be regulated by sections 46 to 50 of the Indian Contract Act. The execution of the conveyance by the vendor and the payment of price by the purchaser are, however, in law presumed to take place simultaneously, and if the vendor before hand signifies his refusal to execute the conveyance, the purchaser need not tender the purchase-money, or a draft of the conveyance. (6)

1046. It is not usual to prepare the conveyance till the terms of the

Proper time and place of conveyance.

contract have been finally settled and the purchaser has accepted the title, but the preparation of a conveyance does not necessarily imply acceptance of the title, although it is undoubtedly a circumstance from which it may be inferred

that the parties had arrived at a stage of proceeding subsequent to the question of title. (7) All persons whose concurrence is essential to give validity to the sale must be parties to and execute the conveyance. Thus a mortgagor, selling property as unincumbered, must procure the concurrence of his mortgagees, the expense of which falls on the vendor. (8) Persons merely concurring must be so described in the deed. (9) It is not necessary that the purchaser be present at the time of the execution of the sale deed, (10) but its execution must be attested by witnesses, though this is by no means a rigid legal requirement. The time for executing the conveyance is usually fixed by the parties by mutual consent, but where no time is fixed, the conveyance must be executed within a reasonable time. (11) The question, what is a reasonable time, is in each case a question of fact. (12) Where the vendor is not to execute the deed without application by the purchaser, it is then the latter's duty to apply for execution of the conveyance at a proper place and within the usual hours of business. (13) Ordinarily the conveyance must be executed at any time which the purchaser prescribes or sanctions (14) (§ 983). Where the vendor has to convey without application by the purchaser and no place is fixed, it is the duty of the vendor to apply to the purchaser to appoint

(1) *Egmont (Earl of) v. Smith*, 6 Ch. D., 469.

(2) S. 18 (b), Specific Relief Act (I of 1877); Sugd. 561; Davidson Prec. Conv. (5th Ed.) 477-479.

(3) *Staines v. Morris*, 1 V. & B., 15.

(4) Specific Relief Act (I of 1877), 18 (b).

(5) Dart., p. 580.

(6) *Essaji v. Bhinji*, 4 B.H.C.R. (O.C.) 125.

(7) *Burroughs v. Oakley*, 3 Swan., 159,

Sugd., 345, and cases therein cited, Dart., 497, 571.

(8) *In re Sander & Walford's Contract*, (1900), W.N., 183.

(9) *Carter v. Carter*, 3 K. & J., 634.

(10) Dart., 741.

(11) S. 46, Indian Contract Act (IX of 1872).

(12) *Ibid.*, S. 46, Expl.

(13) S. 48, Indian Contract Act (IX of 1872).

(14) *Ibid.*, S. 50.

a reasonable place for the performance of the promise, and to perform it at such place.⁽¹⁾ What is a proper place, is in each particular case a question of fact.⁽²⁾ In the case of sale of moveable property, it is enacted that in the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for delivery.⁽³⁾ So, in the case of immoveable property when a conveyance has to be executed, it is the party in whose favour it has to be executed who should tender it to the other. A contract to convey "as soon as possible" has been construed to mean "within a reasonable time," which again means such time as would be considered reasonable, having regard to the circumstances of the case,⁽⁴⁾ that is, the ordinary circumstances as distinguished from some fortuitous impediment which will not excuse the vendor.⁽⁵⁾

1047. If the property being subject of the sale is accidentally destroyed, the vendor can convey nothing and the purchaser can recover no compensation, for the contract having depended upon the existence of the property ceases to exist as soon as the subject-matter is destroyed.⁽⁶⁾ If the conveyance is prepared before the title is accepted, and it is then discovered that the vendor had no title, the expense of conveyance cannot be recovered, for it should not have been prepared before the title is accepted.⁽⁷⁾ Nor can he recover expenses preliminary to contract, such as the costs of survey. But he may recover the cost of searching for judgments, and for comparing the abstract with the deeds.⁽⁸⁾ And if the vendor had concealed the objection to title, the existence of which prevented the completion of the purchase, the purchaser may then recover all expenses.

If the conveyance be accidentally destroyed, the vendor must reconvey to the purchaser, and he would be compelled upon a re-sale to join in a conveyance to the new purchaser.⁽⁹⁾ Mistakes in the conveyance may be corrected by the executant before its execution, and even afterwards with the consent of both the parties.⁽¹⁰⁾ If the purchase goes off, the stamped paper belongs to the purchaser, if it was made over by him to the vendor for execution. The vendor may, however, cancel it before delivery.⁽¹¹⁾ In any other case, the vendor has the right to retain it with him until the purchase-money is paid or tendered, unless this is a condition which the parties have by common consent dispensed with. The attorney of either party appear to have no lien on the deed for his general costs of preparing it.⁽¹²⁾

Prudence dictates that a conveyance should be presented for registration immediately after its execution. In any case, it must be presented within four months of its execution,⁽¹³⁾ and it is only in special cases that its delay up to eight months would, subject to a penalty, be condoned.⁽¹⁴⁾ The purchaser may compel the vendor to make good a defective conveyance.⁽¹⁵⁾ And where he has conveyed a defective title which is afterwards made perfect, he may be compelled to convey it to the purchaser.⁽¹⁶⁾

(1) *Ibid.*, S. 49.

(2) *Ibid.*, S. 48 Expl.

(3) *Ibid.*, S. 93.

(4) *Allwood v. Emery*, 1 C. B. (N. S.), 110; *Hydraulic Engineering Co. v. Mettalfie*, 4 Q. B. D., 670.

(5) *Adams v. Royal Mail Co.*, 5 C. B. N. S. (492).

(6) *Taylor v. Caldwell*, 33 L. J. Q. B. 164; *Appleby v. Myers*, 2 R. 2 C. P., 651.

(7) *Jarmain v. Egleston*, 5 Cr. & P., 172; *Hodges v. Litchfield*, 1 Bing M. C., 492.

(8) *Sugd.*, 362.

(9) *Bennet v. Ingoldsby*, Finch, 262.

(10) *Staines v. Morris*, 1 Ves. & B., 15.

(11) *Esdaile v. Ozenham*, 3 Bar. & Cr., 225; *Ozenham v. Esdaile*, 2 Y. & J., 493 3 Y. & J. 262.

(12) *Ib. Pelby v. Wathen*, 1 De. G. M. & G. 16.

(13) S. 23, Indian Registration Act (III of 1877).

(14) *Ib.*, S. 34.

(15) Ch. III (Ss. 31-34), Specific Relief Act (I of 1877).

(16) S. 43 *ante*.

1048. To take Care of the Property before Conveyance.—

Cl. (1) (e).

Between the date of the contract and the delivery of the property, the vendor is enjoined to take the same care of the property as an owner of ordinary prudence would take care of it. In other words, the vendor must take the same care of the property as a trustee would of the property of his *cestui que trust*.⁽¹⁾ Indeed, under English law, it is clearly laid down that the vendor is "*pro tanto* a trustee in possession for the purchaser, although he holds the purchaser at arm's length, and a trustee, therefore, who is bound to do those things which he would be bound to do if he were a trustee for any other person."⁽²⁾ Hence, if the vendor is guilty of waste or other misfeasance, he would be liable for damages as if on a breach of trust.⁽³⁾ He is, however, a trustee only to a limited degree, for having a personal and substantial interest in the property, he has a right to protect, and if necessary to assert that interest. While, therefore, the relation of trustee and *cestui que trust* does subsist, it is subject to the paramount right of the vendor to protect his own interest as vendor of the property.⁽⁴⁾ This obligation begins to arise as soon as the purchaser has paid his purchase-money though he has got no conveyance and even when instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow as a necessary corollary, that to the extent to which he has paid his purchase-money, he is a trustee for him.⁽⁵⁾ But he is not bound to deliver possession of the property, until the sale is completed. Indeed, until completion of the sale, and so long as it is *in fieri* the relation is not even strictly that of trustee and *cestui que trust*. But, when the contract is performed by actual conveyance or performed in everything but the mere formal act registering the sale-deed, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*.⁽⁶⁾ But even as a trustee he has peculiar duties and liabilities to perform—indeed, all trustees have not the same duties and liabilities.⁽⁷⁾ The position of the vendor in this respect is closely analogous to that of the mortgagee in possession.⁽⁸⁾ As is the latter, so is the former enjoined to take reasonable care of the property so as to prevent its destruction and deterioration, by its being damaged by the tenants, or by any one else. This only arises after the date of the contract, and the purchaser is entitled to claim compensation, or even damages for allowing the property to deteriorate. But, in any other case the purchaser is not entitled to the profits or income from the date of the contract, though his right commences from the date appointed for completion. From the date of the contract, however, the vendor is liable to account for the profit wrongfully made and for the deterioration suffered. But his liability must be traced to his wilful acts or at least negligence. Thus, if the property sold be a house in the possession of tenants, the purchaser is entitled to damages in the nature of compensation for loss of a tenant, the measure of which would be the rent lost. If the vendor had contracted to sell it with vacant possession, he cannot allow the tenant to hold over, for the purchaser may then say: "Exercise your right; first turn the man out, and then

(1) Indian Trusts Act (II of 1882), s. 15.

(2) *Per* Lord Selbourne, L. C., in *Phillips v. Silvester*, L. R., 8 Ch., p. 177; see also *Lysaght v. Edwards*, 2 Ch. D., 506.

(3) *Clarke v. Ramaz*, [1891], 2 Q. B., 456. Indian Trusts Act (II of 1882), s. 23.

(4) *Shaw v. Foster*, I. R., 5 H. L., 321 (338). In *Nilkamal v. Gunomani*, 7 B. L. R., 113 P. C. it was said that the vendor though liable for mesne profits, was not in the position of a trustee of the rent for the party

kept out of possession.

(5) *Per* Lord Cranworth in *Rose v. Watson*, 10 H. L. C., 672 (683, 684).

(6) Cf. *per* James, L. J. in *Rayner v. Preston*, 18 Ch. D., 1 (13).

(7) *Egmont v. Smith*, 6 Ch. D., 469 (475); followed in *Royal Bristol Building Society v. Bomash*, 35 Ch. D., 390 (398).

(8) *Phillips v. Silvester*, L. R., 8 Ch., 173; *Royal Bristol Building Society v. Bomash*, 35 Ch. D., 390 (397).

give me vacant possession." (1) The vendor must keep the property in reasonable repair. The question what constitutes reasonable repairs, is, however, a question of fact, the consideration of which depends upon the nature of the property sold and the purpose for which it was obviously transferred.

In the case of property under cultivation or settled on tenants the vendor must not allow it to remain uncultivated, (2) nor must he exhaust it by an improper course of husbandry, or deteriorate it by ejecting tenants, felling trees, quarrying stones or working minerals or diminishing its value by other improvident acts. (3) As the title-deeds in possession of the vendor are considered part of the property, the vendor is as much liable to take care of them as of the property. The vendor, it would appear, is not entitled to charge for his *interim* management, as he is entitled to all the rents and profits until completion of the sale. (4)

1049. To give Possession.—The vendor is bound to deliver possession

of the property to the purchaser. It has already been discussed above as to what constitutes delivery of possession. (§ 970).

"If a purchaser," says Lord St. Leonards, "intends to stipulate for a vacant possession, he should carefully do so; for where upon a sale of an orchard 'now in occupation of *L.P.*,' the purchaser was to complete on a day named, 'when he shall have possession,' it was held that the purchaser was not entitled to the occupation of the orchard, or, in other words, he must take it subject to *L.P.*'s occupation, yet the purchaser, no doubt meant to stipulate for an actual delivery of a vacant possession. (5) The word possession, it was said, is a flexible one and when the property is stated to be in the occupation of a tenant, subject to whose tenancy a purchaser buys, the nature of the contract shows that possession means possession as landlord, but it does not appear what interest *L.P.* had, as he may have been a person holding over adversely, and whom it might be found difficult to eject." (6) It is not necessary that the purchaser should take corporeal possession of the property, or of the title-deeds (7) Of course, the possession required is only such possession as the vendor has, or the nature of the property admits of. Where, therefore, the property sold is the coparcenary interest of a Hindu member of a joint family, specific possession cannot be given unless the other members of the family are parties to the suit. (8) So if the property sold is usufructually mortgaged, (9) or in the possession of tenants (10) the possession will be only proprietary possession. If parties, however, agree to give possession in a particular way, the agreement will be enforced, and possession given in any other way would not satisfy the requirements of law. Thus, where the buyer purchased a public-house, and it turned out to have been let on a lease, he was held entitled to repudiate the contract. (11) When property has once been transferred by a registered instrument, the transfer cannot be cancelled by making an unregistered indorsement to that effect on the back of the sale-deed, since such a document requires registration. And under section 92 of the Indian Evidence Act, oral evidence cannot be given to prove rescission of such contract, (12) though oral evidence would be admissible to prove such rescission by a subsequent contract. (13)

(1) *Per Kekewich, J.*, in *Royal Bristol Building Society v. Bomas*, 35 Ch. D., 390 (394).

(2) *Foster v. Deacon*, 3 Mad., 395.

(3) *Harford v. Purrett*, 1 Mad., 532.

(4) S. 55 (4) (a).

(5) *Lake v. Dean*, 28 Blav., 607.

(6) *Sugd.*, 8.

(7) *Xenos v. Wickham*, 2 H.L.C., 296.

(8) *Abdul Aziz v. Ajudhia*, 15 C.P.L.R. 156; *Rewa Singh v. Hardayal*, 3 N.L.R., 160.

(9) *Mumtaz-un-nisa v. Bhagirath*, 6 I.C. 114 (115).

(10) *Subiman v. Palaniappa*,

(11) *Phillips v. Caldwell*, L.R., 4Q.B., 159.

(12) *Umedmal v. Davi*, I.L.R., 2 Bom., 547. *Srinivasaswami v. Athmarama*, I.L.R. 32 Mad., 281.

(13) S. 92, proviso 4, Indian Evidence Act; *Goseli v. Narasimham*, I.L.R. 2 Mad., 368.

The clause is inaptly worded, and must not be too literally construed. For, taken literally it means that in the absence of a contract, the buyer is entitled to such possession of the property as its *nature* or character admits, *i.e.*, if the property sold be a house, he is entitled to personal occupation, although the house be in the lease of tenants; if a farm, he may claim physical possession, although this may, for a like reason, be impossible. But this is hardly what the clause was intended to convey. What is implied by the phrase "as its nature admits" is apparently such possession as is capable of being taken. Perhaps the substitution of the word "state" for "nature" would have made the sense clear. Of course, it cannot be supposed that the *nature* spoken of was to distinguish tangible from intangible property spoken of in the last section, for even, if so, the same objections to the interpretation would still hold good.

1050. The term "possession" is indeed a flexible term,⁽¹⁾ and as remarked before (§ 970) in determining the question of possession regard must always be had to the character of the property, the purpose for which it was designed, and was intended to be used by the purchaser.⁽²⁾ It does not necessarily import a personal occupation.⁽³⁾ The nature of possession intended to be stipulated may be often gathered from the language of the contract, or it may be inferred from what the parties knew about the property. An orchard sold and described as now "in the occupation of L, P," the possession of which was to be delivered on the day fixed for completion, could not be physically put into possession of the purchaser.⁽⁴⁾ But where the vendor described the house sold as "recently in the possession of F," the language would clearly shew that the contract was for sale of the house with vacant possession.⁽⁵⁾ So, where a brewer purchased a house to be used as a public-house, the inference is that he had bargained for immediate possession, and if he could not obtain it, as if a lease had still to run for several years, he was well entitled to rescind the contract.⁽⁶⁾ So where the sale was of part of joint property, the purchaser can only obtain joint possession of his share.⁽⁷⁾

So there can be no physical possession of incorporeal things. In the Civil Law no *animus domini*, and consequently no true possession could be ascribed to him who enjoyed them, and such enjoyment as consisted of a *jus in re* was designated *quasi*-possession to distinguish it from the true possession which was only possible over tangible things.⁽⁸⁾

1051. As a rule, possession is claimable concurrently with the payment of the purchase-money.⁽⁹⁾ The same rule prevails in the case of the sale of moveable property.⁽¹⁰⁾ But where non-payment of purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser,

(1) *Per* Fry, L. J., in *Lyell v. Kennedy*, 18 Q. B. D., 813. "There is, perhaps, no legal conception more open to a variety of meanings than 'possession.'"

(2) *Morgan v. The Government of Hyderabad*, 1 L. R., 11 Mad., 419. *

(3) *Lake v. Dean*, 28 Beav., 607.

(4) *Ibid.*

(5) *Hughes v. Jones*, 3 De F. & J., 307; followed in *Royal Bristol Building Society v. Bomash*, 35 Ch. D., 390 (394).

(6) *Phillips v. Caldwell*, L.R., 4 Q. B., 159.

(7) S. 44, *ante*.

(8) "*Possessio Corporis*" as distinguished from "*Possessio juris*," which is possession over servitudes. (Savigny's *Possession in the Civil Law*, Kelleher's Ed., pp. 21, 33.)

(9) *Per* Lord Watson in *Prevost v. La Compagnie De Fives-Lille*, 10 App. Cas., 543 (650); an appeal from Canada where the law is settled by the statute which provides in the case of judicial sales: "No adjudication is perfect until the price is paid, and then it conveys ownership from the time of its date. (Art. 706, Civil Procedure Code). *Subrahmanya v. Poovan*, 1 L. R., 27 Mad., 29.

(10) S. 95, Indian Contract Act, (IX of 1872).

and the purchaser, notwithstanding such non-payment can maintain a suit for possession.⁽¹⁾ But in decreeing possession, the court may make it subject to the payment of the purchase-money, fixing a time for its payment, ordering that on failure to pay up within the time so fixed the suit shall stand dismissed.⁽²⁾ On the other hand, the vendor cannot compel the purchaser to pay him the purchase-money, if he is unable to deliver possession. So in a case where on a sale of a sugar factory with fixed machinery, on the distinct footing that the property was sold free of all charges, the property was detained by the customs' authorities until the whole export duties chargeable in respect of the machinery were paid, it was held that whether the claim of the Crown was well-founded or not, the fact that the vendor was thereby prevented from giving possession, relieved the purchaser from his obligation to pay the price.⁽³⁾ If the delivery of possession was contingent upon the fulfilment of any condition, the purchaser must fulfil it before he can claim possession. Such a condition may be either express or implied, as where the vendor sold on the understanding that the purchaser should retain a part of the purchase-money and therewith discharge certain bond-debts due by the vendor for the payment of which such property was hypothecated in the bonds, and on which understanding the conveyance of the same property was executed to the purchaser, in which case, the purchaser could not obtain possession of the property in virtue of the conveyance unless he could shew that the bond-debts had been discharged, or that the covenant had been otherwise fulfilled.⁽⁴⁾

1052. Where the land sold is agricultural, it should be expressly stipulated as to who should cut the standing crops. In the absence of any such stipulation, the purchaser is only entitled to them from the day fixed for the completion of the contract, from which date the vendor would on his part be entitled to get interest on the purchase-money, or any part remaining unpaid.⁽⁵⁾ The vendor has no right to remove the crops in an immature state, or otherwise than in due course of husbandry.⁽⁶⁾ The net profits of crops cut after the time fixed for completion would, it appears, have to be paid to the purchaser.⁽⁷⁾ But although the vendor may cut down coppice wood at its full growth, for that is in due course of husbandry, he must not commit waste, as by cutting down ornamental timber upon a residence, in which case, the purchaser may be relieved from the contract.⁽⁹⁾ But ordinary timber cut down by the seller must be compensated for in money.⁽⁹⁾ The purchaser has the benefit or sustains the loss arising from the improvements made to or deterioration suffered by the property after the contract, if they are not due to the fault of either side.⁽¹⁰⁾ Indeed, unless a special case be made, a vendor in possession cannot be charged with what he might have received, "but for wilful default," and where it is necessary, he may justify reducing the rents; but a seller receiving interest during the delay, would not be permitted to say that because the estate was sold he had not used due diligence in getting in the rents. So, if before the

(1) *Raji Nalle Singh v. Paltu* I. L. R., 30 All. 125; *Shib Lal v. Bhagwan Das*, I. L. R., 11 All. 244; *Umed Lal v. Davu*, I. L. R., 2 Bom. 547; *Sagaji v. Namdar* I. L. R., 23 Bom., 525; *Velayutha v. Govindasami*, 5 M. L. T. 205 (1909).

(2) *Shib Lal v. Bhagwan Das*, I. L. R., 11 All. 244; *Baiji Nath v. Paltu*, I. L. R., 30 All., 125; *Balakrishna v. Shripat Singh*, 6 N. L. R. 98 (101); *Nilmadbab v. Hbrapreshad*, 20 I. C. 325.

(3) *Prevost v. La Compagnie De Fives-*

Lille, 10 App. Cas., 643.

(4) *Ikbal Begum v. Gobind*, I. L. R., 3 All., 77; such an obligation is now presumed; See the next clause [S. 55 (1) (g)].

(5) *Dart.*, 148, 149, 285.

(6) S. 55 (1) (e) *Comm.*, *post*.

(7) *Sugd.* 644, *Dart.*, 285.

(8) *Magenhis v. Fallon*, 2 Moll., 584 (585).

(9) *Sugd.*, 644.

(10) *Shervin v. Shakespeare*, 5 De. G. M. & B., 517; *Regent's Canal Co. v. Ware*, 23 Beav. 575.

purchase tenants quit the lands, the loss falls not upon the vendor but upon the purchaser.⁽¹⁾

1053. Separate Suit for Possession.—The purchaser's right to take possession of the property arises coincidently with the right to the execution of a conveyance by the vendor. If then on the vendor's refusal to execute a conveyance the purchaser brings a suit for specific performance, is he at the same time bound to sue for possession of the property, and if he omits to sue for possession, will his subsequent suit for it be barred under section 43 of the Code? The authorities do not all return the same answer to this question. For while in some cases it has been laid down that a subsequent suit for possession would be barred,⁽²⁾ there are others in which the contrary has been affirmed.⁽³⁾ It must be confessed that the earlier Madras view is too narrow and obliterates the difference between cause and effect, since possession is by no means the sale but a consequence of it. Where the purchaser has to sue a third party for possession on the strength of his purchase, and he is opposed by the plea that his seller's claim for possession had become barred by efflux of time, it would be for the plaintiff-purchaser to shew that his seller would have had a valid subsisting title at the date of his suit.⁽⁴⁾

1054. In the case of a joint sale or joint purchase by two or more vendors or vendees respectively, the rights and liabilities of the parties would be governed by the rules enacted in the Indian Contract Act,⁽⁵⁾ consequently, the purchaser may compel any or all of the joint vendors to perform the several covenants and deliver possession, and conversely any one or more of the joint vendors may compel any one or more of the joint purchasers to pay the purchase-money and comply with the other obligations here implied.⁽⁶⁾ And if the contract is unenforceable against some of the joint contractors, it will not cease to be enforceable against the rest.⁽⁷⁾ So if one of them dies, the contract remains and may be enforced by or against the survivors⁽⁸⁾ without joining the legal representative of the deceased.⁽⁹⁾ But the representative of a vendor or vendee may join in such claim,⁽¹⁰⁾ since the contract is not personal and is both heritable and transferable.

The claim of the vendee for possession arises out of and is the necessary incident of the sale, consequently, if the sale fall through for want of title in the vendor, the vendee's claim for possession necessarily falls to the ground, though there is nothing to prevent him from claiming it in a properly constituted suit, if he is otherwise entitled to it. But if he did not so claim it in the first two courts, and the court of final appeal would not readily accede to his prayer to deliver him possession to which he might be entitled in some other character; e.g., mortgagee.⁽¹¹⁾ The question is entirely one of procedure.

(1) *Hartford v. Purrier*, 1 Mald., 592.

(2) *Narayana v. Kandasani*, I. L. R., 22 Mad. 24.

(3) *Nathu v. Budhu*, I. L. R. 18 Bom., 534 (542); *Veeranna v. Muthukumar*, 13 M. L. J. R., 439; cf. *Rangayya v. Manjappa*, I. L. R., 25 Mad., 491 (1503), P. O.

(4) Art. 142, Limitation Act; *Deba v. Rohitagi*, I. L. R., 28 All., 479; *Kashi Nath v. Shridhar*, I. L. R., 16 Bom., 343.

(5) Ss. 42-45, Indian Contract Act (Act IX of 1873).

(6) *Ramdhair v. Bhagwan*, 11 A. L. J. 746; *Parag v. Jagannath*, 15 I. C. 173.

(7) *Sethu Ram v. Vasanta*, I. L. R., 34 Mad. 314 (319).

(8) *Moti Lal v. Ghellabhai*, I. L. R., 17 Bom., 6 (9).

(9) *Moti Lal v. Ghellabhai*, I. L. R., 17 Bom. 6 (9); *Narayana v. Lakshmana*, I. L. R. 21 Mad., 256.

(10) *Manghe Ram v. Ditta*, (1913) P. L. R., No. 19.

(11) *Kumarasami v. Poosari*, 4 I. O. 37.

1055. Limitation for Possession.—The period of limitation applicable to suits by purchasers to whom possession of the whole or part of the property is not given in pursuance of the sale is that prescribed by Article 144 of Schedule 2 of Indian Limitation Act, (1) and if the suit is to recover damages for non-delivery of possession, then the suit would be subject to the limitation prescribed in Article 116. (2) Symbolical possession is good possession in law and may be used as a shield against the vendor's plea of limitation. A purchaser obtaining symbolical possession may sue his vendor for actual possession within twelve years from the date of obtaining such symbolical possession. (3) But, while such possession is good against the vendor or his assigns, it does not avail against third parties. (4) So, in the case of the sale of property sold by the vendor out of possession at the date of the sale, the purchaser must sue the vendor for possession within twelve years calculated from the date of the original dispossession. This is the meaning of Article 136 of the Limitation Act in which the words "when the vendor is first entitled to possession" relate back to the first date of his wrongful dispossession referred to in the first column of the article. The result is that the vendee gets no longer period to sue for dispossession than his vendor, and that the former gets benefit of it and only so much of the unexpired period of limitation as the vendor, consequently, if the latter has been twelve years out of possession at the date of the vendee's suit, such a suit would be barred. The test then is to see whether the same suit if brought by the vendor would or would not have been barred. To give the vendee a fresh start for limitation would, of course, have wrought mischief, by suggesting subterfuges for enlarging the period indefinitely. (5)

The purchaser of land dispossessed by a stranger may maintain one suit both against him and his vendor—for possession as against the stranger, and refund of purchase-money in the alternative against his vendor. (6) But while the two *may* be proceeded against jointly in one suit, it does not follow, nor is it anywhere provided that the two *must* be impleaded in the same suit. (7) Any omission to do so, therefore, does not vitiate the trial or bar another suit.

The purchaser's suit for damages must be maintained within three years of his failing to obtain possession, that being the period of the failure of consideration. (8)

1056. Payment of all Public Charges.—The liability of the

CI (1) (g). vendor to pay all public charges and rent due thereon up to the date of the sale is in accordance with the English law.

Indeed, the obligation necessarily arises out of the vendor's liability to take care

(1) *Bhanjan Ram v. Solura*, 9 I.C. 238; *Mohinuddin v. Mejlis Rai*, I.L.R., 6 All., 231; *Ram Prasad v. Lokhi Narayan*, I.L.R., 12 Cal., 197.

(2) *Tawala v. Saripalli*, 11 I.C. 337 (338).

(3) Art. 144, Indian Limitation Act (XV of 1877); *Gopal v. Krishnarao*, I.L.R., 25 Bom., 275; *Agarchand v. Rakhma*, I.L.R., 12 Bom., 678.

(4) *Gunga Gobind v. Bhoopal*, 19 W.R., 101, P.C.; *Pearee Mohun v. Jugobundhu*, 24 W.R., 418; *Juggobundhu v. Ram Chander*, I.L.R., 5 Cal., 584; *Lokessur v. Purgun Roy*, I.L.R., 7 Cal., 418; *Juggobundhu v. Purmanund*, I.L.R., 16 Cal., 530, F.B., overruling *contra* in *Krishna Lall v. Badha Krishna*,

I.L.R., 10 Cal. (102); *Gossain v. Bepin Behary*, I.L.R., 18 Cal., 520; *Hari Mohan v. Bahurahi*, I.L.R., 24 Cal., 715.

(5) *Partap Chand v. Sanyida*, I.L.R., 23 All., 442 (445).

(6) S. 27, Specific Relief Act (I of 1877); *Abdul v. Boida Nath*, 6 C.W.N., 315; *Seraful Hug v. Dinabundhu*, 6 C.W.N., 300, following *Hanuman v. Hanuman*, I.L.R., 19 Cal., 123; *Rajohur v. Kali Krishna*, I.L.R., 8 Cal. 963; distinguishing *Mullick v. Sheo Pershad*, I.L.R., 23 Cal., 821.

(7) *Abdul v. Boida Nath*, 6 C.W.N., 315.

(8) Art. 97, Sch. II, Limitation Act (XV of 1877); *Tulsiram v. Murlidhar*, I.L.R., 26 Bom. 750.

of the property as an owner of ordinary prudence, (1) who cannot, as such, fail to pay up the assessment and other cognate charges due thereon, failing which it might be sold out. And so again, since all property is presumed to be sold unincumbered, it is on the vendor to redeem all incumbrances on the property unless the purchaser had purchased it subject to them. This is in accordance with section 18 (c) of the Specific Relief Act which runs thus:—"Where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has, in fact, only a right to redeem it, the purchaser may compel him to redeem the mortgage, and to obtain a conveyance from the mortgagee." And by section 69 of the Contract Act, it is provided that "a person who is interested in the payment of the money which another is bound by law to pay, and who, therefore, pays it, is entitled to be reimbursed by the other." A similar provision is also inserted in the English Conveyance Act, 1881, section 7. By this clause, a covenant that the transfer is free from incumbrance is implied where no stipulation is made to the contrary. It being the vendor's duty to free the property from an incumbrance, he is bound to indemnify the purchaser if the latter has to pay for it. (2) Of course, if he has any purchase-money left unpaid in his hands, he may, under clause 5 (b) of this section, retain it and apply it towards reimbursing himself. And this he may still do, even though the vendor may have assigned the purchase-money to a third person. (3) In the English law, such payments are said to be for "consideration executed upon request," the request to payment being implied from legal obligation imposed upon the vendor. If the vendor is "not bound by law" to pay the amount and the purchaser pays it; he cannot recover it from the vendor. (4) If the former is compelled to pay on account of his own wrongful act, the latter cannot be made to reimburse him. (5) In a case to which this Act was not applied, it was held that in the absence of a special agreement, the vendor was not liable to reimburse the purchaser for payments made by the latter for the former. (6) It may be noted that the payment under this clause must be made in good faith. (7) If it is made with the intention of manufacturing a title to the property, or where it is not a public charge, rent or an incumbrance on such property, the payee cannot claim reimbursement. At least the plaintiff must show that the liability which he has discharged was one in which the defendant was interested. (8) It must not be a purely voluntary payment. (9) The provision of this clause has, by analogy, been applied to the sale of a decree, the purchaser being held entitled to pay off the attaching creditor who had attached it in execution of his own decree. (10)

1057. The duty cast on the vendor to pay all public charges and rents continues up to the date of the sale, by which is no doubt **Cessation of Liability.** meant the date fixed for the conveyance. It would thus appear that if the execution of the conveyance is somehow delayed owing to the negligence of the purchaser, the latter and not the vendor must pay the charges

(1) Cl. (e) ante.

(2) *Manishankar v. Ramkishna*, 6 Bom. L. R., 832.

(3) *David v. Sabin*, [1893], 1 Ch. 523; *Lacy v. Ingle*, 2 Ph., 413.

(4) *Ram Tuhul v. Bisseswar*, 15 B. L. R., 208; *Edmunds v. Wallingford*, 4 Q. B. D., p. 811.

(5) *Pitcher v. Bailey*, 8 East., 171.

(6) *Dost Mohammad v. Saujad*, (1883), I. L. R., 6 All., 67.

(7) *Tiluk Chand v. Soudamini*, I. L. R., 4 Cal., 566; *Pinda Kuar v. Bhonda*, I. L. R., 7 All., 660.

(8) *Desai Himatsingji v. Bhavabhai*, I. L. R., 4 Bom., 643.

(9) *Bama Sundari Dasi v. Adhar Chunder Sarkar*, I. L. R., 22 Cal. 28 (see the other cases therein cited).

(10) *Khetsidas v. Shib Narayan*, 9 C. W. N. 178 : see sub-s. 5, cl. (b) post.

accruing due thereafter. In the absence of any avoidable delay, however, the purchaser becomes liable to meet such charges from the time when "the ownership of the property has passed to the buyer"⁽¹⁾ which should ordinarily coincide with the date of the sale. Now since the vendor's liability ceases with "the date of the sale," public charges and rent may have to be apportioned between the vendor and the purchaser, so that if the date fixed for the payment of the rent falls subsequently to the date of the sale, the purchaser and not the vendor would be primarily called upon to pay it, but, of course, in such a case, the purchaser will be entitled to sue for the payment of his proportionate share by the vendor.

1058. As between the vendor and purchaser the charges payable by the vendor up to the date of sale are those designated "public," such as Government revenue and taxes, municipal taxes and cesses, water-rate, gas bill and the like. A debt, *e.g.*, an agricultural loan by the Government is not a public charge, any more than it is a public debt. But it may be an incumbrance by statute or contract, and then it is the duty of the vendor to discharge it, or to reimburse the person who being interested in saving the property from being sold for non-payment of the revenue pays it.⁽²⁾ Similarly a tax levied under the Local Acts would have to be paid in accordance with the terms of those Acts the provisions of which are uncontrolled by this clause. Where, for example, the house-tax levied under the Madras Municipalities Act is a yearly tax, though payable in instalments, it may be levied from either the vendor or the purchaser, and neither can claim that it shall be apportioned between them.⁽³⁾

1059. The vendor being liable to discharge all incumbrances⁽⁴⁾ on the property subsisting on the date of the sale, it is his duty to notify to all intending purchasers the existence of such incumbrances subject to which the property is sold. If the incumbrance is in favour of the purchaser himself, the latter must stipulate for its discharge, otherwise it may be extinguished by merger. A purchaser paying off an incumbrance which it was the legitimate duty of the vendor to discharge is entitled to be reimbursed by the vendor, but he must not charge more than he paid, as that is the amount of the damage which he sustains by the breach of the covenant to pay off the incumbrances,⁽⁵⁾ although if a purchaser buy in an incumbrance to protect his property at an undervalue, he cannot claim the full amount.⁽⁶⁾ A purchaser paying off a prior incumbrance may hold it as a shield against the claim of any subsequent incumbrancer, unless he had notice of it,⁽⁷⁾ or the prior incumbrance was his own.⁽⁸⁾

It has been held in England, that the principle does not readily commend itself to one's reason, that a purchaser buying property subject to an incumbrance is bound to discharge it, though it be defective.⁽⁹⁾ Thus, if a purchaser buy an estate subject to an annuity which was clearly voidable, he was not

(1) Cl. 5 (d), *post*.

(2) *Dautuluri v. Kanjaluri*, 8 I. C. 435.

(3) *Nellore Municipality v. Kotamma*, I.L.R. 30 Mad., 423 (425).

(4) A debt is not a charge on the property sold (*Latafat v. Young*, 2 W.R. 271); and as such it must be distinguished from what is an incumbrance.

(5) *Sugd.* 555.

(6) *Cane v. Lord Allen*, 2 Dow., 289 (296).

(7) *Toulmin v. Steere*, 3 Mer., 210; *Adams v. Angell*, 5 Ch. D., 634; *Re Cork Harbour Docks Co.*, 17 L. R. Ir., 515; *Gokuldas v. Rambux*, I.L.R. 10 Cal., 1035 P. O.; *Muhamad v. Ghous*, 7 A.L.J. 914 (917) F.B.; S. 101 (q. v.).

(8) *Otter v. Lord Vaux*, 6 De. G. M. & G. 638.

(9) *Watson v. Stanford*, 2 Ver., 279; *Doe v. Archer*, 1 B. & P., 531.

allowed to impeach the annuity.⁽¹⁾ So again, where a purchaser buys a reversion expectant upon a particular estate as subject to the life-estate of A, although it turns out that no such estate is in existence, yet A will be decreed to hold the estate during his life, against the purchaser.⁽²⁾ The rule is said to be grounded upon the principle that "the purchaser taking with notice is bound to complete the contract or to indemnify his vendor against the action, or, in other words, is bound to save him from being sued."⁽³⁾ If so, the doctrine may be narrowed down to this, that the purchaser is bound not to dispute the validity of the interest reserved only in cases where the persons entitled has right to sue for damages.⁽⁴⁾

Since the right of the purchaser to obtain the property freed from incumbrance is unqualified, he is not bound to accept an indemnity for a contingent incumbrance however small the amount or remote the contingency, but, is entitled to have it discharged.⁽⁵⁾ Where property is sold to the vendee who is also occupying it as a tenant and the vendor fails to clear the incumbrance as settled, he has no claim for rent-against the vendee, although a portion of the purchase-money was remaining unpaid, for the sale was complete though a covenant thereof was unfulfilled.⁽⁶⁾

1060. The existence of undisclosed incumbrances before the payment of the purchase-money or execution of the conveyance is, as a rule, no ground for rescission of the contract, since the incumbrancers may be paid off and compelled to join in the conveyance; ⁽⁷⁾ but, it would be otherwise if their concurrence cannot be compelled.⁽⁸⁾ The existence of an incumbrance and the mental incapacity of the incumbrancer have been held to be matters of conveyance and not of title, and as such afford no conclusive defence to a vendor's suit.⁽⁹⁾ But where the existence of the incumbrances or liabilities interfere with the enjoyment of the property, the purchaser may rescind the contract and plead their existence as a sufficient answer to the vendor's suit for specific performance. But the vendor who has agreed to sell his property free from incumbrance cannot plead his inability to convey the property on the ground of the refusal of the incumbrancers to allow redemption, for the vendor will be mulcted in damages, if having contracted to convey his property, he has failed to do so.⁽¹⁰⁾ Such liabilities are the payment of a ground-rent,⁽¹¹⁾ or the existence of rights over the property, such as of mining,⁽¹²⁾ common or sporting,⁽¹³⁾ of waterway with the right of entry for its repairs,⁽¹⁴⁾ and restrictive covenants as to user.⁽¹⁵⁾

(1) *Dowell v. Dew*, 1 Y. & Coll., C. C., 345; *Bannatyne v. Barrington*, G. Ir. Ch. R., 439; Sugd., 752.

(2) *Walton v. Stanford*, 2 Ver., 279; *Doe v. Archer*, 1 B. & P., 531.

(3) *Per Cotton, L.J.*, in *Smith v. Widlake*, 3 C. P. D., 10 (17).

(4) *Prettyman's Case* cited in *Walton v. Stamford*, 2 Ver., 279, explained *per Cotton, L.J.*, in *Smith v. Widlake*, 3 C. P. D., 10 (17).

(5) *In re Weston and Thomas's contract*, [1907], 1 Ch. 244.

(6) *MacDonald v. Wills*, 4 L.B.R., 224.

(7) *Townsend v. Champerdown*, 1 Y. & J., 449.

(8) *Page v. Adam*, 4 Beav., 269; Sugd., 425, Dart., 321.

(9) *Duke of Beaufort v. Glynn*, 1 Jur. (N.

S.), 890. So Lord Langdale said: "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the Court considers it a question of conveyance only; but I think it has never gone further than that."—*Sidebotham v. Barrington*, 3 Beav., 528.

(10) *Nabin Chandra v. Krishna*, 38 Cal. 458 (465).

(11) *Jones v. Runimer*, 14 Ch. D., 588.

(12) *Seaman v. Vawbrey*, 16 Ves., 390; *Upperton v. Nicolson*, L.R., 6 Oh., 436.

(13) *Heywood v. Mallalieu*, 25 Ch. D., 357.

(14) *Goodhart v. Hyett*, 25 Ch. D., 182.

(15) *Nottingham Brick v. Butler*, 16 Q.B.D. 778; cf. *Osborne v. Bradley*, [1903], W. N., 96.

The purchaser is entitled to retain the unpaid purchase-money for the purpose of discharging undisclosed incumbrances, which he must be careful to see to before paying the price. If he retains money, he must lose no time before paying off the liabilities, as he is liable to pay interest on the purchase-money the payment of which he has delayed. The amount payable by the purchaser will, of course, by the amount of the incumbrance including interest and other charges legitimately payable therewith, and this amount the purchaser may debit to the vendor. ⁽¹⁾

1061. Covenant for Title — The vendor⁽²⁾ under this clause is deemed

cl. (2).

to contract that he has title to convey the property sold by him. The old rule of *caveat emptor* is thus now obsolete, and the covenant here enacted must be taken as incorporated into every contract. ⁽³⁾ And embodying as it does a rule of universal equity the covenant is not confined to the extent of the Act. ⁽⁴⁾ (s 1112). The present provision is in accordance with section 25 (b) of the Specific Relief Act, and is more liberal in its application to the purchaser than the corresponding clause in the English Conveyancing Act which restricts the vendor to covenant against the acts of himself, his ancestors, devisors, grantors, or donors and persons claiming by, through, under or in trust for him or them respectively. ⁽⁵⁾ In other respects the clause does not materially differ from the corresponding provision made in the English Act, which runs as follows:— 'In a conveyance for valuable consideration other than a mortgage there shall be included the following covenant by the person who conveys and is expressed to convey as beneficial owner (namely): That notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value made, done, executed or omitted or knowingly suffered, the person who so conveys has, with the concurrence of every other person if any conveying by his direction, full power to convey the subject-matter expressed to be conveyed subject as if so expressed and in the manner in which it is expressed to be so conveyed.' ⁽⁶⁾ Under this clause the vendor is presumed to guarantee his title absolutely to the property. If he wishes to contract himself out of the covenant he must do so expressly, or at least under circumstances from which a contract may be necessarily implied. He cannot get rid of his liability by merely showing that the purchaser had notice of the defect in his title. ⁽⁷⁾ (s 908). So where the vendor declared that he had not made any gift etc., of the property and that if on account of any such encumbrance any damage was sustained by the purchaser, the vendor would indemnify him, adding that if damage was sustained from any other cause, he would not be responsible therefor, it was held that the last clause was not sufficient to negative the liability created by this clause. ⁽⁸⁾ And if after purchase, the vendee discovers a material defect in the property, he is entitled

(1) *Daswant v. Syed Shah*, 6 C.L.J., 398 (402).

(2) And when there are more vendors than one, all of them are presumed to enter into a joint covenant — *Randhir Singh v. Bhagwan Das*, 11 A.L.J. 746 (748); cf. S. 13 (2) General Clauses Act (Act X of 1897).

(3) *Basaraddi v. Enajaddi*, I. L. R., 25 Cal. 298; *Basruddi v. Enajuddi*, 2 C. W. N. 222 (223) *Chidambaram v. Sivathasamy*, 15 M. L. J. R., 396; *Mehdi Husain v. Jafar Khan*, (1905), 8 O. C. 345.

(4) *Sadhu v. Nga*, (1907), U. B. R., 1.

(5) *Davul v. Sabu*, [1893], 1 Ch., 523; 44 & 45 Vic., c. 41, s. 7.

(6) Conveyancing Act, 1881 (44 & 45 Vict., c. 41), S. 7 (1) (A).

(7) *Muhammad v. Nalched*, 7 A.L.J. 752 in which however, the effect of the opening words of the section. "In the absence of a contract to the contrary" does not appear to have been considered.

(8) *Digambar v. Nishibala*, 8 I. C. 91.

to rescind the contract. (1) But in that case, he must rescind the entire contract. "A defrauded party cannot repudiate a contract in part only: he cannot pick out the plums of a bargain into which he has been misled and reject the remainder." (2) The benefit of a covenant for title can be enjoyed not only by the purchaser and his representatives, but also subsequent alienees who claim under the seisin vested in the original covenantee, or, as it is expressed, by the privity of estate. (3) And where the land is divided, the benefit of the covenant will go to each alienee in proportion to his interest in the property. (4) In a suit for damages by the purchaser against the vendor for breach of the covenant for title, the latter cannot be permitted to plead that his purchaser had notice of the defect, since oral evidence on this point is by section 91 of the Evidence Act inadmissible. But "although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed: yet, in an action to rectify the covenant, the fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware." (5) But generally speaking, covenants for title apply to all defects within the terms, whether such defects are known to the purchaser or not. (6) And similarly the purchaser may lose his right to avoid the sale or to compensation by laches and acquiescence, as where, although aware of his rights, he allows a long time to pass by without taking any action. (7) Damages upon covenants for title may be recovered in the event of the vendors' death, against his estate, and the vendee need not wait for actual disturbance. He has a right to sue as soon as he becomes aware of the defect.

The existence of a restrictive covenant is a sufficient blot upon the vendors' title to entitle the purchaser to repudiate his purchase. Where an owner of two adjoining houses *A* and *B* first sold *A* to *P* agreeing with him not to disturb *P*'s right to light to his windows, though they were only new ones, and then after some years sold *B* to *Q* subject to a right of light with *P* being guaranteed, it was held that the agreement with *P* amounted to a restrictive covenant on *B* and that the vendors' title to *B* was effective. (8)

1062. By Article 61 of the Limitation Act, where the plaintiff has paid money for the defendant, he can recover the amount within three years from the date of payment. By payment is meant actual payment and not when the money is demanded or sued for. The same period is allowed for rescinding a contract, (9) calculated from when the facts entitling the plaintiff to have the contract rescinded first become known to him.

1063. By sale the seller must be presumed to convey to the buyer the whole interest he possesses in the property, including such rights as easements and other legal incidents, which the purchaser is entitled to enjoy in the same way as the seller.

(1) *Essa Sulleman v. Dayabhai*, I. L. R., 20 Bom., 522; *Ramaswamy v. Valayuda*, 4 M.H.O.R., 269.

(2) *Per Bowen, L. J., in David v. Sabin*, [1893], 1 Ch., 523 (540).

(3) *Spencer's Case*, 5 Co., 16 see S. 40 ante.

(4) *Noble v. Cass*, 2 Si., 343.

(5) *Dart*, p. 886.

(6) *Page v. Midland Railway Co.* [1894],

1 Ch., 11.

(7) *Null v. Easton*, [1899], 1 Ch., 873.

(8) *Pemsel and Wilson v. Tucker*. [1907], 2 Ch. 191.

(9) *Torab Ali v. Nilrutton*, I. L. R., 13 Cal., 155; *Doya Narain v. The Secretary of State* I.L.R., 14 Cal., 256; *The Secretary of State v. Gubru Prasad*, I.L.R., 26 Cal., 51 F.B.

Thus, for example, trees being attached to the earth are included in the legal incidents of the land and pass to the transferee, unless, of course, a different intention is expressed or necessarily implied. (1) Similarly, a well passes with the land in which it is embedded as a legal incident thereof (2) (§§ 358, 359). Apart from the *quantum* of interest conveyed, the vendor is presumed to contract with the purchaser for a title free from reasonable doubt, (3) for it appears to have been held by the Privy Council that an *absolute* warranty of title cannot be insisted on by the purchaser. (4) But the distinction is for practical purposes illusory, for it may be taken as settled that no vendor is entitled to sell an interest which is defective, or as to which he is uncertain. The usual covenants for title comprise the following covenants (i) that he has the interest; (ii) that he has power to convey it; (iii) for quiet enjoyment by the purchaser, his heirs and assigns; (iv) that the property is free from incumbrances; and (v) for further assurance. Of course, the vendor is not bound to shew that he possesses a greater interest than that transferred by him. But he must show that he has no less an interest than that conveyed. Such a covenant is however, only limited to the consequence of legal acts, but it does not extend to the wrongful acts of strangers, which are obviously not within the power of the vendor to prevent. (5) But it would appear that a provision may be validly made against the acts of a particular individual name. Of course, the covenantor is under no circumstance exempted (6) from liability for his own unlawful acts, and if the covenant extends to his heirs and assigns, they are equally bound by it. (7)

1064. The covenant has nothing to do with the purchaser's disqualification to buy, and on this principle it was held that the purchaser could not be indemnified if he was deprived of the property by a third party in exercise of the right of pre-emption. (8) The correctness of the reasoning may, however, be doubted, for if the vendor knew that there was the right of pre-emption, he cannot be said to covenant that he had "power to transfer" the property to the purchaser, unless the clause be restricted to mean that the vendor only covenants that he holds a transferable interest and not that he can validly transfer it to the purchaser—a construction which is both illogical and unnatural, in view of the fact that the covenant is made *with the buyer* and that the transfer must naturally refer to the particular transfer in respect of which the covenant is made.

A contract for the sale of a house with windows looking over the land of a third person implies no representation or warranty that the windows are entitled to the access of light over that land, or even that the prescriptive period is running, and consequently the non-disclosure of a deed acknowledging that the vendor is not entitled to that light is no ground for refusing the vendor specific performance, or allowing the purchaser compensation, though it may be a ground for depriving the vendor of his costs. (9) Where the Government sold a plot of land to a purchaser stipulating "that it will be assessed at the rate of

(1) *Pandurang v. Bhimraj*, I.L.R., 22 Bom., 610; *Sri Babusu Ramalakshman v. Thé Collector of Godavari*, I.L.R., 22 Mad., 464, P.C.

(2) *Harichand v. Bala*, [1888], B.P.J., 125. See for fuller discussion, s. 8 ante and § 224 *et seq.*

(3) S. 25 (b), Specific Relief Act (I of 1877); *Haji Mahomed v. Musaji*, I.L.R., 15 Bom., 657 (666).

(4) *Bindeshri v. Jairamgir*, I.L.R., 9 All.,

70 (713) P.C. No reference is made to the Act in the judgment and the point was conceded by counsel.

(5) *Dudley v. Foliott*, 3 T.R., 584.

(6) *Poster v. Mapes*, Cro. Eliz., 212; *Foule v. Welsh*, 1 B. & O., 29.

(7) *Lloyd v. Tomkies*, 1 T.R., 671.

(8) *Ghulam v. Imdad*, I.L.R., 4 All., 357.

(9) *Greenhalgh v. Brindley*, [1901], 2 Ch., 324.

nine pies per square yard per annum," the covenant was held to exclude the enhancement of the rate notwithstanding that it might be justifiable by an Act regulating it. (1)

1065. A covenant for title must be distinguished from one for quiet enjoyment, as the limitation for suits for their breach has two distinct starting points. The two covenants may both co-exist as where the vendor assures not only of his title, but also warrants quiet enjoyment, and where it is so, it is not easy to conceive of a case which could present difficulties, for, in such a case, the purchaser may found his action on a covenant giving him the longer period to sue. A covenant worded thus: "Should any one put forward a right or claim or cause, obstruction or hindrance or make a quarrel or disturbance in connection with this *watan* (share) land, I and, my heirs and representatives are to answer for the same" is no more than a covenant for quiet possession. (2) The main distinction between the two species of covenants undoubtedly is, that in the one the vendor has title, but it is *defective*, whereas in the other there is *no title at all*. As an instance of the former may be given a sale by the father of an undivided Hindu family governed by the Mithila Law, under which the father has but limited authority to sell, and the sale is voidable at the option of the sons. (3) It is the same in the case of transactions entered into by persons with limited authority, as, for instance, by a manager of a joint Hindu family, an agent, or a minor's guardian, the wife in the absence of her husband, (4) or transactions which require election by some person authorized in law to elect to complete the vendee's title. (5) In such cases, the vendor sells, and the purchaser takes, but since the former has not conveyed a flawless title, the latter may be evicted at any time. But the case would be different where the purchaser gets a complete title, *though but for an instant*, as where the property sold is in the possession of a trespasser whose adverse title requires but that time to be perfected, and in which case, the purchaser's right to damages, can only arise where the subsequent failure of consideration is due to the act of the vendor himself, or if it is due to some other causes, the vendor has made himself answerable for it by proper covenants in his deed. (6) "If a purchaser can sue his vendor for his purchase-money because some time after he has bought the property from the true owner, and become himself its owner, it is lost by the subsequent adverse possession of a third party, the purchaser would become entitled to a refund of his purchase-money, in every case where the property is lost after he has acquired the ownership, as for instance, where it is lost by accident or a natural cause." (7)

1066. In the language of conveyancers, the different covenants are embodied thus:—(i) as to title, "that he hath power to grant and convey;" (ii) as to enjoyment, "that the premises shall at all times thereafter remain and be to the use of the grantee, and be enjoyed without interruption by the vendor or any one claiming through him, and free and discharged from all estates, incumbrances etc.,

(1) *Dadoba v. Collector*, 3 Bom., L.R., 603 (615); *Jethabhoy v. Collector*, I.L.R., 25 Bom., 714 (745).

(2) *Ardeshir v. Vajesing*, I. L. R., 25 Bom., 593 (602).

(3) *Hanuman v. Hanuman*, I.L.R., 19 Cal., 123, P.C., explained in *Ardeshir v. Vajesing*, I.L.R., 25 Bom., 593 (603).

(4) *Venkatanarasimhalu v. Peramma*, I.L. R., 18 Mad., 173.

(5) *Cowper v. Godmond*, 3 Moo. & Sc., 219; *Ardeshir v. Vajesing*, I.L.R., 25 Bom., 593 (604).

(6) *Ardeshir v. Vajesing*, I.L.R., 25 Bom., 593 (601).

(7) *Ardeshir v. Vajesing*, I. L. R., 25 Bom., 593 (601); *Raju Balu v. Krishnarav*, I.L.R., 2 Bom., 273 (292, 293); *Hari v. Raghunath*, I.L.R., 11 All., 27 (30), F.B.

created by the vendor or any one claiming through, or in trust, etc., from him." The first is broken, if at all, on the day the sale-deed is executed, whereas the second admits of a continuing breach, so that under section 23 of the Limitation Act, a suit would not be barred so long as the breach continues, and, therefore the suit, if otherwise maintainable, would not be barred by reason of the law of limitation.⁽¹⁾ The sale of property with the usual covenants over which or over any portion of which, the vendor had no valid title, occasions a suit for breach of the covenant for title, and in which limitation begins to run immediately upon the execution of the assurance, and a suit to obtain compensation is then governed by Article 62 and not Article 97 of the Limitation Act. In other words, suits to enforce such covenants must be brought within three years from the sale, for the purchase-money paid by the purchaser is from that date in the hands of the seller, money had and received for the purchaser's use.⁽²⁾ But, where the covenant is one for quiet possession, the purchaser can enforce it within three years calculated from the date of the failure of the consideration, as provided in Article 97 of the Limitation Act *i.e.*, from the date of his eviction.⁽³⁾ So, in an English case, it has been laid down that in the case of a covenant for title, the time of limitation begins to run from the time the deed of sale is executed,⁽⁴⁾ although the covenantee be in ignorance of the breach.⁽⁵⁾ Such a breach cannot be called a continuing breach, any more than non-payment of money when due can be so designated.⁽⁶⁾ But in another case Lord Ellenborough observed: "The covenant passes with the land to the devisee and has been broken in the lifetime of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which not being done the covenant is broken once for all, but it is the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require."⁽⁷⁾ It would thus appear that it is the resulting damage, and not even the mere breach of covenant, which gives the right of action. Thus suppose *A* sells to *B* an estate. It turns out that he had one or two years previously already transferred half of it on his death to *C*, should the latter be then living. *A* lives for twenty years and then dies, and *C* survives him and enters. Now in such a case there can be no doubt but that the covenant was broken as soon as it was made. But should *B* be ignorant of the conveyance until *A*'s death, he loses half his land and has no remedy, for limitation has long since extinguished his right. And if he hears of it and sues within the twenty years, but in *A*'s lifetime, how can the damages be assessed in the uncertainty whether *A* may or may not survive *C*, and that the covenantee may never be disturbed in possession?

1067. Inapplicability of the Rule to Sales in invitum.—While there is an implied covenant for title by the vendor in a private sale, there is no such covenant either by the decree-holder, or by the court in sales made in execution of mortgage or money decrees. Under section 237 of the Code⁽⁸⁾ the decree-holder when applying for execution, has no doubt to specify the judgment-debtor's share or interest in the property "to the best of his belief," and so far as he has been able

(1) *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., 273 (293).

(2) *Ardesir v. Vajesing*, I. L. R., 25 Bom., 593 (600); *Strickland v. Turner*, 7 Ex., 208; *Hanuman v. Hanuman*, I. L. R., 19-Cal., 123, P. C. There never was any consideration for it and the sale was void *ab initio*.

(3) *Nagardas v. Ahmed Khan*, I. L. R., 21

Bom., 175; *Ardeshir v. Vajesing*, I. L. R., 25 Bom., 593 (602).

(4) *Spoor v. Green*, L. R., 9 Ex., 99 (116),

(5) *Short v. McArthur*, 3 B. & Ald., 626.

(6) *Per Bramwell B. in Spoor v. Green*, L. R., 9 Ex., 99 (111).

(7) *Kingdon v. Nottle*, 4 M. & S., 53 (57).

(8) Now o. 2, r. 13.

ascertain the same," and the proclamation issued under section 287⁽¹⁾ is similarly enjoined to embody the description "as fairly and accurately as possible," and "as far as it has been ascertained by the court," but those precautions do not afford the purchaser any more protection than that provided for in sections 313 and 315⁽²⁾, under which barring cases of fraud which of course, vitiates all transactions, the purchaser has the right to recover back his purchase-money only in case it is found that the judgment-debtor had no saleable interest in the property at all. But should he have had *some* interest, whatever its quantity and value, the purchaser can then claim no refund at all, and from which it is evident that he is not entitled to obtain a refund in proportion to the extent to which the judgment-debtor had no interest. ⁽³⁾ The purchaser must then be taken to buy the property without warranty of title, with all risks and all defects in the judgment debtor's title except in the cases and to the extent above indicated. In cases of fraud, however, not only would the sale be set aside, but the purchaser may also recover damages or compensation. ⁽⁴⁾ On cancellation of the sale, the purchaser may, of course, recover his deposit, either by applying for it in execution, or by maintaining a separate suit. ⁽⁵⁾ Where the purchaser has sustained a loss on account of a misdescription in the sale-proclamation, as where the area is misdescribed, the purchaser may recover damages, and he is entitled to an abatement of rent for the deficiency.

1068. This essential difference between a voluntary and an involuntary sale is founded upon intelligible reason. In the words of Sir J. W. Colville, the chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But, the purchaser at a sheriff's sale has at best very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title, and interest of the judgment-debtor, with all its defects; and the sheriff, who sells and executes the bill of sale, is never called upon, and if called upon, would refuse to execute any covenant of title. Therefore, the reasons for the rule failing, the rule cannot properly be held applicable to sales by the sheriff, which are governed by rules peculiar to such sales. ⁽⁶⁾ And so it is provided by o. 21 r. 91 of the Civil Procedure Code that the only ground upon which the purchaser can move the court to set aside the sale is that the "judgment-debtor had no saleable interest in the property sold," and which means that the sale can be set aside only where the seller had nothing to sell. ⁽⁷⁾ If he had some interest though in only a portion of the property, it is sufficient to uphold the sale. ⁽⁸⁾ The rule is the same where the sale relates to the interest of the mortgagor,

(1) Now o. 21, r. 66.

(2) Now o. 21, rr. 91, 93.

(3) *Shanto Chandar v. Nain Sukh*, I. L. R., 23 All. 355 (357); following *Ram Narain v. Mahatah*, I. L. R., 2 All., 828; *Dorab Ally v. Abdool Azeez*, 21 A., 166 (128); *Sundara v. Venkata*, I. L. R., 17 Mad., 228.

(4) *Derry v. Peek*, 14 App. Cas., 337; followed in *Shanto Chandar v. Nain Sukh*, I. L. R., 23 All. 355 (358), but contra *per Maclean, C. J.*, in *Doyal Krishna v. Amrita Lal*, I. L. R., 29 Cal. 370, who held that it was not necessary to make out a case of fraud.

(5) *Munna Singh v. Gajadhar*, I. L. R., 5

All., 577; *Kishun Lall v. Muhammad*, I. L. R., 13 All. 283; *Shanto Chandar v. Nain Sukh*, I. L. R., 23 All., 355 (356).

(6) *Dorab Ally Khan v. The Executors of Khaja Mohamed Din*, I. L. R., 3 Cal., 806 (813), P. C.; *Sundara Gopaian v. Venkata*, I. L. R., 17 Mad., 328; *Vithoba v. Esal*, I. L. R., 18 Bom., 594; *Dhannoo Jingar v. Autoba*, 12 C. P. L. R., 49.

(7) *Munna Singh v. Gajadhar*, I. L. R., 5 All. 577.

(8) *Ram Coomar v. Soshes*, I. L. R., 9 Cal. 626.

although the mortgagee may have obtained a decree on the property sold. (1) But the purchaser with notice that the debtor had no saleable interest in the property has been held to be estopped from rescinding the sale. (2) Thus it has been laid down by the Privy Council that a person who with notice buys property subject to a contingency, which may defeat or destroy the interest which is the subject of sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated actually happens, and the property either does not become, or ceases to be available for his benefit. (3)

1069. Exceptions.—The benefit of the rule may be lost to the purchaser by (i) Fraud, (§ 1070), (ii) Notice (§ 1069), (iii) Waiver (§ 1072), and (iv) Express or implied contract (§ 1073, 1074).

1070. On the principle that no man shall take advantage of his own fraud, a purchaser who has procured a covenant for title by

(1) **Fraud.** fraud is precluded from enforcing it against his vendor. (4)

But it has been held that though the purchaser's fraud is a good defence against him so long as the property is in his hands, it does not avail against a *bona fide* transferee from him for value without notice. (5) This view is justified on the ground that while there is an equity between the original parties to the covenant which is a good defence to an action on the covenant, the same defence is of no avail when it is sought to be enforced by a subsequent purchaser who had no notice of the equity. (6)

1071. Where the purchaser has notice of his vendor's defective title and still purchases the property, he cannot afterwards rescind the

(2) **Notice.** sale, (7) unless he expressly stipulates with the seller that

good title shall be shown, in which case, he cannot be fixed with notice. (8) An execution-purchaser with notice that the judgment-debtor had no saleable interest is equally estopped from rescinding the sales (§ 1069). But if the covenant is clear, its construction or effect cannot be controlled by extrinsic evidence of notice or intention. (9) In other words, when the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal presumption may be rebutted by shewing that the purchaser had notice before the contract that the vendor could not give a good title. But, if the contract expressly provides that a good title shall be shown, then inasmuch as a notice by a vendor that he could not show a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of defect of the title might have been given to the purchaser, he would still be entitled to insist on a good title. (10) Where a vendor contracted

(1) *Protab Chunder v. Panioty*, 1 L. R., 9 Cal., 506; *Saraswati v. Nabadwip*, 5 B. L. R. 380; *Bossain Munraj v. Deen Dyal*, 20 W. R., 20.

(2) *Mahabir v. Dhumand*, 1 L. R. 3 All., 527; *Shivram v. Dal Daji*, 1 L. R., 26 Bom., 519.

(3) *Ram Tuhul Singh v. Biseswar*, 15 B. L. R., 208, P. C.; approving *Sowdamini Chowdhurani v. Krishna*, 4 B. L. R., 11 F. B.

(4) *David v. Sabin*, [1893], 1 Ch., 523.

(5) *David v. Sabin*, [1823], 1 Ch.; 523 (536, 537).

(6) See *Per Lindley, L. J.*, in *David v. Sabin*, [1893], 1 Ch. 523 (537).

(7) *Mancharji v. Narayan*, 1 B. H. C. R., 77; *Gloag & Miller's Contract*, 23 Ch. D., 321, 327.

(8) *Ram Chunder v. Dwarkanath*, 1 L. R., 16 Cal., at p. 341; *Pathoolal v. Radhika*, 3 N., W. P. H. C. R., 106; *Great Western Railway v. Fisher*, [1905], 1 Ch., 316.

(9) *Page v. Midland Railway Co.*, [1896], 1 Ch., 11 (23); disapproving *Hunt v. White*, L. J. (Ch.), 326.

(10) *Per Fry, J.*, in *re Gloag & Miller's Contract*, 23 Ch. D., 20; *Ibrahimibhai v. Fletcher*, 1 L. R., 21 Bom., 827 (847, 886) F. B.

to sell certain property which the purchaser knew to be in occupation of a tenant, and it was afterwards discovered that the tenant had a lease, it was adjudged that the purchaser was affected with notice of the lease, and was not entitled to specific performance with compensation. (1) An intending purchaser having notice of the fact that the premises sold were in the occupation of a tenant is not bound to go and inquire of the tenant what is the nature of his tenancy, (2) for this is the duty of the vendor who cannot be afterwards heard to say: "If you had gone to the tenant and inquired you would have found out all about it." (3) The fact that the purchaser had notice of the bad repair of a house held on a lease by the vendor, does not exonerate the latter from keeping it in good repair. (4) Where the purchaser of a legal estate had express notice that the defendant detained possession of the land bought under a deed which purported to convey to them an equitable title thereto, it was held that he must convey the legal estate to the defendant, who was not estopped by the erroneous recitals in the deed as to the derivation of the equitable title actually transferred. (5) Recitals in a deed are not representations of fact on the faith of which a stranger to the deed is entitled to act without inquiry. (6)

1072. The purchaser may, again, lose the benefit of this section by waiver.

(3) **Waiver.** "Acts of ownership on the part of a purchaser may amount, in the contemplation of the court, to a declaration that he considers himself as the owner of the property, and then they work an acceptance of title and a waiver of all objections." (7) Acts amounting to waiver must be very strong and distinct—such acts, in short, as are equivalent to a declaration by the purchaser that he has taken the estate at possible risks, and considers himself as the absolute and unconditional owner of it, and so preclude any investigation of title at all. (8) Possession of property by the purchaser, though a strong evidence of waiver of objections to the title, (9) is, however, by no means conclusive. A stipulation in a memorandum that the agreement was "subject to the preparation by the vendor's solicitor and completion of a formal contract" cannot be waived by the vendor as being intended for his benefit alone, so as to constitute the rest of the memorandum a final contract enforceable against the purchaser. (10) Where the purchaser took possession without being called upon to do so, it has been held that the fact was almost conclusive against the purchaser. Where, however, possession is taken in accordance with the clear intention of the parties as evidenced by the terms of the contract, or with the consent of the vendor, it is not in itself, as a general rule, any waiver of the purchaser's right to good title. (11) Possession for two years has been held to create a waiver. But there can be no waiver where there is a serious misdescription of the property, not discovered until after possession is taken. (12) Waiver may be implied from the purchaser's attempt to resell the

(1) *James v. Litchfield*, L.R., 9 Eq., 51.

(2) *Caballero v. Henty*, L.R., 9 Ch. (447), explaining *James v. Litchfield*, L.R., 9 Eq., 54 in which some dicta do nearly go to that extent.

(3) *Per James L.J.*, in *Caballero v. Henty*, L.R., 9 Ch., 447 (450).

(4) *In re Hight and Bird's Contract*, [1902], Ch., 2 214, O.A. [1903], 1 Ch., 287.

(5) *Trinidad Asphalt Co. v. Coryat*, [1896], A.C., 587, P.C.

(6) *Trinidad Asphalt Co. v. Coryat*, [1896],

A.C., 587 (593), P.C.

(7) *On Specific Performance* (3rd Ed.), § 1349, p. 600.

(8) *Ibid* § 1350, p. 600.

(9) *Fludger v. Cocker*, 12 Ves., 25 (27); *Fleetwood v. Green*, 15 Ves., 594.

(10) *Lloyd v. Nowell*, [1895], 2 Ch., 744.

(11) *Ghousain v. Rustumjah*, I.L.R., 13 Mad., 158; *Bolton v. London School Board*, 7 Ch. D., 766; *Vancouver v. Bliss*, 11 Ves., 458.

(12) *Turquand v. Rhodes*, 37 L.J.Ch., 830.

property, (1) or from his acquiescence. (2) Waiver, however, cannot be pleaded to cure a serious defect in the property. (3) And in no case can there be waiver of the purchaser's right to compensation. "The purchaser," says Dart, "will be entitled to compensation for a deficiency in quantity, even although the estate be not sold professedly by measurement, (4) and although, of course, he could not claim compensation if it appeared that he contracted with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the property, (5) or even from his being the occupying tenant; (6) nor is the right to compensation precluded by a condition that he shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars (7), nor by acts which amount to a waiver of objections to the title." (8) When a vendee sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, he cannot, on failing to establish those grounds of relief, set up in appeal a case founded on the implied covenant for title under this section. Having chosen to go to trial upon those grounds and failed, he could not be allowed to start a new case involving new issues and a fresh inquiry. (9) But apart from this, there is nothing to preclude the purchaser from urging that if he cannot sustain a case of fraud, he is as a matter of law entitled to succeed upon the ground that there was a covenant for title on the part of the vendor. (10)

1073. This section, as observed before, only applies to cases in which

(4) **Express con-** the parties do not enter into a contract to the contrary :
tract. *expressum facit cessare tacitum.* (11) Even a partial contract would exclude the operation of the clause *pro tanto*. (12) But such a contract must be clearly proved and cannot be implied from the fact that the defect of title was visible on the face of the conveyance, or was otherwise known to the purchaser. (13) Such a contract to be binding must, according to the English cases, be expressed in a plain and unambiguous language. (14) "I think," says Bruce, V. C., "and have always thought, that when a vendor sells property under stipulations which are against common right, and places the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, or if he uses ambiguous words, the purchaser may generally construe them in a manner most advantageous to himself." (15) But a condition of sale requiring the purchaser to assume certain facts is not misleading, if the vendor believes the fact to be true, even though the condition is intended to cover a flaw which goes to the root of the title. In such a case, it is not necessary to explain in the condition the specific defect in the title which the condition is intended

(1) *Perriam v. Perriam*, 32 W.R. (Eng.). 369.

(2) *Bown v. Stenson*, 24 Bing., 631.

(3) *Gloag & Miller's Contract*, 23 Ch. D., 320.

(4) *Hill v. Buckley*, 17 Ves., 394; *King v. Wilson*, 6 Bing., 124; *McKenzie v. Heskelth*, 7 Ch., D., 675.

(5) *Shackleton v. Sutcliffe*, 1 De.G. & S., 609; *Cala v. Thompson*, 9 Q.B.D., 616.

(6) *King v. Wilson*, 6 Bing., 124.

(7) *Frost v. Brewer*, 3 Jur., 165.

(8) *Calcraft v. Roebuck*, 1 Ves., 221; Dart, pp. 735, 736.

(9) *Mahomed v. Sitaramayyar*, I.L.R., 15

Mad., 50 (52).

(10) *Nasaraddi v. Enajaddi*, I. L. R., 25, Cal., 298 (299).

(11) "What is expressed, makes what is silent to cease."

(12) Cf. *Chandiere Gold Mining Co. v. Desbarats*, L.R., 5 P. C., 277.

(13) *Page v. Midland Railway Co.* [1894], 1 Ch., 11 (20).

(14) *Re Marsh and Earl Granville*, 24 Ch. D., 11 (17).

(15) *Seaton v. Mapp*, 2 Coll. at p. 562; *Motivahoo v. Vinayak Veerchand*, I.L.R., 12 Bom., 11 (17) *Haji Mohamed v. Musaji*, I. L. R., 15 Bom., 657.

to cover. (1) The purchaser is not always bound by the condition of sale whereby the vendor provides against the full investigation into his title. (2) (§ 1020). Misleading conditions are also unenforceable in law. Thus, it has been held that the purchaser is not bound if the vendor either leads him to assume that which he knows to be false, or evasively pretends not to know it when in fact he knows it, or is guilty of any artifice to divert attention. (3) But if the vendor clearly stipulates in regard to title, as for example by stipulating that the purchaser is to accept the vendor's title "without dispute," (4) or that his title "shall not be inquired into," (5) or that no title prior to certain date shall be required, investigated or objected to, (6) or that it is "such as the vendor has," (7) or is "such as they have received from A," (8) it has been held that the purchaser was precluded from objecting *aliunde*. (9) But in another case (10) it was however held, that the stipulation in the condition was merely directed against requisitions on the vendor to prove the title, and that it did not preclude inquiry in other quarters. The principle of this case has also been followed by the Bombay High Court. (11) A stipulation in these terms: "The time in respect of this bargain is fixed at two months. Within this time we are duly to have everything cleared," does not imply a contract so as to exclude the operation of the rule. (12)

1074. It may be taken as settled that so far as the vendor is concerned, a clear stipulation against inquiry into his title would clearly bind the purchaser. (13) The law is the same with regard to the sale of moveable property, for which provision is made in section 109 of the Indian Contract Act. But a covenant against an inquiry into title does not mean no title at all, and not even possession to offer. The subject has been fully set out elsewhere. (§§ 1061-1066) Under this clause, there is not only the covenant that the interest which the seller professes to transfer to the buyer subsists, but also that *he has power to transfer the same*. (14) This covenant really implies two covenants: (a) that the property is saleable, and (b) that the vendor has power to sell it. Such covenants are distinct and easily distinguishable from the covenant for title, inasmuch as the subsistence of title is by no means a necessary adjunct of its transferability—and that by the person in whom it may have for the time become vested. A zemindar holding impartible and inalienable property affords an illustration of an interest which, though subsisting in the owner, is not transferable by him. Other instances have been already enumerated elsewhere (15) (§§ 195—225). A covenant for right to convey extends not only to the *title* of the covenantor, but also to his *capacity* to grant the estate. Therefore, where, upon a conveyance by a man and his wife, the husband covenanted that they had good right to convey the lands, and the wife was under age, the covenant was adjudged to be broken. (16)

(1) In *re Sandbach & Emondston's Contract*, [1891], 1 Ch., 99.

(2) Dart., p. 169 and note; *Mancharji v. Narayan*, 1 B. H. C. R., 77.

(3) *Re Banister*, 12 Ch. D., at p. 143; *Redgrave v. Hind*, 20 Ch. D., at p. 14; In *re Marsh v. Earl Granville*, 24 Ch. D., 11 *Heywood v. Mallatiew*, Ch. D., 357; *Nottingham Patent Brick Co. v. Butler*, 16 Q. B. D., 778; so the maxim *ex turpi causa non oritur actio*. (No right of action arises from an immoral or base cause.)

(4) *Duke v. Barnett*, 2 Coll., 337.

(5) *Hume v. Bentley*, 5 DeG. & S., 520.

(6) In *re National Provincial Bank*, [1895],

1 Ch., 190.

(7) *Tweed v. Mills*, L. R., 1 C. P., 39.

(8) *Ashworth v. Mounsey*, 9 Ex., 175.

(9) Dart., p. 169, but see *ibid.*, note (Z).

(10) *Darlington v. Hamilton*, Kay. 550.

(11) *Mancharaji v. Narayan*, 1 B. H. C. R. 77.

(12) *Haji Mahomed v. Musaji*, 1 L. R., 15 Bom., 667.

(13) *Matiwahoo v. Vinayak*, 1 L. R., 12 Bom.

(14) *Vishwanth v. Vithoba*, 13 C. P. L. R. 97; following *Basaraddi v. Fnojaddi*, 1 L. R., 25 Cal., 298.

(15) S. 6 *ante* and Comm.

(16) *Nash v. Aston Jones*; 195; Sugd., 601.

1075. Sale by Trustees.—In the case of a sale by trustees it is provided that the trustee making any such sale may insert such reasonable stipulation, either as to title or evidence of title or otherwise, in any condition of sale or contract for sale as he thinks fit; and may also buy in the property, or any part thereof, at any sale, by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby. (1) The rule here laid down is the same as in England, where a trustee simply covenants that he has done no act to incumber. (2) A sale by trustee, as regards covenants stands on the same footing as a sale by order of the Court (§ 1023, 1024). In both the presumption is that there were no covenants for title or quiet enjoyment, and all that the vendor can do is to covenant to the extent of his own knowledge. As a matter of fact, this gives the intending purchaser very little security, and it is accordingly the practice of conveyancers to make all the beneficiaries parties to covenant for title to the extent of their interest in the proceeds. (3) But this practice has never been adopted by the court in sales under its decree. (4) Indeed, the practice of making beneficiaries under a will parties to the covenant has been condemned as being oppressive and arbitrary, inasmuch as "it seems an arbitrary thing to hold that a legatee is to take nothing from the bounty of the testator until he has entered into covenants for title, and possibly been put to considerable expense." (5) But no such objection can arise where the money to arise by sale of the estate is absolutely given to two or more persons who are substantially owners of the estate. (6) Having promised the purchaser to obtain concurrence of the beneficiaries, if the trustee fails to obtain concurrence of some or all, it would be a defect in title.

The usual covenant by a trustee in a conveyance is not only that he has not made, etc., or *permitted or suffered*, but that he has not been *party or privy* to any act whereby the estate is incumbered, thereby embracing not only those acts which he could have prevented but also those permissive acts which operated to charge the estate. (7)

1076. Benefit of the Contract runs with the Land.—The benefit of the covenant for title runs with the land, and, as has been stated above, will enure to the benefit of future purchasers and alienees. This rule too is in accordance with the English law, (9) and similar provisions also occur elsewhere in the Act. (9) Prior to the Conveyancing Act, it was sometimes said that a covenant for title could not be apportioned on the subdivision of the property by sale, on the ground that if this had been allowed, the covenantor might be subjected to multifarious actions. Thus, if the purchaser of two fields were to sell one of them to another person, the latter could not sue on the covenant since it would subject the covenantor to double actions. (10) But this view was never favoured or followed, and the Conveyancing Act has set at rest all doubts in the matter. (11) The clause under discussion is thus in perfect harmony with the

(1) S. 38, Indian Trusts Act (II of 1882).

(2) Sugd., 574; Dart., p. 617; *Worley v. Frampton*, 5 Ha., 560.

(3) *Cottrell v. Cottrell*, L. R., 2 Eq., 330.

(4) Sugd., 574, Dart., 618; *Cottrell v. Cottrell*, L. R., 2 Eq., 330 (333); *Earl Poulett v. Hood*, L. R., 5 Eq., 115.

(5) *Per Sir John Stuart, V. C.*, in *Cottrell v. Cottrell*, L. R., 2 Eq., 330 (333).

(6) Sugd., 574, 575. This proposition is said, to be too broadly stated—Dart, pp.

617, 618.

(7) *Hobson v. Middleton*, 6 B. & C., 295; Sugd., 603, 604.

(8) 1 Sm., L. C., 88; Dart, p. 879.

(9) S. 40, S. 65, last para., & S. 108 (A) (C).

(10) 3 *Preston's Abstract*, 57, 58, cited *per* Sugd., 598.

(11) S. 7, Sub-S. 6, which enacts that the benefit of an implied covenant for title is to run with the land.

English rule, according to which such covenants are apportionable, so that if an estate is divided and becomes vested in *A* for life with remainder over to *B*, and the breach of covenant affects the entire inheritance, both *A* and *B* may sue for damages proportioned to the extent of their estate; and the same rule would hold good if the property is sub-divided.

1077. Consequences of Breach.—The question what relief the

(1) **Before conveyance.** purchaser may claim for breach of the covenant for title has still to be considered. In this case, the remedy of the purchaser depends upon whether the defect has been discovered before or after the conveyance. So long as the contract is *in fieri*, the purchaser may repudiate the contract and obtain a return of his deposit. And if he be sued by the vendor for specific performance, he may successfully defend himself by pleading want of title in the vendor, for the court will not force a doubtful title on the purchaser.⁽¹⁾ But his rights are materially curtailed the moment the conveyance is taken and the money paid, for if he afterwards discovers a flaw, he cannot obtain the same relief unless there be a case of fraud, or a case of misrepresentation amounting to fraud by which he may have been deceived. ⁽²⁾ He cannot, whenever he is ejected, come to the vendor and say: "Take back the estate for what it is worth and give me back my money." ⁽³⁾ Before the conveyance, the purchaser has, however, not only the *locus penitentiae* to repudiate the bargain, but he may also recover damages if the vendor had improperly refused to make a good title, as where by his fraud, ⁽⁴⁾ or wanton refusal, ⁽⁵⁾ the contract could not be completed. In a case after the contract of sale by the mortgagee with power of sale, in which he had covenanted for vacant possession, on the purchaser requiring possession, it appeared that the mortgagor was in possession and refused to give it up. The vendor was in a position to have him ousted by ejectment, but he refused to complete the sale, whereupon the purchaser sued him for damages which were decreed, the measure of damages being the difference between the contract price and the value at the time of the breach of contract, and the profit which it was shewn the purchaser could have made on a resale uncontradicted by other evidence, was held to be evidence of this enhanced value. ⁽⁶⁾ But if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.⁽⁷⁾

1078. There is yet another stage in the case in which, while the vendor

(2) **Specific performance with compensation.** is entitled to specific performance, the purchaser is awarded compensation. Such cases may arise where there has been delay in completing the sale, ⁽⁸⁾ or misdescription as to the area, ⁽⁹⁾ or an overstatement of income derived from the estate, ⁽¹⁰⁾ or a misstatement in the particulars, such as that the road over

(1) *Mullings v. Trinder*, L. R., 10 Eq., 449. In re *Marshall and Salt's Contract*, [1900], 2 Ch., 202 [where the court will refuse specific performance if the concurrence of a person necessary to the use of the property for a particular purpose or in a particular manner cannot be obtained.

(2) Per Lord Selborne, L.C., in *Brownlie v. Campbell*, 5 App. Cas., 925 (937); *Sloper v. Arnold*, 37 Ch. D., 96 (102).

(3) Per Cotton, L.J., in *Sloper v. Arnold*, 37 Ch. D., 96 (102).

(4) *Bain v. Fothergill*, L. R., 6 Ex., 59 O.A., 7 H.L. 158.

(5) *Engell v. Fitch*, L. R., 3 Q. B., 314 O.A., 4 Q.B., 659.

(6) *Engell v. Fitch*, L.R., 3 Q.B., 314 O.A. 4 Q.B., 659.

(7) *Bain v. Fothergill*, L.R., 6 Ex., 59 O. A., 7 H.L. 158.

(8) *Marsh v. Jones*, 40 Ch. D., 563.

(9) *Whittemore v. Whittemore*, L.R., 8 Eq., 603.

(10) *Powell v. Elliot*, L.R. 10 Ch. 424.

the land was "made up" whereas it was not, and in which the measure of compensation was held to be not the sum it would cost to make up the road to the extent represented; but the difference between the value of the property as it existed at the time of purchase and the value it would have had if the road had been "made up." (1) So where *A* contracted with *B* for the purchase of property in ignorance that *B* was only entitled to an estate *pur autre vie*, and that *C* (*B*'s wife) was entitled to the remainder in fee on the determination of the particular life, *D* with full knowledge of *A*'s contract took a conveyance from *B* and *C* of the property, acknowledged by *C*, so as to pass her interest: *A* then sued *D* and was held entitled, by way of specific performance, to a conveyance from *D* of *B*'s interest, with compensation in respect of *C*'s interest which *B* was unable to bind or convey without her consent. (2) So, where two persons agreed to sell property of whom one was entitled to a moiety subject to a mortgage for its full value, and the other had no interest, a judgment for specific performance with abatement was made against the former. (3) A purchaser may obtain compensation for deterioration of the property, (4) or for having been kept out of possession. (5) In the case of a purchase of a dwelling-house, however, it is impossible to compensate a person in respect of a mis-statement which has the effect of reducing the vendee's title to only a fraction, and in such a case the whole contract will have to be rescinded. In the case of land occupied for agricultural or such like purposes, where there is a deficiency in area, the equities arising are naturally different, unless the deficiency is of a very great extent. And the reason is obvious, for while a fractional share of an estate or land is capable of enjoyment, a share in a dwelling-house would in most cases be useless. (6) In the case of material deficiency in area, the court may award compensation even though it may have been a condition of sale that no compensation shall be recoverable for any error, misstatement or omission in the particulars. (7) The court may, in a suit for specific performance with an inquiry into title, decree by way of damages, the return of the deposit with interest, giving the plaintiff his costs of the suit and of the agreement and investigation of title, if it appears, that the vendor had no title, although the purchaser may have failed to claim damages or "further or other relief." (8) An undisclosed incumbrance on the property does not raise a question of title, but only of conveyance even though the amount of the incumbrance be greater than the purchase-money, the vendor being at liberty to shew that he was able to convey a title free from incumbrance. (9).

1079. After the execution of conveyance, the purchaser has an uphill task

in getting the transfer set aside, unless he can shew that the transaction was impregnated with fraud or misrepresentation (3) **After conveyance.** amounting to fraud, the burden of proof of which lies on the party averring it. (10) In this connection, it may be remarked that a contract for the sale of immoveable property is very different; from a contract for the sale

(1) *In re Chifferiel*, 40 Ch. D., 45.

(2) *Barnes v. Wood*, L. R., 8 Eq., 424. *Barker v. Cox*, 4 Ch. D., 464.

(3) *Horrocks v. Rigby*, 9 Ch. D., 180.

(4) *Thoms v. Buxton*, L. R., 3 Eq., 120.

(5) *Phillips v. Silvester*, L. R., 8 Ch., 173.

(6) *Uendra Nath v. Obhoy Kali*, 5 C. W. N., 597.

(7) *Whittemore v. Whittemore*, L. R., 8 Eq. 603.

(8) *Pearl Life Assurance Co. v. Buttenshaw*

[1893], W. N. 123.

(9) *Esdaile v. Stephenson*, 23 R. R., 248; *Camberwell and South London Building Society v. Holloway*, 13 Ch. D., 754; *Townsend v. Champernown*, 30 R. R., 825; *Megrhaj v. Chunnial*, 1 Nag. L. R. 190.

(10) *Wilde v. Gibson*, 1 H. L. C., 632; *Brownlie v. Campbell*, 5 App. Cas. 736; *Soper v. Arnold*, 37 Ch. D., 96; *Seldon v. North Eastern Salt Co.*, [1905], 1 Ch., 326.

of a chattel. In the former, the purchaser knows that, having regard to the complications of law, there must be uncertainty as to making out a good title; in the latter, the vendor must know what his right to the chattel is. (1) After the conveyance then, the question that arises, in most cases, is whether the purchaser is or is not entitled to compensation. In cases where the parties have beforehand agreed, that any error, or mis-statement should not annul the sale, but that it should be compensated for and an error in the quantity of land is discovered, the purchaser can claim no more than compensation. (2) But compensation in such cases is given in pursuance of an express contract, and when it is so, the court cannot refuse it on the ground that no compensation can be given after conveyance for a misrepresentation, error or mis-statement not amounting to fraud. (3) But, in the absence of any clause in the contract for compensation, the purchaser is not entitled to any compensation after the conveyance, the reason being that the defect could have been discovered before completion if he had chosen to investigate the title. (4) In the absence of a contract to the contrary, after the conveyance, the purchaser had no remedy in respect of defects either in the title to or quantity or quality of the property, unless such defects amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud, or misrepresentation amounting to fraud, is shown to have been practised or made on the purchaser. (5) Hence, where the vendor *bona fide* represented to the purchaser that the land sold measured three acres, whereas it eventually amounted to only 2a. 1r. 2p., the court refused to award any compensation. (6) So, in another case, a discrepancy of five acres out of forty-one was held not to be so serious as to amount to a breach of the warranty. (7) On the other hand, 100 acres out of 349 was considered too serious to be covered by the qualifying expression, "containing by estimation," used in the conveyance. (8) The question in such cases is one of fact, whether the vendor had not in fact believed in the quantity estimated. If the discrepancy is small, the error may be so accounted for, but if the discrepancy is great, a different presumption may naturally arise. (9) There are cases in which the conveyance itself may be set aside. These cases will be discussed in the sequel.

1080. Delivery of Title-deeds.—This rule has been taken from the two English Statutes (10) which enunciate a similar rule in harmony with the leading precedents. (11) The obligation here

CL. (3).

(1) *Per* Lord Hatherley in *Bain v. Fothergill*, L. R., 6 Ex. 590, A., 7 H. L., 158.

(2) *Palmer v. Johnson*, 13 Q. B. D., 351 (355, 356); overruling *Cann v. Cann*, 3 Sim; *Bos v. Helsham*, L. R. 2 Ex. 72; *Manson v. Thacker*, 7 Ch. D., 620; *Besley v. Besley*, 9 Ch. D., 103; *Allen v. Richardson*, 13 Ch. D., 524.

(3) The view that after conveyance no compensation could be given except for fraud was propounded by Malins, V. C., in *Manson v. Thacker*, 7 Ch. D., 620; but it was a view held to be untenable. *Per* Brett, M. R., Bowen, L. J., and Fry, L. J., in *Palmer v. Johnson*, 13 Q. B. D., 351, which overruled the first named case. The view of the text has been since reiterated in subsequent cases. e. g., *Clayton v. Leech*, 41 Ch. D., 103 (106). In re *Jackson and Haden's Contract*, [1905], 1 Ch., 603.

(4) *Per* Cotton, L. J., in *Clayton v. Leech*,

41 Ch. D., 103 (107); *Jolliffe v. Baker*, 11 Q. B. D., 225 (267).

(5) *Jolliffe v. Baker*, 11 Q. B. D., 255 (269, 270). The fraud shown must not be what is called a "legal fraud" as distinguished from "moral fraud and deceit," a term which is illogical and unmeaning (*ib.*, p. 270). The fraud to be proved implies some base conduct and moral turpitude.

(6) *Jolliffe v. Baker*, Q. B. D., 255 (273).

(7) *Winch v. Winchester*, 1 V. & B., 506.

(8) *Portman v. Mill*, 1 V. & B., 375.

(9) *Per* Williams, J., in *Jolliffe v. Baker*, 11 Q. B. D., 255 (274).

(10) Vendors and Purchasers Act (37 & 38 Vic., c. 78); Conveyance Act, 1881, (44 & 45 Vic., c. 41), S. 9.

(11) *Austin v. Croome*, Car. & M., 653; *Harvington v. Price*, 3 B. & Ad., 170; *Wakefield v. Newton*, 6 Q. B., 276.

imposed is as limited as in the corresponding English Statute, where the liability is restricted to delivering up deeds in the "possession or control" of the vendor. Accordingly, the vendor must procure the deeds, if necessary. Title-deeds include *kabuliats*, *pattas*, and all agreements such as counterpart leases, etc. Village account books and other documents relating to the management of the property sold being accessory to the estate and essential to the proper and effectual enjoyment thereof, would also pass to the purchaser, though they may not be strictly regarded as covered by the term. (1) So a mortgagee of freehold land and of some policies of insurance on the life of the mortgagor, selling the mortgaged land in exercise of the power of sale contained in his mortgage, could not withhold the mortgage-deed from the purchaser who was entitled to have it delivered over to him on completion. (2)

1081. The liability of the vendor to deliver up the title-deeds, begins with the payment to him of the price by the purchaser. Till then, being the muniments of his title, he is entitled to retain them. This appears to have been the rule from the earliest times. (3) Obviously, there is no reason why a seller should retain the deeds after he has parted with the estate, and indeed, there is very good reason why he should not retain them, for he may use them for perpetuating a fraud upon the purchaser as by creating an equitable mortgage by deposit. A purchaser may upon completion of the sale stand upon his right to the deeds as an incident to his ownership. (4) So if the vendor has delivered the deeds beforehand to the purchaser, as for the purpose of drawing up the conveyance, the latter will, on completion of the conveyance and payment of the purchase-money, be entitled to retain possession of them; but if he refuse to perform the contract according to its import and return the deeds to the vendor, the latter may sue for their recovery. (5) But if the vendor has executed a conveyance as an escrow and received a part of the price, the deeds being left with the common solicitor for delivery to the purchaser on payment of the balance of the purchase-money, he could not with the aid of the solicitor pledge them to a third party, although an innocent one, for more than the balance due, because the deeds belong to the purchaser. (6) If the purchaser had negligently but without fraud, left the deeds in the hands of the vendor, *any* subsequent purchaser from the first purchaser may yet recover them from the original vendor, and even against a person to whom he had fraudulently conveyed the property. (7)

1082. All the title-deeds relating to the property, however numerous or ancient, pass with it on conveyance without being named. (8) The person who is entitled to the land is entitled to the deeds, it being immaterial that there is an outstanding term of years in a trustee. (9) Except in cases in which the deeds subject him to some future personal liability, the vendor is not even entitled to keep any copies of any documents as a record of the title. (10) An omission on the part of the purchaser to make an inquiry respecting the deeds has been held to be in itself evidence though not conclusive of fraudulent

(1) *Shri Bhavani v. Devrao*, I. L. R., 4 Bom., 485.

(2) *In re Fuller & Sealbley's Contract*, [1897] W. N. 54; *In re Williams & Coy's Contract*, [1897], Ch., 144.

(3) *Lord Buckhurst's Case*, 1 Rep., 1.

(4) S. 8 *ante*; Sugd., 434.

(5) *Parry v. Frame*, 2 Bo. & Pul., 451; *Foster v. Foster*, 1 Hog. 224; Sugd., 434.

(6) *Hooper v. Ramsbottom*, 6 Taunt., 12; *Goode v. Burton*, 1 Ex., 189. It would thus

appear that the vendor has a charge not only on the land but also the deeds which are its incident for the amount of the purchase-money.

(7) *Harrington v. Price*, 3 Bat. & Ad., 170; *Wakefield v. Newton*, 6 Q. B., 276.

(8) S. 8, *ante*.

(9) Sugd., 433.

(10) *In re Wade & Thomas*, 17 Ch. D., 348 (352).

indifference so as to be material in a struggle for priority. (1) But it is not in itself sufficient to postpone him. As Lord Eldon, L. C., said: "The doctrine at last is, that the mere circumstance of parting with the title-deeds, unless there is fraud, concealment or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgage". (2) But the absence of inquiry may be, if it is not explained, evidence of a design, inconsistent with *bona fide* dealing, to avoid knowledge of the true state of the title. (3) A reasonable excuse given to the purchaser for non-delivery would be sufficient to exonerate him from any suspicion. (4) The vendor being enjoined to deliver up not only the title-deeds in his possession, but also those that are in his "power," the mere fact that obtaining the deeds may cause the vendor trouble and expense, is no answer to the purchaser's demand. Indeed, in an open contract, it is the vendor who must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract. (5) Where owing to want of concurrence of the heir, the deeds deposited with a solicitor cannot be delivered, the court may direct that the deeds be deposited in court and, that the purchaser have liberty to inspect and make copies of them. (6)

1083. This clause enacts an exception in consonance with the English law, which also enacts a somewhat similar rule in the following terms: "Where the vendor retains any part of an estate to which any documents of title relate, he shall be entitled to retain such documents." (7) This rule has been held to apply only to land, including leaseholds, and consequently, when a mortgage comprised land and policies of insurance on the life of the mortgagor, it was held that on a sale of the land by the mortgagee, the purchaser was entitled to have the mortgage-deed delivered to him, notwithstanding that the mortgagee still retained the policies. (8) But, in this respect, the language of the proviso is wider, and in a similar case, the mortgagee, would be here entitled to retain the mortgage-deed. Indeed, so long as the vendor retains the modicum of interest in the property and to which the title-deeds relate, he is not bound to deliver them up to the purchaser of a fraction, although the lot sold may be considerably larger than that retained by the vendor. The proviso does not apply to a case where the vendor having sold all his property has entered upon it as a lessee from the purchaser or where a new interest has been carved out for him by the purchaser.

1084. Where the vendor has sold (9) the whole of the property to the different purchasers, the purchaser of the lot, not largest in area, but greatest in "value" is entitled to the custody of the deeds. The lot of greatest value here means the lot in

(1) *Hewith v. Loosemore*, 9 Har., 449 (458); *Ratcliffe v. Barnard*, L.R., 6 Ch., 652; *Northern Insurance Co. v. Whipp*, 26 Ch. D., 482.

(2) *Evans v. Bicknell*, 6 Ves., 174 (190); cited *Per Fry, L.J.*, in *Northern Insurance Co. v. Whipp*, 26 Ch. D., 482 (489). "If you give the key of the wine-cellar to your butler, does that enable him to make a valid pledge of your wine." *Per Fry, L.J.*, in *Northern Insurance Co. v. Whipp*, 26 Ch. D., 482 (486).

(3) *Agra Bank v. Barry*, L.R., 7 H. L., 157.

(4) *Espin v. Pemberton*, 3 D. & J., 547.

(5) *In re Dutty and Jesson's Contract*, [1898], 1 Ch., 419.

(6) *Wright v. Robotham*, 33 Ch. D., 106.

(7) Rule 5, S. 2, Vendor and Purchasers Act, 1874.

(8) *In re Williams & Coy's Contract*, [1897], 2 Ch., 144.

(9) This clause obviously contemplates sale in lots by the same transaction.

respect of which the highest price has been paid. (1) Of course, there can be no apportionment of title-deeds. The clause does not provide for the contingency of the two or more lots fetching an even price, but in such a case, the deeds would have to be made over to the purchaser chosen by the whole body of purchasers for the purpose. If, however, the sale to the several purchasers was not concurrent but consecutive, the *last* purchaser is the person entitled to the deeds, since it is with him that the seller ceases to retain "any part of the property" which upholds his rights to the deeds. (2) A case might be conceived for which the rule here enacted makes no provision. Suppose the vendor sells the greater part of his property to *A*, and afterwards sells the residue to another purchaser *B*. Here after sale to *A*, the vendor would still retain the deeds, and which we would have to make over on sale of the remainder to *B*. But what are the equities as between *A* and *B*? Probably justice in such a case, demands that the deeds be made over to the subsequent purchaser on condition that he may produce them to the first purchaser upon every reasonable request by him. At the same time, he cannot withhold delivery of the deeds to the subsequent purchaser on the ground that he had covenanted with the first purchaser for their production. Nor is the vendor, after the second sale, entitled to deliver the deeds to the first purchaser.

A trust is fastened on the seller or the buyer in respect of the custody of the deeds which the other purchasers are entitled to inspect or copy. In case of misuse of the deeds or of an unreasonable refusal to produce them, they may be ordered to be deposited in court, for the benefit of persons interested in them, (3) who may arrange to deposit them at a banker's for greater convenience. In the absence of special circumstances, a trustee is not entitled to have title-deeds removed from the custody of a co-trustee and placed at a bank, in a box accessible only to the trustees jointly. (4) As to the time, place and the manner and expense of delivery, reference may be made to the foregoing discussion.

1085. Seller's Right to Rent between Contract and Sale.—

Cl. (4)(a).

Having provided that the contract alone passes no interest to the buyer, it follows that the seller is entitled to all the rents and profits pending the completion of sale, after which he is no longer entitled to any interest in the property, except by way of a lien for his unpaid purchase-money. If either the vendor or the purchaser is responsible for delay in either not selling or buying the property on the date fixed by them, the party in default must account to the other for any profits made in the *interim*. Thus should the purchaser being put into possession fail to pay the purchase-money, he must either pay interest on the amount not paid, or a fair rent for his occupation, (5) even though the purchase-money may have been lying idle and not appropriated by the purchaser, (6) or the property may have been unproductive, and the vendor will, moreover, be entitled to any actual profits arising from it. (7) Where considerable time elapsed before the vendor established his title, it was held that the purchaser who was in possession of the land must pay also interest on

(1) The clause is drawn from Sugden's V. & P. 434, in which the rule is thus stated; "Upon a sale of part of an estate without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody of the deeds—whether the seller or the purchaser,—giving to the other covenant to produce them; but of course the purchaser would not be bound to furnish the seller with attested copies of them."

(2) Cl. (3) (a) *supra*.

(3) *Worthington v. Morgan*, 16 Sim., 547.

(4) *Jones v. Trappes*, [1903], 1 Ch., 262.

(5) *Greenwood v. Turner*, 2 Ch. D., 144; *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D., 387.

(6) *Calcraft v. Roebuck*, 1 Ves. J., 221 (225, 226); *Euraght v. Fitzgerald*, 2 Ir. Eq., R., 87; *Dyson v. Hornby*, 4 De G. & S., 481.

(7) *Dart*, p. 286.

the purchase-money to the vendor. But, should the interest exceed the rents and profits received by him, it would appear, that, then he need only pay the interest. (1) If the delay is attributable to the vendor in possession, he is entitled to interest all the same, but he must then in his turn pay a fair occupation-rent to his purchaser. (2) If no time be fixed for completion, the purchaser must pay interest on the purchase-money, unless it be lying idle after notice to the vendor. If he is in possession from the date of the contract, he must pay interest as from that date, but in any other case interest will accrue from such date as he took possession, or might prudently have taken possession as when it was offered him.

Although entitled to the rents and profits, the vendor cannot of course commit waste by taking crops in an immature state or otherwise than in due course of husbandry, (3) for he is liable for deterioration caused by either his wilful acts or mere negligence. He cannot eject tenants or allow the land to remain uncultivated. If the deterioration is not of a serious character, the purchaser will be entitled to an allowance, and in a serious case, he may even be relieved from the contract. (4) The subject of rent has been before dealt with in section 36. It is deemed to accrue from day to day and must be apportioned accordingly.

1086. Vendor's Charge for unpaid Purchase-money.—The

vendor has a charge on the property for the unpaid purchase-money. If he has not delivered possession of the property, he can insist on payment before delivery, (5) and his lien continues so long as the payment is not made, even though possession of the property be changed. The term "purchase-money" would include not only money, but anything that is money's worth and forms consideration of the sale. So if a promissory note (6) or a mortgage (7) executed by the vendee before sale is accepted as the price of the property sold, the vendor has a charge for the amount due under the promissory note as representing the unpaid purchase-money. (8) In other words, the statutory charge of the vendor is not lost by the mere acceptance of a collateral security. The only means of defeating it is "a contract to the contrary" i.e., by an express or implied contract or waiver which cannot be inferred from the mere acceptance of an additional security; (9) or leaving the purchase-money with the vendee for payment to a creditor of the vendor. (10) (§ 1093) Where the purchaser executed a mortgage deed as security for payment of a portion of the purchase-money, and the vendor was unable to transfer a portion of the property for want of title, the purchaser was held entitled to reduce the consideration of the mortgage *pro tanto*. The condition requisite for the passing of the ownership to the buyer, before payment of the whole of the purchase-money, would usually be delivery of possession of the property, after which he acquires what is known in the English law as the vendor's equitable lien, and which savours of the common law right of the unpaid vendor of goods. "The principle is," wrote Lord St. Leonards, "that

(1) *Dart*, p. 709.

(2) *Metropolitan Ry. Co., v. Defries*, 2 Q. B. D., 387; *Leggott v. Metropolitan Railway Co.*, 5 Ch. 716.

(3) *Dart*, p. 733.

(4) *Ibid.*, p. 733.

(5) *Unedmal v. Davabin*, 1 L.R., 2 B.M., 547.

(6) *Vellayappa v. Narayannan*, 18 I. C. 81 (82); *Karuppa v. Hari Row*, 11 I. C. 890;

Raman v. Sankaran, 23 T.L.R. 51.

(7) *Lakshmana v. Sankara*, (1913), 13 M. L.T. 364.

(8) *Digambar v. Nishibala*, 8 I. C., 91.

(9) *Abdulla v. Manmali*, 1 L.R. 33 Mad. 446 (449); *Siva v. Gnanasambanda*, 10 I. C. 98 (102).

(10) *Harchand v. Kishori*, 7 I. C. 639 (640).

the lien for the purchase-money represented the estate which in equity no longer was his: this right the conveyance did not defeat. Now the purchaser, upon the execution of the contract, becomes in equity owner of the estate and the money belongs to the vendor. If all the money is paid, he obtains the estate itself. The money is in exchange for the estate. A deposit is part payment. Therefore, part payment *to that extent* constitutes the purchaser actually owner of the estate: consequently if the contract do not proceed without the fault of the purchaser, the seller to recover the equitable ownership, must repay the deposit, which, representing a portion of the interest in the property, is a lien upon it."⁽¹⁾ The lien having been reserved to the vendor by the clause, it is immaterial that he had no intention to reserve it,⁽²⁾ or that he intended to rest satisfied with the personal security.⁽³⁾ Nor is it excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it excluded by any contract, covenant or agreement not inconsistent with its continuance.⁽⁴⁾ But an actual agreement to that effect would, by force of the saving clause governing the whole section, necessarily extinguish it. The right of the vendor to lien was recognized as an essential equity even before the Act.⁽⁵⁾ The fact that the consideration is upon the fact of the instrument expressed to be paid, and it is acknowledged by a receipt endorsed upon the back, does not take away the lien if the money or part of it has not in fact been paid.⁽⁶⁾ Indeed, it is quite customary in documents executed in India to recite the payment of consideration as a thing of the past, whereas no consideration was in reality paid before the recital.⁽⁷⁾ But this is a practice which may create difficulties. If, for instance, the purchaser mortgages the property and the mortgagee takes without notice of the vendor's charge outstanding, the vendor could not enforce it against the property in his hands. In a registered sale-deed, it was stated that the vendor had received consideration in full, and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor also parted with all title-deeds relating to the property. The purchaser subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor, though he knew that the vendor was in possession of some portion of the property. It was held that the vendor was estopped from contending that he had a charge on the property sold for the unpaid balance of the purchase-money by his declaration as to the receipt of the whole purchase-money and by his act of handing over the title-deeds.⁽⁸⁾

1087. This clause enacts a rule for this country, which is different in its origin and nature from the vendor's lien given by the English Courts of Equity to an unpaid vendor. This Act gives a statutory charge upon the estate to an unpaid vendor, unless it be excluded by contract, and such a charge stands in quite a different position from the vendor's lien under the English law. Such a charge cannot be excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments,

(1) Sugd., 671, 672.

(2) *Macreth v. Symmons*, 15 Ves., 329.

(3) *Winter v. Lord Anson*, 1 Sim. & S., 438 (445).

(4) *W. bb v. Macpherson*, 1 L.R., 31 Cal., 57 (72) F.C.

(5) *Yellappa v. Mantappa*, (1866), 3 B.H. C.R., 102.

(6) *Per Lord Eldon, C., in Macreth v.*

Symmons, 15 Ves., 329; *Umedmal v. Davu*, 1 L.R., 2 Bom., 547 (549); *Trimalrav v. The Municipal Commissioners*, 1 L.R., 3 Bom., 172.

(7) *Cf. Seshachala v. Varada*, 1 L.R., 25 Mad., 55.

(8) *Tehil Ram v. Kashi Bai*, 1 L.R., 33 Bom., 53.

nor by any contract, covenant or agreement with respect to the purchase-money which is not *inconsistent* with the continuation of the charge.⁽¹⁾ The period of limitation within which it may be enforced is twelve years as provided by Article 132 of the Limitation Act.⁽²⁾

1088. The vendor of immoveable property who has given possession to the purchaser is not entitled to rescind the contract of sale and recover possession only because the purchase-money is not paid. The clause creates a lien on the property which he may enforce in a suit for recovery of the sum due.⁽³⁾ Of course, he may refuse to give delivery until the consideration is paid, but having given delivery, he has no right to retake possession and pay himself the purchase-money out of the usufruct.⁽⁴⁾ The vendor's lien does not operate on the finality of the sale, but being an equitable right, all that it does is to entitle the vendor to enforce payment, if necessary, out of the property. In other words, the vendor's charge is non-possessory, and does not confer on him the right to retain possession of the land sold in virtue of his charge. He is only entitled to retain the title-deeds, and to charge interest on the unpaid purchase-money.⁽⁵⁾ The right, again, is personal to the vendor, so that a creditor of the vendor cannot claim it.⁽⁶⁾ The lien declared here is also provided for in England,⁽⁷⁾ but there it is assignable or chargeable by parol, the assignee or incumbrancer taking subject to any prior equitable incumbrances created by the vendor.⁽⁸⁾ The vendor's lien may be abandoned by him by taking some other security in substitution for the ordinary lien. Such abandonment must, however, be alleged and proved by the party relying upon it. It is always a question of construction and intention, and must depend upon the circumstances proved in each case. Where a purchaser gave bonds to the vendor for unpaid purchase money, and which being unregistered were held to be inadmissible in evidence, the latter was allowed to establish a charge on the property sold in respect of the unpaid purchase-money.⁽⁹⁾ By taking one security, the vendor does not necessarily abandon the other.⁽¹⁰⁾ Before the vendor can be shown to have lost his lien, it must be shown that he had clearly agreed to substitute one security for the other. The new security must be shown to be inconsistent with a right of lien, as when the vendor actually receives the consideration for which he stipulates. "There is a marked distinction between a conveyance as for money paid, with a separate security for the price, whether by covenant, bond or note, and a conveyance expressed to be in consideration of covenants which

(1) *Webb v. Macpherson*, I.L.R., 31 Cal., 57, P.C.; *Of. Subrahmanya v. Poovan*, I. L. R., 27 Mad., 28; *Ramakrishna v. Subrahmanya*, I.L.R., 29 Mad., 305 (306).

(2) *Munir un-nisa v. Akbar Khan*, I.L.R., 30 All., 172; F.B.; following *Harbai v. Muhmad*, I. L. R., 21 All. 454; overruling *Buldeo v. Jit Singh*. (1891), A. W. N. 130; *Ramakrishna v. Subrahmanya*, I. L. R., 29 Mad., 305.

(3) *Trimalrav v. The Municipal Commissioners*, I.L.R., 3 Bom., 172; *Kewaldas v. Nagandas*, 2 I.C. 429; *Balkrishna v. Shribat*, 6 N.L.R. 99 (102).

(4) *Prem Soonduree v. Grish Chunder*, 10 W.R., 194; *Mohsum Ally v. Balosso*, 2 Hay., 576; *Yellappa v. Mantappa*, 3 B.H.O.R.,

102; *Moidin v. Avaran*, I.L.R., 11 Mad., 163; *Kesri v. Ganga*, I.L.R., 4 All., 168; *Trimalrav v. The Municipal Commissioners*, I.L.R., 3 Bom., 172; *Sagajiv v. Namdev*, I.L.R., 23 Bom., 525.

(5) *Velayudha v. Govindasamy*, I.L.R. 30 Mad. 524.

(6) *Hari Ram v. Denaput Singh*, I.L.R., 9 Cal., 167 (172); *Moti Lal v. Bhagwan Das*, I.L.R., 31 All. 443 (444).

(7) 3 & 4 Will. IV., c. 27, §. 25. See also 30 & 31 Vict., c. 69; and 40 & 41 Vict., c. 84.

(8) *Dart.*, p. 828.

(9) *Rice v. Rice*, 2 Drew., 72; *Virchand v. Kumaji*, I.L.R., 18 Bom. 49.

(10) *Grant v. Mills*, 2 Ves., & B., 306.

the purchaser enters into by the deed itself." (1) In short, where the security is the price, and is not for the price of the sale, there is no lien. Hence where the consideration for a sale was the immediate payment of a portion of the purchase-money, and an undertaking by the purchaser as to the residue and a part payment was made, and an undertaking given in the form agreed upon, there could be no lien. (2) So, in one case, it was observed by Lord Westbury "If a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings, in that relation, the express stipulation and agreement of the parties for security exclude lien and limit their rights by the extent of the express contracts that they have made,—*Epressum facit cessare tacitum*." (3) It may often happen that where the vendor relies for payment on the proceeds of the sale of share and the capital of the company, the arrangement being inconsistent with his right of lien necessarily excludes it. (4) Both in England and here, oral evidence is on this point admissible to rebut the intention that may be presumed from documentary evidence. (5)

1089. It is clear from this section, taken with section 40, that the lien will avail against the property in the hands of the purchaser's gratuitous transferee or a transferee with notice. It cannot, however, be enforced against a *bona fide* purchaser for valuable consideration or one without notice. (6) It is, however, valid as against sub-purchasers and mortgagees even without notice.

1090. The vendor's lien here mentioned is of a somewhat similar character to that conferred on the seller of goods by section 95 of the Indian Contract Act. As in the case of goods, the lien may be enforced by stoppage *in transitu*, or re-sale, so in the case of immoveable property, it may be enforced by a charge on the property, or, in other words, by proceeding against the property as on a mortgage and bringing it to sale. But it is not necessarily incident to an exchange where by the very nature of the transaction such a charge is ordinarily not implied. (7)

1091. The limitation for suits of this kind is according to the Bombay Court governed by Article 132, and not Article 111, of the Limitation Act; (8) but according to the view taken in the earlier cases of Madras, such a suit should be governed by Article 111 and not Article 132. (9) The Allahabad Court follows the view taken in Bombay. It would

(1) In re *Albert Life Assurance Co.*, I. L. R., 11 Eq., 164; *Dixon v. Guyfere*, 7 De.G & J., 615; *Clarke v. Royle*, 3 Sim., 499; *Parrot v. Sweetland*, 3 My. & K., 655; *Winter v. Lord Anson*, 3 Russ., 488; *Jerry v. Briton Ferry, &c., Co.*, I. L. R., 7 Eq. 409 (413); In re *Brentwood, &c. Co* 4 Ch. D., 562.

(2) *Webb v. Macpherson*, I. L. R., 31 Cal., 57 P. C. Cf. *Subrahmania v. Poovan*, I. L. R., 27 Mad., 28.

(3) *Chambers v. Davidson*, I. L. R., 1 P. C.: 296 (305). The Latin quotation means—"An express contract excludes an implied one."

(4) In re *Brentwood Brick Co.*, 4 Ch. D., 562.

(5) *Frail v. Ellis*, 16 Bing., 350; *Prso Nath v. Madhu Sudan*, I. L. R., 25 Cal., 603; *Ramjibun v. Oghore Nath*, *ib.*, 401; S. 93, Proviso 3, Indian Evidence Act (I of 1872).

(6) See S. 100, *post*. But see *Meghraj v. Abdullah*, 12 A. L. J., 1034 (1038) in which however, the transferee was found to have had notice.

(7) *Krishna Nair v. Kundu Nair*, (1912) M. W. N. 535; *Pallgit v. Kizhakke*, 16 I. C. 109.

(8) *Virchand v. Kumaji*, I. L. R., 18 Bom., 48; *Virchand v. Kumaji*, I. L. R., 22 Bom., 846; *Harlal v. Muhamdi*, I. L. R., 21 All., 454. The English law is similar, see *Darby and Bosanquet's Law of Limitation* (2nd Ed.) 170, 175, but then there is no analogy between this and the Indian Act.

(9) *Natesan v. Soundararaja*, I. L. R., 21 Mad., 141; *Avuthala v. Dayamma*, I. L. R., 24 Mad., 233; *Subrahmania v. Poovan*, I. L. R., 27 Mad., 28; dissented from in *Ramakrishna v. Subrahmania*, I. L. R., 29 Mad., 305, following *Webb v. Macpherson*, I. L. R., 35 Cal., 57, P. C.

appear that the view taken by Strachey, C. J., in the Allahabad case⁽¹⁾ is more dictated by the anomalies which are involved in the Madras view, than by the plain interpretation of the two articles. But, as pointed out by Shephard, J., in the Madras case,⁽²⁾ the Limitation Act enacted in 1877 could not be interpreted, with reference to an enactment on a totally different subject passed some five years later. Comparing the language of the two articles, it would seem that Article 132 is a general article prescribing limitation for the recovery of money charged on immoveable property generally, whereas Article 111 specially prescribes the shorter term of three years for suits by the vendor for the enforcement of his lien for unpaid purchase-money. Indeed, if this be not the object of Article 111, it is difficult to see what other suits it is then intended to govern. In Madras, this article was at one time applied to the vendor's lien irrespective of whether the suit was on a contract registered or unregistered; ⁽³⁾ but it has since changed its views⁽⁴⁾ in deference to the remarks of the Privy Council who held that the charge enacted by this section is different in its origin and nature from the vendor's lien given in England by the Courts of Equity to an unpaid vendor.⁽⁵⁾ But this view, though final, is not inconsistent with the applicability of Article 111 when there can be no mistake about its meaning. Indeed, the distinction drawn by the Privy Council between a vendor's lien and the statutory charge could scarcely be said to be present to the minds of the framers by the Act which was passed some years before the present enactment. On the other hand, the later Madras view may be justified on the ground that the shorter article dealing with a vendor's lien ceased to apply as soon as a statutory charge was created by the Act.

1092. The statutory charge here given may be excluded or lost by a contract to the contrary or by waiver, which may be inferred from a variety of circumstances.⁽⁶⁾ The question whether the lien was abandoned or waived must naturally depend upon the intention of the vendor which may be inferred from his words and acts, as for example, where he has taken some other security instead. Ordinarily, the mere taking of a personal security for the purchase-money does not extinguish the lien, so that if the purchaser had executed a bond,⁽⁷⁾ a promissory note,⁽⁸⁾ a mortgage⁽⁹⁾ or bill of exchange⁽¹⁰⁾ or left the purchase-money with the vendor for payment to a third party⁽¹¹⁾, it does not always have that effect, though if there be anything therein to evidence a clear and manifest inference to the contrary, the lien would then be deemed to have been abandoned.⁽¹²⁾ (§ 1086) So, if the property be sold for an annuity, and a bond or note is taken to secure its payment, the lien still remains.⁽¹³⁾ But, it is

(1) *Harlal v. Muhamdi*, 1 L. R., 21 All. 451; to the same effect *Munimunnissa v. Akbar Khan*, I.L.R., 30 All., 172 (174); *Syed Talib v. Ramcharan*, (1906), 9 O. C. 284.

(2) *Avuthala v. Dayunma*, I. L. R., 24 Mad., 233 (237); distinguishing *Krishnav. Kannau*, I. L. R., 21 Mad., 8; followed in *Seshachulu v. Varada*, I. L. R., 25 Mad., 55.

(3) *Seshachala v. Varada*, I. L. R., 25 Mad., 55.

(4) *Ramakrishna v. Subrahmanya*, I.L.R., 29 Mad., 305.

(5) *Webb v. Macpherson*, I. L. R., 31 Cal., 57 (72), P. C.

(6) *Abdulla v. Mammali*, I.L.R. 33 Mad., 446 (449); *Siva v. Gnanasambanda*, 10 I.C. 98 (102).

(7) *Winter v. Lord Anson*, 3 Russ., 488
Collens v. Collins, 31 Beav., 346 contd—
Karuppa v. Hari Rao, 11 I. C. 890.

(8) *Gibbons v. Baddall*, 2 Eq., Cas., Abr., 682n; *Putti Narayanamurthi v. Marimuttan*, I.L.R., 26 Mad., 322; *Doraisani v. Lakshmanan*, 14 M.L.J.R., 285.

(9) *Lakshmina v. Sankara*, 13 M.L.T. 364.

(10) *Grant v. Mills*, 2 V. & B., 306.

(11) *Harchand v. Kishori*, 7 I.C. 639 (640).

(12) *Winter v. Lord Anson*, 3 Russ 492, cited per Baggallay, D.A., in *In re Brentwood Brick Co.*, 4 Ch. D., 562 (565). *Abdulla v. Mammali*, I.L.R., 33 Mad 446 (449).

(13) *Buckland v. Pocknell*, 13 Sim., 412; Sugd., 676; Dart., 830.

otherwise where a mortgage-bond or other security is taken, in which case, the lien is destroyed.⁽¹⁾ The lien is not lost by an unauthorized payment to the vendor's agent.⁽²⁾ The lien may again be lost by estoppel, as where the vendor by his conduct induces the purchaser to believe that his vendee had full power to sell free from his own lien.⁽³⁾ There is no lien where the sale is illegal,⁽⁴⁾ or is made in favour of a disqualified person.⁽⁵⁾

1093. The vendor may enforce his lien in any or all of the three following :

Charge how enforced. (i) By sale of the property, which is the most usual mode of enforcing a charge, (6) (ii) By the appointment of a receiver pending the sale, (7) (iii) By obtaining an injunction

restraining the purchaser from continuing in possession of the property, and by restoring it to the vendor,⁽⁸⁾ and (iv) if he has not already transferred possession to the purchaser, then, he may himself continue in possession, until the purchaser pays him the purchase-money, and this he may do even though his suit to enforce the lien may have become barred by time. (9) The right of the purchaser to obtain possession of the property and the right of the vendor to a charge on the property may be tried in the same suit⁽¹⁰⁾, as the two equities arising out of the same contract, and constituting reciprocal duties consequent thereupon.⁽¹¹⁾

Where the purchase-money is payable by instalments, the cause of action to sue accrues as each instalment falls due.

1094. Buyer's Duty to disclose Facts materially enhancing

Cl. (5) (a).

Value.—Like the seller, the buyer is correspondingly bound to disclose any fact enhancing the value of the property. Lord

Selborne has summarized the purchaser's duty in this respect in the following words :—"Every purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and, of course, to abstain from all deceit, whether by suppression of truth or suggestion of falsehood. But inasmuch as the purchaser is, generally speaking, under no antecedent obligations to communicate to his vendor, facts which may influence his own conduct to judgment, when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of these facts, would be necessarily or naturally and probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud ; and it is sufficient ground for setting aside a contract, if the vendor was in fact so misled. A man is presumed to intend the necessary or natural consequences of his own words and acts : and the *evidentia rei* would therefore be sufficient without other proof of intention. If the vendor was not in fact misled, the contract could not be set aside, because a *dolus* which neither induced nor

(1) *Re Brentwood Brick Co.*, 4 Ch. D., 562;
Re Albert Assurance Co., L.R., 11 Eq., 164.

(2) *Wroux v. Dawes*, 25 Beav., 369.

(3) *Kettlewell v. Watson*, 26 Ch. D., 501.

(4) *Fisher v. Bridges*, 3 E. & B., 642.

(5) *Harrison v. Southcote*, 2 Ves. 389 (993).

(6) S. 100, *post*.

(7) *Munro v. Isle of Wight Ry. Co.*, L.R., 5 Ch., 414.

(8) *Williams v. Aylesbury &c. Ry. Co.*, 21 W.R. (Eng.) 819 ; *Allgood v. Merrybent Ry. Co.*, 33 Ch. D., 571.

(9) *Subrahmaniam v. Poovan*, I. L. R., 27, Mad. 28 ; following *Umedmal v. Dara*, I. L. R., 2 Bom., 547.

(10) *Nilmadhab v. Hara Prashad*, 17 O. W. N. 1161 ; 20 I.C., 325.

(11) *Nives v. Nives*, 15 Ch. D. 649.

materially affected the contract is not enough." (1) So in another case, it was observed by a Master of the Rolls: "If a person comes to me and offers to sell to me a property which I knew to be five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title which I know that he can, and I conceal that knowledge from him, is not that a *suppressio veri*, which is one of the elements which constitute a fraud?" (2) A purchase for an inadequate weekly payment from an old and infirm woman ignorant of the value of the property sold was on a similar ground set aside. (3) So also, where the vendor having no knowledge of the value of the property or its value, nor any legal advice, conveyed the property to the purchaser relying upon her father's statements, the latter being agent of the former owner, the transaction was declared null and void. (4) Inadequacy of consideration is, however, by itself not a sufficient defence, unless it can be shown to be the result of fraud, surprise, misrepresentation, or improper concealment on the part of the vendee. (4) It may, however, be so great as in itself to furnish evidence of fraud. (5) A misrepresentation made in perfect good faith, if made in order to induce others to act upon it or under circumstances in which the party making it may reasonably suppose that it will be acted upon, *prima facie* binds the party making it, as between himself and those whom he has thus misled. (6) The corresponding duties of the vendor and purchaser are much alike, but while the vendor must disclose latent defects, the purchaser need not, it is said, mention latent advantages, *e.g.*, the existence of a mine on the property unknown to the vendor. (7) But it is submitted that this view is scarcely correct. If the buyer was aware of the existence of a mine which would materially increase the value of the property, it is conceived that his failure to disclose it to the seller would clearly be fraudulent under this clause. (8)

1095. In all cases where the purchaser has reason to believe that the vendor is aware of the nature and extent of his interest, his duty to disclose ceases. But while the purchaser must not mislead the vendor, (9) nor misrepresent the property to other rival purchaser, (10) he is not liable for uttering depreciatory remarks as to the value of the property, or its chances of sale, (11) in the same way as the vendor is not liable for puffing, praise. And the vendor has no remedy if the purchasers combine *inter se* not to bid against one another, and such an agreement has even been enforced at the instance of the bidder withdrawing his opposition by giving him his right of pre-emption over other property. (12)

1096. To pay Purchase-money.—The liability of the purchaser to pay or tender the purchase-money to the vendor "at the time and place of completing of the sale" follows from the nature of the transaction, which is defined to be an exchange for a price, (13) and from which it follows that the payment or tender of the price must as a rule be made at the time of completion. The purchaser cannot withhold payment of

(1) *Coakes v. Boswell*, 11 App. Cas., 235.

(2) *Summers v. Griffiths*, 35 Beav., p. 32.

(3) *Sadashiv v. Dhakubai*, I. L. R., 5 Bom., 450.

(4) *Haygarth v. Wearing*, L. R., 12 Eq., 320.

(5) *Tyler v. Yates*, L. R., 6 Ch. 665.

(6) *Dart*, 118.

(7) *Fox v. Macreth*, 2 Br. C. C., 420; *Turner v. Harvey*, Jac., 178.

(8) See *Phillips v. Homfray*, L. R., 6 Ch., 70; *Haji Essa v. Dayabhai*, I. L. R., 20 Bom., 522 (532, 533).

(9) *Turner v. Harvey*, Jac., 178.

(10) *Howard v. Hopkyns*, 2 Atk., 371; *Buxton v. Lister*, 3 Atk., 383 (386).

(11) *Vernon v. Keys*, 12 East., 632 (638).

(12) *Galton v. Emuss*, 1 Coll., 243; *Re Carew's Estate*, 26 Beav., 187.

(13) S. 54. *ante*.

the price till he is put into possession of the property. But, if possession be refused and the vender is unable to fulfil the contract, the purchaser is at liberty to sue for repayment of the purchase-money. (1) The liability to pay the purchase-money devolves on the purchaser who had made the contract, it being immaterial that he had since conveyed the estate to another, for whom he had purchased it. (2) The repayment of purchase-money is like a debt, which on the death of the vendor must be discharged by his heirs in proportion to the shares inherited by each. (3) Such a case may arise where the sale is made by a widow for the purpose of discharging liabilities on the estate or by a (4) co-parcener without the consent of the other members. (5) But a purchaser who, with notice, buys property subject to a contingency, which may defeat or destroy the interest which is the subject of the sale, is not entitled to be relieved from his bargain and to recover the purchase-money, merely because the contingency contemplated actually happens and the property either does not become, or ceases to be, available for his benefit. (6) There are other circumstances which may disentitle the purchaser to recover back his purchase-money, but these will be found to be set out in the sequel (§1109).

1097. The purchaser is bound to remit or pay money in accordance with the direction of the vendor. If he directs payment to a particular person, whether his agent or attorney, his banker or a stranger, the purchaser cannot object. So if the vendor has prescribed the payment to be made in a particular manner, as by the post, the purchaser so remitting will be absolved from liability, if it be lost, provided that he had used due caution in the transaction. (7) A purchaser paying money to the agent or solicitor of the vendor before the time of the completion, does so at his own risk. (8) If the vendor direct the purchaser to pay over the purchase-money to a third person, it may be a question whether he could revoke his order before payment. It is certain that he cannot do so if the direction was made for valuable consideration or the purchaser has promised payment to the third person, (9) but in any other case, there would appear to be no objection to his withdrawing it. (10) As to what constitutes a sufficient tender, reference must be made to the ensuing pages. (11)

The purchaser agreeing to pay a specific sum to a third party will be entitled to retain the benefit of any remission made by the payee in favour of the purchaser, (12) but if the remission is made without reference to the purchaser, then, since the latter is the agent of the vendor, he must restore the benefit to his principal.

1098. An undertaking by the purchaser to pay the vendor's nominee does not constitute the former a trustee of the latter so as to be exempt from the operation of limitation. (13) His suit for recovery of such unpaid purchase-money would be governed either by Article 111

(1) *Mohan v. Beharee*, 3 N.W.P. H.C.R., 336; *Kishen v. Ram Chunder*, 3 W.R., 28.

(2) *Bhojrab v. Anundmoye*, Marsh, 494.

(3) *Oomedee v. Cheda Lall*, 2 Agra, 264.

(4) *Roostum v. Alum*, 1 Agra, 291.

(5) *Oomedee v. Cheda Lall*, 2 Agra, 264.

(6) *Ramtubul v. Rissessur*, 15 B.L.R., 208 P.C., overruling *Bissessur v. Ramtubul*, 11 B.L.R., 121.

(7) *Sugd.*, 49.

(8) *Paruthur v. Gaitskill*, 13 East., 492;

Hughes v. Morris G. Hare, 636.

(9) *Bowstead on Agency* (4th Ed.) p. 414;

Griffin v. Weatherby, 37 L.J. Q.B. 280; *Siva Subramania v. Gnanasammanda*, 10 I.C. 98 (102).

(10) In *Ansur Subba v. Bathulla*, (1910) M.W.N., 302, 7 I.C. 269; this view was assumed and the purchaser mulcted in costs because he had paid the third party after the vendors sued for its recovery.

(11) S. 60 post (q. v.).

(12) *Siva Subramania v. Gnanasammanda*, 10 I.C. 98 (102).

(13) *Deb Narain v. Ram Saadhan*, 9 I.C., 988 (989).

or Article 83 extended by Article 116 of the Limitation Act, the starting point for limitation, in the first case, being the time fixed for completion of the sale, or where the title is accepted after the time fixed for completion, the date of the acceptance, and in the second case, when the plaintiff is actually damaged, (1) and which should be when the payment is refused to the vendor's knowledge or the performance by the vendee of his agreement becomes impossible. (2)

1099. The obligation of the purchaser to pay the vendor ceases if the property sold be incumbered, unless the contract was for the sale of only the equity of redemption, in which case he cannot withhold payment. In any other case, he may retain the amount requisite to wipe off the "incumbrance"—a term which is wide enough to include a charge or any equitable claim enforceable against the property. The amount which the purchaser may retain would include both the principal and interest, and in the case of a mortgage, all that is comprised in the term "mortgage-money." Any surplus must be paid over to the vendor. On the other hand, if the purchase-money is insufficient to pay off the incumbrance, the purchaser need not pay at all till the vendor (3) provides the rest of the money necessary for the purpose. (4) The language of the clause "and shall pay the amount so retained to the persons entitled thereto" would appear to be inapt, for the purchaser is under no obligation to pay or tender a sum which would leave the property still incumbered, and, may deprive him withal both of the property and his money. (5) But, if in such a case, in spite of the vendor being willing to pay the balance, the purchaser refuse or omit to pay the money, the vendor may then recover interest or damages for improperly withholding payment. If the purchaser finds even after conveyance that the property is incumbered, he is entitled to retain out of the purchase-money such sum as may be sufficient to discharge it. The mode in which this may be done is set out in section 57, *post*. (6) The fact that the purchase-money has been assigned by the vendor does not prejudice the purchaser's right in this respect. The purchaser's right to withhold an amount out of the purchase-money sufficient to pay off an incumbrance on the property is an equity which even the purchaser of a decree has been held entitled to enforce. So, where a decree sold was at the time under attachment at the instance of another creditor, the purchaser was held entitled to retain out of the purchase-money a sum sufficient to remove the attachment, and which he could set off against the vendor's claim against him. (7) The purchaser, must, it is evident, pay money so retained to the vendor, should the incumbrance go off, and the purchaser be no longer required to pay the incumbrancer. This money is unpaid purchase-money which the purchaser is only entitled to retain to pay off an existing prior incumbrance because a prior incumbrance is a blot on his title, against which the vendor has entered into a covenant. Hence whilst the incumbrance lasts, he may retain the money and which he may in proper time pay to redeem it. But if the prior incumbrance be declared invalid or inoperative, the blot on his title being cleared, the purchaser has then no right to retain the money which he must

(1) *Ram Barai v. Mohendra*, 16 I. C. 74
Vythinaatha v. Bheemachariah, 8 I. O. 804.

(2) *Tangammal v. Subbammal*, 16 M. L. J. 20.

(3) See S. 60, *comm.*, as to the meaning of this term.

(4) *Muhammad v. Muhammad*, I. L. R., 21

All., 223, P. C.

(5) *Muhammad v. Muhammad*, I. L. R., 21 All., 223 (226, 227), P. C.

(6) See also s. 5, Conveyancing Act, 1881.

(7) *Khetsidas v. Shib Narayan*, 9 C. W. N., 178.

pay over to the vendor. ⁽¹⁾ Hence where the purchaser, a subsequent mortgagee, purchased the mortgaged property upon which two prior incumbrances were notified, and these latter afterwards proved to be fictitious, it was held that inasmuch as the price for which the property had been sold must be deemed to be the actual price paid together with the amounts of the prior incumbrances, the purchaser was bound to pay this amount to the vendor as soon as the invalidity of the incumbrances became established. ⁽²⁾ The purchaser may withhold payment of the purchase-money if the vendor has failed to carry out his part of the contract which interferes with his undisturbed possession. ⁽³⁾ On the other hand, the vendor's right to recover the purchase-money from the purchaser may be satisfied by the pre-emptor, and though the decree for pre-emption may have been reversed, and the vendor rendered liable to refund the purchase-money received by him when the decree was unreversed, still his cause of action to claim the amount from the purchaser would arise only when he has actually refunded the amount. He may then, but not till then, be free for its recovery from the purchaser. ⁽⁴⁾ A suit for the recovery of unpaid purchase-money under a contract for the sale of land is regarded in Madras as a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16 (d) of the Code, so that a suit for its recovery must be brought in the court within whose jurisdiction the property sold is situate. ⁽⁵⁾

1100. From Completion Purchaser must bear Loss.—Until

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the sale is complete and the property passes to the buyer, the seller is declared to be entitled to all the rents and profits, as he is liable for any loss of the property by destruction or otherwise. After conveyance, the same rights and liabilities are transferred to the purchaser. Indeed, this view of the law naturally follows from the definition given of the contract of sale in the preceding section, and according to which a mere contract creates no interest in or right over the property in respect of which the contract is made. Not having any right *in rem*, the purchaser should not be liable for the accidental destruction of the property, since not to have any interest in the property, and yet to have to pay for its destruction, would be a contradiction in terms. But, while the present clause obviously does not countenance such a construction, the contrary has been laid down in the Specific Relief Act, ⁽⁶⁾ and according to which the purchaser is liable to bear the loss due to the accidental destruction of the property before the completion of the sale. The rule embodied in the Specific Relief Act was adopted from the English law with which it corresponds. ⁽⁷⁾ and according to which, the purchaser takes accidental

(1) *Inayat Singh v. Izzat-un-nissa*, I.L.R., 27 All., 97, F.B.

(2) *Inayat Singh v. Izzat-un-nissa*, I. L. R., 27 All., 97, F.B.

(3) *Rasik Lal v. Chandra Bhusan* 15 C. L.J. 410 (411).

(4) *Mubarak Ali v. Adi Heya*, 17 I.C. 288.

(5) *Maturi v. Kota*, I.L.R., 28 Mad., 227.

(6) S. 13 illus. (d) (Act I of 1877). This illustration taken from the English Case of *Paine v. Mellor*, 6 Ves., 349, runs thus:—"A contracts to sell a house to B for a lakh of rupees. The day after the contract is made the house is destroyed by a cyclone. B may be compelled to perform his part of the

contract by paying the purchase money."

The case of *Rayner v. Preston*, 18 Ch. D., 1 (11) was decided from a different standpoint—that the contract of fire insurance being a personal contract, the vendor and not the purchaser was entitled to the insurance-money received on destruction of the property before completion of the sale. As it is, this view is also opposed to the Act. (See S. 49 ante).

(7) So in *Cass v. Rudele*, 2 Vern., 280, the destruction of the property by an earthquake was held to fall on the purchaser. But in 1 Bro., C.C., 157n, this case was said to be misreported.

benefits and bears such losses, as from the date of the contract,⁽¹⁾ an exception being made only in the case of court-sales.⁽²⁾ This clause and the one corresponding to it ⁽³⁾ are then manifestly opposed both to the above provision of the Specific Relief Act and of the English precedents bearing on the subject. So far as regards this country, the rules laid down in the two Acts are clearly conflicting, and no attempt has been yet made to reconcile them. Should the conflict, however come in for decision, the rule here enacted would probably be preferred if only as contained in a later Act, if not because it is more harmonious with its other provisions, and is commendable to reason. A similar rule applicable to moveable property is enacted in the Indian Contract Act.⁽⁴⁾

1101. Liability at Three Stages.—With the preceeding clause which enjoins on the seller the duty of taking care of the property prior to its delivery,⁽⁵⁾ the subject may be viewed in three successive stages, according to the care required and the incidence of liability in case of destruction or deterioration of the property: (a) Between the date of contract and the passing of ownership, (b) after the ownership has passed, but before delivery, (c) where delivery is made before the sale is complete, or the ownership has passed. Clause (c) of the section provides for the first contingency, and under it the purchaser must bear any loss arising from the "destruction, injury or decrease in value of the property not caused by the seller." The destruction may be caused by fire, cyclone or a cataclysm, and in such a case, the sole question to consider is whether it could have been averted by the vendor. The subject presents greater difficulties where the property is injured or decreases in value. Property may be deteriorated through the calamities of the times,⁽⁶⁾ by accident of natural causes, as the dropping of a life or purchase of an estate *pur autre vie*, or a life annuity, the failure of tenants owing to pestilence or distress, or the depreciation of landed property caused by the passing of laws trenching upon the right of free alienation. So where the property is injured as by the falling of the adjacent houses, the loss would fall on the vendor who will have to make good any injury done to adjoining premises by the fall of the building subsequently to the contract.⁽⁷⁾ As regards contingency (b), the section appears to be silent. Suppose the sale is completed, but owing to the distance between the property sold, and the place where the sale was completed, delivery could not be made, and after completion, but before delivery it is destroyed, on whom is the loss to fall? Apparently on the purchaser, since after the ownership has passed, it is he who must bear any loss arising from the destruction of the property. Lastly, where the change of possession has preceded completion of the sale, the possession of the purchaser is that of the trustee for the vendor, and his liability to account for losses should be determined on that basis.

1102. To pay off All Charges, etc.—From the date of conveyance or completion of sale, the buyer being on the one hand entitled Cl. (5) (d). to all the rents and profits, is also on the other liable to pay all charges and rent which may become payable in respect of the property. But where the vendor "is personally subject to liabilities, either in respect of the estate, or for the performance of which the estate stands as security, the purchaser taking the estate, must undertake the liabilities, and covenant to indemnify

(1) Sugd., 291—295, where the earlier cases are all collected, Dart, 286.

(2) (3) Ex parte Minor, 559; *Zagury v. Furnell* 2 Cam., 240.

(3) (6) (a) *post.*

(4) S. 86, See ill. (b) (Act IX of 1872).

(5) (1) (e) *ante.*

(6) *Poole v. Shurgold*, 2 Bro., C. C. 118.

(7) *Ct. Robertson v. Skelton*, 12 Beav., 260 (626), in which the contrary was laid down in accordance with the contrary English rule before noticed.

the vendor against them.”⁽¹⁾ Ordinarily, “where a property is merely sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration for the purchase. The vendor simply sells, and the purchaser buys an incumbered property; and it is in no way essential to the validity of the sale that the mortgage or charge should be paid off.”⁽²⁾ “Before as after the passing of the Act the transferee would, as a matter of course, have taken the property subject to the charge. The only burthen which he would not have taken upon himself would be the personal liability (if any) of the transferor, and it is possible that section 55 may effect some alteration in the law in this respect.”⁽³⁾ This decision so far as it is based on section 24 of the former Stamp Act (under which it was held that the payment of mortgage or charge subject to which property is sold is not part of the consideration-money for the purchase), must be taken now to be superseded by the provisions of the present Stamp Act,⁽⁴⁾ which has adopted the view previously taken by the Bombay High Court,⁽⁵⁾ in opposition to the above case, as also to a ruling of the Madras High Court:⁽⁶⁾ The new Act now provides that “in the case of a sale of property subject to a mortgage or other incumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale.”⁽⁷⁾

1103. This clause enacts a rule of equity, and as such applies not only to private sale but also to court sales to which the section as a whole has no application.⁽⁸⁾ So, where the defendant purchased a share of certain property in September 1872, but did not obtain possession until confirmation of the sale in May 1873, it was held that he was liable for the amount of Government revenue in respect of his share which became due between the date of the sale and its confirmation.⁽⁹⁾ In this case which follows one of the two previous conflicting rulings of the same High Court,⁽¹⁰⁾ it has been held by the Full Bench that from the date of the sale, the property became vested in the purchaser, and from which period his liability must be also deemed to have commenced. The liability of the purchaser to pay rent and discharge burdens incidental to his ownership commences the moment the ownership has passed to him. Thus where the purchaser at a court sale had his sale confirmed on the 31st March 1900, but did not obtain possession till the 11th May following, he was held to be liable to pay the two instalments of rent which fell due subsequently to the confirmation of sale, namely, on 1st April and 1st May, it being immaterial, in regard to his liability for rent, when he recovered actual possession of the land.⁽¹¹⁾ Indeed, besides the rent due since his purchase, the purchaser is bound to pay rent due on land of which he had notice, and even though it be for a period anterior to the date of sale.⁽¹²⁾ It may be urged that the clause defines

(1) *Dirt.*, p. 628.

(2) *Per* Garth, C.J., in *Reference from the Board of Revenue*, I. L. R., 10 Cal., 92 (95).

(3) *Ibid.*, p. 96.

(4) S. 24, Act II of 1899.

(5) *Nagindas v. Halakore*, I. L. R. 5 Bom. 470.

(6) *Reference under Stamp Act*, 1879, I. L. R., 5 Mad., 18; cited and followed in *Reference from the Board of Revenue*, I. L. R., 10 Cal. 92.

(7) S. 24, Expl., Indian Stamp Act (II of 1899).

(8) *Mangalathammal v. Narayanswami*, 17 M.L.J.R., 250.

(9) *Bhupab Chunder v. Soudamini*, I.L.R., 2 Cal., 141, F.B.; *Kavali (Rajah) v. Rangiah (Sri Rajah)*, I.L.R., 29 Mad., 519.

(10) *Kaleedas v. Hur Nath*, [1864], W. R., Gap No. 279; followed by the F.B. *ante*; *Bepin Behari v. Judoonath*, 21 W. R., 367; overruled (in which it was held that the purchaser took from the date of confirmation).

(11) *Ramasami v. Annadorai*, I. L. R., 25 Mad., 454.

(12) *Haradhan v. Kartik Chandra*, 6 C.W. N., 877; distinguishing *Faez Rahman v. Sukh*, I.L.R., 21 Cal., 169; *Alim v. Satish Chandra*, I.L.R., 24 Cal., 37.

the liability of the purchaser only as between himself and the seller, and that a third party, for example the landlord, cannot avail himself of it. This point was overlooked in the Madras case before cited, ⁽¹⁾ but that view may be justified on the ground that rent being the paramount charge on the land must be paid by the tenant, and, as by transfer, the purchaser became the tenant, as from that date commenced also his liability to pay rent.

In addition to the rent and the public charges which the purchaser has to pay, and the nature of which has been before discussed, he may have in addition to pay the customary due known as *haq-i-chaharum* ⁽²⁾ if sanctioned by custom or contract to the superior landlord, unless the latter is limited to a right to claim it only from the vendor. The right to claim such customary dues is in several places sanctioned by the terms of the *wajib-ul-arz*, and such was the case in a suit from Mao in which the zemindar was held entitled to recover it. ⁽³⁾

1104. The vendor is bound to indemnify the purchaser for breach of an express covenant to pay arrears of rent due up to the time of sale, failing which, if the vendee should have had to make the payment, he would be entitled to recover the amount as a loss sustained by him. If the vendor breaks his express covenant to pay, and the landlord sues him for rent due for the period both anterior and subsequent to the date of sale, and obtains a decree in execution of which a part of the property is sold, the purchaser may well claim to be reimbursed the loss which he has sustained on account of the vendor's failure to comply with the terms of his contracts. ⁽⁴⁾

1105. The purchaser is further liable to pay off the money due on any incumbrance of the property, but in this respect, his liability is limited only to paying the principal and future interest accruing due thereon from the date of the completion. So, where in a suit for specific performance of a contract of sale, brought against a mortgagor and mortgagee of certain properties, a person obtained a decree and in pursuance of the order of the court paid the whole purchase money into court to the credit of the mortgagor, who failed to satisfy the mortgage, it was held that it was the duty of the purchaser and not that of the mortgagee to see that the money deposited in court was first applied in discharge of the mortgage, and that the mortgagee was therefore entitled to the benefit of the security. ⁽⁵⁾ As between the purchaser and mortgagee, it was no doubt the former's duty to satisfy the debt. No doubt the mortgagee might have applied to the court to alter its decree, but he was under no obligation to do so. And no more was the purchaser; but, if he parted with his money irrecoverably, without first seeing that the property was freed from the incumbrance, he did so at his own peril, and must take the consequences. Of course, the liability of the purchaser to pay off incumbrances, under the clause does not give him any right of indemnity against the vendor, inasmuch as he had taken the property subject to the incumbrances. The purchaser is not entitled to dispute non-existent or voidable incumbrances subject to which he has purchased. The purchaser is, however, not liable to pay accumulated interest due on existing incumbrances, since he has no reason to suppose that it was not paid when it fell due.

(1) *Ramasami v. Annadurai*, I. L. R., 25 Mad. 454.

(2) Lit., "one-fourth right."

(3) *Dhandai v. Abdur Rahman*, I. L. R., 23 All., 209; following *Heera Ram v. Raja Deo*

Narain, [1863], N. W. P., S. C. R., 63, F. B.,

(4) *Syed Kutub v. Azibulla*, 7 C. W. N., 905.

(5) *Kandasami v. Jagathamba*, 10 M. L. J. R., 353.

1106. Buyer's Rights to Improvements, etc.—This clause is

CI. (6) (a). complementary to clause 4 (a) of which it is a natural corollary. From the date of the conveyance, the purchaser is entitled to all accretions, as he has been declared liable to any deterioration of the property. He is entitled to the improvements equally, whether affected by the vendor or independently of him; *e.g.*, the dropping of lives on the purchase of a reversionary interest; or a sudden rise in the value of land from its being required for a public purpose. The purchaser is, of course, not entitled to any rents and profits accruing due before the date of his conveyance, unless they have been expressly sold. If the rents and profits have been paid to the vendor in ignorance of the transfer, the purchaser cannot recover them from the payee, but may sue the vendor for money wrongfully had and received. (1)

It should be observed, that both in England as well as in this country the purchaser is entitled to rents and profits only as from the date of the conveyance, and not from the date of the contract. Strictly construed, this clause would seem to exclude from the purchaser the benefit of improvements made before the completion. Thus, if the value of the land suddenly go up on account of the completion of an irrigation channel, the approach of a railway, or for any cause, is the vendor entitled to its benefit, and if so, is he entitled to claim re-adjustment of the price? But to this he is evidently not entitled since a claim for an enhanced price presupposes the formation of a fresh contract. In England, the purchaser is entitled to all accidental improvements made before the completion. These become incidents of the estate and pass with it to the transferee. On the other hand, the purchaser can, where a re-conveyance is decreed, recover the amount of repairs and improvements, if executed before the discovery of the defect in title, (2) and for necessary repairs pending litigation, if specially claimed. (3) But, as regards deterioration, it would seem that the vendor continues to be liable till the completion, (4) and so, while he has the disadvantage of having to pay for the deterioration, he has not the advantage of improvements, (5) as in England.

Although the purchaser is entitled to rents and profits as from the date of the purchase, tenants without notice and in good faith continuing to pay their rents to the vendor are protected. (6)

1107. Charge for Purchase-money paid in Advance.—The word-

CI. (6) (b). ing of this clause, which is held to embody a rule of universal equity, (7) is somewhat obscure. The clause defines certain rights which the purchaser possesses "unless he has improperly declined to accept delivery of the property" and additional rights "when he properly declines to accept the delivery." In the first case, the purchaser would appear to possess the rights unless the party disputing them can shew that he had improperly declined to accept delivery, and in which case, the burden of proof would be on him. But if the purchaser claims the additional rights, it is on him to shew that he had improperly declined to accept delivery. Resolved into its constituent

(1) S. 50, *ante*.

(2) *Edwards v. McLeay*, 2 Swan., 287 (289); *Hart v. Swaine*, 7 Ch. D., 42

(3) *Sugd.*, 254; citing *Edwards v. McLeay* 2 Swan., 287.

(4) Cl. (5) (c), *ante*.

(5) See Cl. (5) (c), *ante*, §§1098, 1099 and cf. the maxim "*Nam et commodum ejus esse*

debet cujus periculum est. (He who enjoys the advantages must also suffer the disadvantages.)

(6) S. 51, *ante*.

(7) *Gangabishen v. Tukaram*, 5 N L R. 70 (75). The clause was held to apply to Berar even before the Act was extended to it.

elements, the clause enacts that in ordinary cases the purchaser is entitled to a charge on the property for (i) purchase-money paid in advance, (ii) interest on such purchase-money and in cases where he is shewn to have properly declined to accept delivery, to a charge also for (iii) earnest-money paid and (iv) costs awarded him either of a suit instituted against him by the vendor for enforcing the contract (and which is necessarily dismissed), or of a suit instituted by himself against the vendor for rescission of the contract. In no case, however, is the purchaser entitled to a charge where he is shown to have improperly declined delivery. If the purchaser has paid the purchase-money in anticipation of the delivery which is not made, he is entitled to a charge on the property for the amount which he may have paid. In this respect, the rights of the buyer *pari passu* correspond with those of the seller, ⁽¹⁾ who delivers the property, but does not obtain his purchase-money. A similar provision is also made in the Specific Relief Act, section 18 (d): "Where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let." The charge is declared, however, only in the interest of a purchaser who, having performed his part of the contract, is prepared to take delivery. If he improperly declines to accept delivery, he loses the benefit of this rule. And it follows that if the purchaser has reason to rescind the sale, he does not thereby lose his lien. ⁽²⁾ But, if the sale was wholly invalid, then the clause could not apply, ⁽³⁾ because it presupposes the validity of the sale, and non-compliance with only one of its implied terms. Thus, it has been held in England, that "under a contract for the purchase of an estate, where the money is to be paid in portions, every payment is a part performance of the contract by the vendee, and, in equity, transfers to him a corresponding portion of the estate." ⁽⁴⁾ The charge thus created is not lost to the purchaser by his taking other or additional securities for his money. ⁽⁵⁾ The lien can be enforced in precisely the same way as a vendor's lien for unpaid purchase-money. In England, interest at 4 per cent., is usually decreed on the purchase-money. ⁽⁶⁾ "The lien is not strictly confined to a case of simple purchase: it extends to the case of a lease, and entitles an intended lessee, who has entered under the contract and expended money, to a lien on the lessor's interest." ⁽⁷⁾ It extends, too, to a sub-purchaser: so that where *A* sold to *B* and received part payment from him, and *B* sold to *C* and received part payment from him, *C* was held entitled to a lien on *B*'s interest in *A*'s estate." ⁽⁸⁾ But there can be no charge under this clause where the consideration is payable otherwise than in cash, as where it is paid in the shape of services, ⁽⁹⁾ or in kind, in which case, the transaction, would not be sale as defined in the last section, so that no clause of this section as such, would be applicable.

1108. Commencement and Extent of the Right of Lien.—

From the moment a part of the purchase-money is paid, the purchaser has a lien

(1) S. 55 (4) (b).

(2) *Torrance v. Bolton*, L.R., 14 Eq., 124; *Weston v. Savage*, 10 Ch. D., 736.

(3) *Abdul Khadir v. Mammad*, (1910) 8 M. L.T., 361; *Muthu v. Chellappa*, ib., 464.

(4) *Sadashiv v. Dhakubai*, I.L.R., 5 Bom.

450; see *ante*, notes to cl. (4) (b).

(5) *Rose v. Watson*, 10 H.L.C., 672.

(6) *Lord Anson v. Hodges*, 5 Sim., 227; *Rose v. Watson*, 10 H.L.C., 672.

(7) *Middleton v. Magnay*, 2 H. & M., 239.

(8) *Aberaman Iron Works v. Wickens*, L.R. 4 Ch., 101; *Fry, Specific Performance*, § 1481.

(9) *Madhaor v. Kashi Bai*, I.L.R. 34 Bom., 287 (290).

upon the property to that extent, which lien can only be lost to him by reason of his failing to carry out his part of the contract. The circumstances under which the purchaser is justified in refusing to take delivery are those in which he is justified in repudiating the contract. Ordinarily this he is entitled to do if he has since the contract discovered a serious defect in his vendor's title. But there are other cases in which he is equally entitled to claim a similar relief. And so the charge here spoken of is not confined to the cases in which the contract goes off for want of a title in or by reason of the default of the vendor,⁽¹⁾ but also when it is determined, without any default on his part. Thus, where a contract for the purpose of land empowered the purchaser to rescind the contract on the happening of a specified event which he did, he was held still entitled to retain a lien for the deposit which he had paid.⁽²⁾

1109. On the other hand, where a contract of sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract.⁽³⁾ (§ 984). If the vendor falsely denies the contract *in toto*, and it appears that the purchaser while he failed to pay the balance of the consideration money on the stipulated date, had not repudiated the contract, having regard to the conduct of the vendor, the court ordered a refund of the deposit to the purchaser.⁽⁴⁾ But the circumstance that the purchaser is not entitled to specific performance is by no means conclusive against his right to a return of the deposit.⁽⁵⁾ If having regard to the terms of contract, he is justified in refusing to accept the title, which the vendor is able to give, he is entitled to a refund of the deposit. So where on the sale of a freehold the vendor promised to make a good marketable title, but the purchaser on investigation discovered that the property was subject to stringent restrictive covenants which were admitted to make the title not a marketable one. The vendor having declined to procure a release of the covenants, the purchaser sued to recover back his deposit, and it was decreed, the court holding it immaterial whether he knew of the restrictions at the time of the covenant or not. He in fact said to the vendor: "I know that there is a serious defect in your title, but I will buy if you can make it marketable."⁽⁶⁾ The question whether the purchaser is entitled to a refund of his deposit depends upon whether there has been a breach by the vendor of his bargain, for the deposit being paid as a guarantee for the performance of the contract, the vendor is entitled to retain it if the contract goes off by default of the purchaser.⁽⁷⁾ The fact that the transaction was a speculative one and not authorized by the trust-deed does not disentitle the purchaser to claim a lien, if he is otherwise entitled to it.⁽⁸⁾ But if the purchaser refuse to pay off a certain incumbrance on the property which he had undertaken to do, and thereupon the vendor refuse to effect mutation of names,

(1) *Whitebread & Co. v. Watt*, [1902], 1 C. H., 911 O. A. [1902], 1 Ch., 835; following *Rose v. Watson*, 10 H. L. O., dissenting from Kay, L.J., in *Rodger v. Harrison*, [1898], 1 Q. B., 173, 174.

(2) *Ardesbir v. Vajesing*, 3 Bom. L. R., 190 (196), distinguishing *Venkatanarasimhulu v. Peramma*, 1. L. R., 11 Mad., 173.

(3) *Balvanta v. Whatekar*, 1. L. R., 23 Bom., 56; *Bishan Chand v. Radha Kishan*, 1. L. R., 19 All., 489; following *In re Parnell*, L. R. 10 Ch., 512; *Howe v. Smith*, 27 Ch. D., 89.

(4) *Alokeshi v. Hara Chand*, 1. L. R., 24 Cal., 897.

(5) *Howe v. Smith*, 27 Ch. D., 89 (95); *Ibrahimbhai v. Fletcher*, 1. L. R., 21 Bom., 827 (853), F. B.

(6) *Cato v. Thompson*, 9 Q. B. D., 616; of. *Per Fry, J.*, in *In re Gloag & Miller's Contract* 23 Ch. D., 20; followed in *Ibrahimbhai v. Fletcher*, 1. L. R., 21 Bom., 827 (847), F. B. (The difference referred to the F. B. was on a question of fact; see *ib.*, 859.)

(7) *Per Pollock, B.*, in *Collins v. Stimson*, 11 Q. B. D., 142.

(8) *Ecclesiastical Commissioners v. Pinney*, [1899], 2 Ch., 729; O. A. [1900], 2 Ch., 736.

but do not repudiate either the sale or the purchaser's title thereunder, the latter cannot recover back his purchase-money. (1)

1110. If the purchaser having accepted the title pays the deposit but afterwards fails to provide the residue of the purchase-money, and the vendor thereupon gives the purchaser notice that the contract is rescinded and the deposit forfeited, the purchaser cannot recover the deposit, if the title turn out afterwards to be bad. (2) In such a case, the purchaser having accepted the title, would have taken the conveyance if he had paid the money, after which, he would have been precluded from raising the question of title. Why then should he be allowed to raise it, because the contract remained incomplete through his own default? (3) The charge which the vendor and purchaser acquire in certain circumstances would have to be enforced in accordance with the procedure for enforcement of charges. If therefore the purchaser was put in possession of the property by the vendor in anticipation of sale which eventually could not be enforced owing to defective conveyance, as where the sale-deed being compulsorily registrable remained unregistered, the vendor would be entitled to sue back for possession, though the purchaser's charge may remain unsatisfied. (4) In such a case, the purchaser cannot defend his possession on equitable grounds, for his possession, being traceable to no legal conveyance, must be deemed to be illegal, for the charge in his favour does not confer upon the charge-holder the right to take possession of the property charged. (5)

1111. The doctrine of lien is of wider application, (6) and the principle here enunciated is not confined to a case of sale only, but extends also to other transfers the nature of which will have to be hereafter discussed. (7) It has been applied to a lease where the lessee was to immediately enter and expend money in repairs with a proviso that on the lesser failing to give a valid lease within a certain time, he would repay the outlay, in respect of which the lessee was on the lessor's default held entitled to claim a lien. (8)

1112. The same rule has been extended to the case of a mortgagor who has not received the mortgage-money, although the deed contain an acknowledgment and a receipt has been indorsed, and in which case, the mortgagor is entitled to redeem on payment of what was actually received with interest. (9) The mortgagee in possession is entitled to a charge on the mortgaged property for the insurance premiums paid by him on the property insured by him against loss or damage by fire. (10) A usufructuary mortgagee to whom was pledged land which has since been assessed with revenue is entitled to a charge against on the land for money paid by him in discharge of the revenue. (11)

(1) *Siraj-ud-dowlah v. Noor Ahmad*, 5 N. W. P. H. C. R., 194

(2) *Soper v Arnold*, 14 App. Cas., 429 (433), affirming O. A., 37 Ch. D., 93; *Ex parte Barrell*, L. R., 10 Ch., 512; *Cato v. Thompson*, 9 Q. B. D., 616; *Howe v. Smith*, 27 Ch. D., 89.

(3) *Per Lord Herschell*, L. C., in *Soper v. Arnold*, 14 App. Cas., 429 (433).

(4) *Lalchand v. Lakshman*, I. L. R., 28 Bom., 466

(5) The *contra* held in *Ram Baksh v. Mughlani*, I. L. R., 26 All., 266; *Ram Baksh v. Mughlani*, I. L. R., 24 Bom., 400, is oppos-

ed to the clear directions of s. 54 and have been dissented from in *Lalchand v. Lakshman*, I. L. R., 28 Bom., 466.

(6) See S. 100, *post*.

(7) S. 100, *Comm.*

(8) *Middleton v. Magnay*, 12 W. R., 706; cf. S. 170, Indian Contract Act (IX of 1872).

(9) *Bickerton v. Walker*, 31 Ch. D., 161 (157); *Re Cockroft*, 24 Ch. D., 94; cf. *Avuthala v. Dayammur*, I. L. R., 24 Mad., 233.

(10) S. 72, *post*.

(11) S. 72 (a); S. 76 (c) *post*; *Nurjoo v. Moozeerudin*, 3 W. R. 6 (7).

1113. So if two or more persons make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs or improvements and dies, this is a lien on the land ⁽¹⁾.

1114. The clause enacts that the right of lien can only avail against a volunteer or a transferee for valuable consideration with notice. Such notice cannot be inferred from the fact that the title was deduced from the first purchaser in recital, if it does not show that the estate was not paid for. ⁽²⁾ If receipt of the purchase-money is acknowledged in the body of the deed and by endorsement, the fact that the vendor had continued in possession of the property as lessee is no notice of the purchase-money remaining unpaid so as to cause the lien to attach. ⁽³⁾ But if the vendor remain in possession of the conveyance, and the title-deeds, a subsequent transferee would be affected with notice if he has negligently omitted to inquire about them. ⁽⁴⁾

1115. Purchase-money when recoverable.—Under this clause, the purchaser is not bound to sue for possession if he is entitled to recover his purchase-money. So if the vendor is found to have had no title and the vendee is dispossessed ⁽⁵⁾ or he is unable to deliver possession which he had contracted to give, the purchaser is not obliged to sue for possession of the property, but may sue for repayment of the purchase-money. ⁽⁶⁾ So again, where some dispute having arisen as to the purchase, the matter was referred to arbitrators who held that the vendor had no authority to sell, the purchaser was held justified in calling for his money. ⁽⁷⁾ But a mere attachment of the property as distinguished from dispossession does not let in the right to sue for the refund of purchase-money. In other words, in order to give the purchaser the right to sue actual dispossession and not merely a threat of dispossession will suffice. So, where a sale-deed contained the covenant that if in future any one should claim the property and dispossess the purchaser, then the vendor would refund the purchase-money with interest. Subsequently the vendor's creditor attached the property to which the purchaser objected, but his objection was dismissed. He thereupon sued for the refund of his purchase-money but the court threw out his suit as premature. ⁽⁸⁾ So if the vendor refuse to grant a proper conveyance, as where he insisted on describing the premises sold to him by auction by reference to another deed which was not shown to or seen by the purchaser and of whose contents he had no notice, it was held that the purchaser could recover back his deposit and he was not bound to tender a conveyance engrossed to the vendor for execution, with the residue of the purchase-money. ⁽⁹⁾ By one deed of sale, A sold two plots of land to B, who filed two separate suits against A, one for possession of one of the plots and another for refund of the purchase-money in respect of the other plot, on the ground that A had no title to it. A objected to the two suits founded on a single contract, but the court held the suits maintainable on the ground that the two causes of action were different. ⁽¹⁰⁾

(1) *Lake v. Gibson*, 1 Eq. Ca. Abr., 294; 2 W. & T.L.C. (7th Ed.), 952.

(2) *Cator v. Pembroke*, 1 Bro.C.C., 302; *Eyre v. Sadler*, 14 Ir. Ch. R., 119.

(3) *White v. Wakefield*, 7 Sim. 401; *Price v. Blackmore*, 6 Beav., 507.

(4) *Heern v. Mill*, 13 Ves., 114; *Maxfield v. Burton*, L.R., 17 Eq., 15, and cases under "Notice," S. 3 ante.

(5) *Walidah v. Janak*, 11 A.L.J. 512.

(6) *Mohun v. Beharee*, 3 N.W.P., H.C.R., 336.

(7) *Kishen v. Ram Chunder*, 3 W.R., 29.

(8) *Tassaduk Hossain v. Aftale Hossain*, 15 I.C. 334.

(9) *Essaji v. Bhimji*, 4 B.H.C.R., 125.

(10) *Lakshmi Das v. Balak Ram*, 16 I.C. 24; following *Hanuman v. Hanuman*, I.L.R. 15 Cal. 51 (59).

1116. If the purchaser having the lien contracts to sell his interest to another and receives the price, and the first contract then goes off, the second purchaser acquires the lien possessed by his predecessor. Thus if *A* sell a property to *B*, and *B* pays *A* Rs. 10,000 on account of its purchase, *B* has, in the event of the purchase going off, a lien on the property for his money. But if *B* contract to sell the identical property to *C*, and receive from him the price, say Rs. 1,500, *C* will in his turn acquire a lien on the same property, so that if the first contract goes off, his own lien remains. (1).

A lien avails not only against the vendor, but also against those who hold a derivative interest with notice of the payment in respect of which the lien is claimed. A lien operates exactly in the same way as if upon the payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent. (2) It avails against subsequent mortgagees with notice of the payment. (3)

1117. Joint-purchasers are considered to have an interest in the property purchased out of their joint funds, in proportion to the sums advanced by each of them. (4) Such purchasers are in the nature of partners and their relations *inter se* should be judged on that basis. So on the death of a co-charer his interest will survive and the surviving partners will be considered as trustees for the representatives of their deceased partner. (5)

1118. Where the vendor sells property over which he has no title, the purchaser's suit for refund of the purchase-money should be laid within three years in accordance with Article 62 of the Limitation Act. And the starting period for limitation would, in such a case, be not from the time when the vendee is deprived of his possession, but from the date of the sale. But the case would be otherwise, if the vendor had some title over the property at the time of the sale, or that the sale had been rendered void on account of some defect or circumstance subsequently discovered. But, in such a case, the vendee can only claim damages if he can show that the subsequent failure of consideration was either due to the act of the vendor himself, or that if due to some other cause, the vendor had made himself answerable for it by proper covenants in his deed. (6) And if, moreover, the sale deed was registered the extended period of limitation prescribed by Article 116 would then apply. (7) A defendant in possession may, however, set up the invalidity of a sale, though his right to have it set aside may have become barred by the Law of Limitation. (8)

(1) *Per* Lord Cairns, L. C. in *Abernethy v. Iron Works v. Wickens*, L.R., 4 Ch., 101 (109, 110); Lord Westbury, L.C., described a lien to be "that partial ownership that interest in the estate which is due to the purchase-money which he has paid. *Rose v. Watson*, 10 H.L.C., 572 (619).

(2) *Per* Lord Cranworth in *Rose v. Watson*, 10 H.L.C., 672 (684).

(3) *Ibid.*; S. 91 Trusts Act (II of 1882); *Gafur v. Bhikaji*, 3 Bom. L.R., 596.

(4) *Rigden v. Vallier*, 3 Atk., 735.

(5) *Lake v. Gibson*, 1 Eq. Ca. Abr., 294; *Lake v. Craddock*, 3 P. Wms., 158; cf. Ss. 20,

22, English Partnership Act, 1890.

(6) *Ardeshtir v. Vajesing*, I.L.R., 25 Bom., 593; distinguishing *Venkatanarasimhulu v. Peranna*, I.L.R., 18 Mad., 173.

(7) *Kishenlal v. Kivlock*, I.L.R., 3A., 712; *Amanat Bibi v. Ajudhia*, I.L.R., 18 All., 160; *Krishnan v. Kannan*, I.L.R. 21 Mad., 8; *Zamindar of Vizianagram v. Behara*, I.L.R., 25 Mad., 587; *Bahadurlal v. Jadhao*, 2 Nag L.R., 174; In such a case if the deed be unregistered, Art. 65 would appropriately control limitation.

(8) *Ramanasari v. Muthusami*, I. L.R., 30 Mad., 248.

1119. The lien in the case of a purchaser, extends to (i) all instalments of the purchase-money; (1) (ii) interest thereon at 4 per cent. per annum; (2) (iii) sums paid under the contract as interest on the unpaid purchase-money; (iv) interest thereon; (3) and (v) the costs of an unsuccessful action by the vendor against the purchaser. (4)

1120. Where the vendor agrees to sell his property free from incumbrance and leaves a portion of the purchase-money with the buyer, this sum falling short of that required to discharge the incumbrance, it has been held by the Privy Council that the vendee could retain the amount as a security in order that the property sold should be freed from incumbrances upon it and that he should have a good title. He was entitled to retain it, until the vendor provided the rest of the money necessary for the purpose. It was not a deposit upon which the vendee would be liable to pay interest, unless he refused or omitted to pay, when he was informed by the vendor that he was prepared to pay the balance. Without the balance he was not bound to pay or tender the insufficient amount in hand. (5)

1121. Omission to disclose when fraudulent.—The last clause enacts that the omission to make the disclosure mentioned therein would make the party liable in the same manner as if he were guilty of fraud. Of course, instances have before been given of where the party misrepresenting cannot be said to be guilty of fraud in the sense the term is defined in the Indian Contract Act. (6) The introduction of this clause has wrought an important change in the relation as between buyers and sellers. The old common law maxim of *caveat emptor*, which even in England was hedged round with so many exceptions as "well nigh to eat up the rule" (7) has here been entirely superseded. It is immaterial now whether the party liable is or is not in fact guilty of fraud. Here the law imposes an obligation to give correct information, and if he does not do it, he is liable, it being immaterial whether the misrepresentation made was or was not made in the honest belief that it was true. (8) The use of the term "fraudulent" here follows the English law, but the appropriateness of the nomenclature has been questioned in England. To herd together it is said, under a collective word like "fraudulent" people who are honest and people who are dishonest cannot tend to the maintenance of commercial morality. (9) No doubt a person who acted honestly but omitted to supply a material information is not fraudulent in the general acceptance of the term which always implies some degree of moral turpitude. But the term has now acquired a technical sense, and in that sense it has become a part of the accepted legal vocabulary.

1122. A substantial deficiency in area of property is itself a good ground for not forcing a sale on an unwilling purchaser, whether in execution of a decree or by contract. (10) Nor is such a case a fit one for decreeing specific

(1) *Bryant v. Beek*, 4 Russ.; 5, *Mycock v. Beaton*, 13 Ch. D. 384 (386).

(2) See ante.

(3) *Rose v. Watson*, 10 H L.C., 672.

(4) *Turner v. Marriott*, L. R., 3 Eq., 744. See Fry on Specific Performance, p. 650.

(5) *Muhammad v. Muhammad*, 1 L. R. 21 All., 223, P. C.

(6) S. 17, see *Low v. Bouverie*, L. R., 3 Ch. D., 82.

(7) Per Lord Campbell in *Eichholz v. Bannister*, 34 L. J. Ch., p. 105

(8) *Law v. Bouverie*, [1891], 3 Ch., 82; *Derry v. Peek*, 14 App. Cas. 337, distinguished.

(9) *Cackett v. Keswick*, [1902], 2 Ch., 456.

(10) *Bank of Bengal v. Akhoy Kumar*, 6 C. W. N. 365; following *Jacobs v. Bevell*, 2 Ch. D., 858.

performance with compensation for deficiency, inasmuch as to do so would be to make a new contract between the parties. (1) But where at a Registrar's sale, the misrepresentation does not go to the essence of the contract, the remedy which the purchaser can claim is compensation and not annulment of the sale. (2) In a private sale, however, a different principle prevails. A misdescription of the nature described in clauses (1) (a) and (5) (a) would entitle the party aggrieved not only to throw up the contract, for fraud vitiates the most solemn acts, but the party aggrieved may recover damages into the bargain. Again, the court will never force a purchaser to take a title which is shewn to be bad, and which will expose him to an immediate law suit, against which he will have no defence. (3) So again the court will decline to assist the vendor if the purchaser would thereby be involved in litigation quite beyond any value he could possibly get. (4) But a purchaser who has wilfully rushed into a bargain has to thank himself if he finds his title defective. Where a sharer in certain property purchased from his co-sharer some lands forming a part of the common property, and in the subsequent partition-suit between the co-sharers of the property a portion of the land sold fell to the share of the purchaser himself, he could not thereupon sue his vendor for damages with respect to the portion of his purchased land allotted to his own share, since the purchaser when he bought the land could not but be aware that though the contract was performed, and he was put in possession of the land sold to him, his possession could only be protected by the action of the court in subsequent partition proceedings. The liability to partition in regard to the land was one which could not be removed by the vendor, as must have been well-known to the purchaser. (5)

1123. That a sale cannot be set aside merely on the ground of undervalue has been settled in England by legislation. (6) But although inadequacy *per se* is not a ground for annulling a contract, it is always an element of weight not to be disregarded when a transaction is attacked on the ground of undue influence, unfairness or fraud. (7) But where, however, both the parties were ignorant of the value of the property at the time of the contract, the question of inadequacy becomes immaterial. (8)

1124. Effect of Non-disclosure.—The effect of non-disclosure mentioned in the two paragraphs has been at length discussed before, and to which reference should be made for more particular information (9) (§ 1121). A party, though entitled to set aside a sale, may lose his right by his conduct evidencing intention to treat the sale as binding. For example, where the vendor after he knew of facts entitling him to set aside the sale or recover damages accepts the balance of the purchase-money to which he had no title except on the footing that the sale was not to be set aside, he cannot be afterwards permitted to repudiate the contract of which he has thus deliberately secured the benefits. (10)

(1) *Ibid.* p. 369.

(2) *Administrator-General v. Aghore Nath*, I. L. R., 29 Cal. 420.

(3) *Scott v. Alvarez*, (1895), 2 Ch., 613.

(4) *Per Rigby, L. J.*, in *Scott v. Alvarez*, [1895], 2 Ch., 603 (616).

(5) *Shivaram v. Bal Daji*, I. L. R., 26 Bom., 519; following *Ellis v. Rogers*, 29 Ch. D., 61 (666).

(6) *Bhimbhat v. Yeswantrao*, I. L. R., 25 Bom., 126; following *Kedari v. Aswarambhat*, 3 B. H. O. R. 11; S. 16, Indian Contract Act, (IX of 1872)

(7) 31 Vict. C. 4.

(8) *Dart*, s. 1209.

(9) Specific Relief Act (I of 1877), S. 35 and illustrations.

(10) *Law v. Law* [1905], 1 Ch., 140 (159).

1125. Court-fee.—A suit for a declaration that a sale is invalid must be stamped as for consequential relief. ⁽¹⁾ it being immaterial that the plaintiff still alleges to be in possession of the property. ⁽²⁾

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of
two properties
subject to a common
charge.

1126. Analogous Law.—This section, which is taken from the English law ⁽³⁾ furnishes an instance of marshalling applied to sale. The same rule, in so far as it is applicable to mortgages, is defined in section 81. The rule presupposes the existence of a concealed incumbrance, but "if there is a declaration or covenant that the property is free from incumbrances, the first purchaser is entitled to be relieved against the seller and latter judgment-creditors claiming under him, so that the estate unsold must bear the whole of the prior judgment-debt, as well as its own subsequent incumbrances. But this does not touch the question between several innocent purchasers." ⁽⁴⁾

The right here declared was enforced in favour of purchasers without notice of the common charge in cases determined even before the Act. ⁽⁵⁾

1127. Principle—This section is founded upon the equitable principle that the seller, being primarily liable for the debt charged on his property, must satisfy it so far as the property in his hands will extend, after which, the property in the hands of the purchaser can be proceeded against to satisfy the remaining debt. There is some difference between the rule here enunciated and the doctrine of marshalling stated in section 81. The latter is dependent upon notice; but this section would apply equally whether the purchaser had or had not notice of the charge, unless he has contracted to discharge it out of the property sold to him.

1128. Meaning of Words.—"Common charge," i.e., a charge common to the two properties. If it is distributed quantitatively on the two properties, each property will bear its own burden. Charge is here used in the sense of an incumbrance and not in the limited sense given to it by section 100. "As against the seller" implies that the right can only be enforced as against the seller and only out of the "other property" subject to the charge left in his hands. It would not avail against the subsequent purchaser of the other property.

1129. To What Cases the Rule applies.—The rule here enacted applies to a case of a vendor *versus* the purchaser. It is limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. In the first place the rule applies only in the absence of a contract to the contrary. As such, it will be construed as an implied incident of every contract of sale. In the second place,

(1) *Gopal v. Mohesh*, I. L. R., 9 Cal., 230.

(2) *Mahomed v. The Collector*, 6 C. W. N., 157.

(3) *Barnes v. Racsster*, 1 Y. & C. Ch., 401; followed in *Flint v. Howard*, [1993], 2 Ch., 54; Sugd., 746, 747.

(4) Sugd., 746.

(5) *Toolsee v. Munnoo Lal*, 1 W. R., 353; *Nora Kowadi v. Sheikh Abaul*, (1864), W. R., 374; *Bishonath v. Kistomohun*, 7 W. R., 482; *Rodh Mal v. Ram Harakh*, I. L. R., 7 All., 711; *Ram Lochun v. Ram Narain*, 1 C. L. R., 296; *Tadgobla v. Lakshamma*, I. L. R., 5 Mad., 385.

it has no application where only the equity of redemption is purchased, (1) not as between a mortgagee of the seller and the buyer, (2) though upon general principle, when the mortgagor sells, not merely the equity of redemption but conveys a portion of the property itself free from incumbrance, the purchaser may insist upon the mortgagee proceeding in the first instance against the rest of the property in the hands of the mortgagor. (3) The section, again, has no application to a case between purchaser and purchaser, although upon reason and principle, it is difficult to see why if marshalling is to be allowed as between two subsequent mortgagees, it should not be allowed as between subsequent purchasers. (4) Quoting the words of Dart, the application of the rule may be thus illustrated: "If two estates, X and Y, are subject to a common charge, and estate X is sold to A, A will, as against the vendor and his representatives, have a *prima facie* equity, in the absence of express agreement and whether or not he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X." (5)

If in this case a third person (B) purchases the property Y with notice of the charge and of the prior sale of the property X to A, his estate (Y) will be primarily liable in the same manner as if the estate had remained unsold in the hands of the seller. (6) "If B, at the time of his purchase, have notice of the charge as affecting Y, but he not led to suppose that estate X is also subject to it, or if he purchase without notice of the charge, and A purchased with notice of the charge as affecting Y, in either of these cases, it is conceived, B's equity is inferior to A's and the entire charge must rest primarily upon Y." (7) But, 'if B purchase with notice of the charge as affecting Y, and with no notice of the sale to A, and be led to suppose that X is subject to the charge, or if both purchase without notice of the charge, B's equity would appear in either case to be equal in degree to A's; so that either party, by taking a transfer of the charge and securities (supposing them to be such as to give the incumbrancer a claim at law against the two estates), would, it is conceived, be able to throw the charge exclusively upon the other. So the incumbrancer himself, if able to proceed at law against the estates, might proceed against the two in such proportions, or against such one only as he saw fit; and the purchasers, if they had the legal estate (as might happen in the case of the incumbrance being a rent charge), would have no remedy as between themselves: but, if their estates were equitable, or if the incumbrancer were obliged to, or did in fact resort to a Court of Equity for payment of his claim, then the equities being equal, A's would prevail as being prior in date.'" (8)

It is apparent from the section that, where the seller disposes of properties to separate purchasers, they must bear the charge proportionately.

1130. Again, the right being available only against the seller, it cannot affect innocent purchasers without notice. The law here laid down has been applied to *execution-sales* (9) from before the passing of the Act. (10) In all cases

(1) *Sirajuddin v. Sirajuddin*, 2 A.L.J. 698 (700); *Krishna v. Muthukumara*, I. L.R., 29 Mad. 217 (222).

(2) *Subraya v. Ganpa*, I.L.R. 35 Bom. 395 (400).

(3) *Krishna v. Muthukumara*, I. L. R. 29 Mad. 217 (222).

(4) *Magniram v. Mehdi Hossein*, I. L. R.; 31 Cal., 95 (102).

(5) Dart. 1035.

(6) *Hamilton v. Royse*, 2 Sch. & L., 315

(328).

(7) Dart., pp. 1035, 1036.

(8) Dart., p. 1036.

(9) *Mt. Nour Kowari v. Sheikh Abdu* (1864), W. R., 374; *Ramlochan v. Ram Narain* 1 C.L.R., 296; *Tadigobla v. Lakshamma*, I.L.R., 5 Mad., 395.

(10) *Bishongath v. Kisto Mohun*, 7 W. R., 483; *Radha Mal v. Ram Harakkh*, I.L.R., 7 All. 711.

the liability is commensurate with the *extent of the property*. If after the property, in the hands of the seller, is exhausted and there still remains a balance unsatisfied, it will be realized from the property in the hands of the buyer, and subject to the common charge. The section does not absolutely relieve the buyer, but only postpones him to the seller in possession of the property. Where a decree declares a lien over *A's* property, for a certain sum, in favour of *B*, and subsequently *A* sells part of this property to *B*, and part to *C*, *B* cannot sue to enforce his lien against *C's* purchase without bringing his own into contribution.⁽¹⁾ In a case decided in 1882, but without reference to this section, the purchaser was held liable to discharge the incumbrance although there was property subject to the common charge in the hands of the seller. But probably this case was peculiar. (For a further discussion on this and similar cases see section 81 and the commentary thereon.)

Discharge of Incumbrances on Sale.

(a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,

Provision by Court for incumbrances, and sale freed therefrom.

- (1) in case of an annual or monthly sum charged on the property, or of capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for the charge, and
- (2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case, there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving

(1) *Ram Lochun Sircar v. Ram Narain*, 1 C.L.R. 296.

effect to the sale, and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a district Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

1131. Analogous Law.—With the exception of the last two paragraphs this section is copied almost *verbatim* from the English Conveyancing Act, section 5. (1)

1132. Principle.—This section is enacted to facilitate the realization of fair value for incumbered estates, which, as experience shows, not be otherwise readily sold for their fair intrinsic value. For intending purchasers are as reluctant to offer a fair price for incumbered property, as the property is itself sometimes not susceptible of a fair and exact valuation. The section further enables the parties to a sale to invoke the assistance of the court for the purpose of fulfilling their contracts. In the words of Kekewich, J : "Until it came into force a purchaser was entitled to object that he did not get his estate in fee because there was a charge—it might be only an insignificant charge, such as a small legacy payable *in future*. He got off his bargain unless he and the vendor could arrange on some scheme of indemnity." (2) No such objection, can now thwart the purchaser, since if any difficulty arises it can be cleared away by resorting to the provisions here made. Where property is intended to be sold free from incumbrance, the court is empowered on the application of any of the parties to the sale to declare the property to be freed from incumbrance, after receiving in deposit for payment to the incumbrancer the capitalized value of periodical charge, or the capital sum charged on the property together with other incidental expenses. The section is inapplicable to cases in which a decree has been obtained on the incumbrance, for then the latter having merged into the former, the incumbrance, as such, ceases to exist. (3)

1133. Meaning of Words—The term *incumbrance* is not defined in this Act. It has been, however, defined in the English Conveyancing and Law

(1) 44 & 45 Vict. C. 44.

(2) *In re Freme's Contract*, [1895], 2 Ch., 24.

(3) *Mallikarjuna v. Narasimha*, I. L. R., 24 Mad., 412.

of Property Act, 1881, thus :—"Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof." (1) The term is, it is apprehended, used in this section in the same sense, and would include a "charge," (2) such as may be, created by an annuity. "Direct or allow" direct in the case of sales by the court, and allow in the case of sales out of court. (3) "Unless the court for special reasons" as where the interest is to be paid for a fixed period certain, or a larger sum is required to pay off further advances. (4)

1134. Procedure.—Under this section, the court has power to declare any estate free from incumbrance in the manner stated in the section. The court, however, cannot act *suo motu* since its power is to be exercised on the application of *any party to the sale*. Nor can the court, it is apprehended, determine the question as to the existence of an incumbrance, (5) but if the existence of the incumbrance is admitted, the court will act whether it is immediately payable or not. For the purpose of determining the nature of the incumbrance, the court will construe the documents creating the incumbrance. By parties to the sale is no doubt intended the vendor and the purchaser who are the only parties to a sale-transaction. It certainly cannot include a mortgagee who though interested in the sale, may be a party in the suit in which the sale is made, but he does not thereby become a party thereto.

1135. On receiving an application under this section, the court would ordinarily issue notice to the incumbrancer to state the amount of the incumbrances as well as the security which he may consider sufficient in substitution of his incumbrance. Of course, it is not incumbent upon the court to issue such notice, and there is no provision made therefor; notice under section 102 being confined only to Chapter IV relating to mortgages. But since the inquiry under this section is to be a judicial inquiry, the court cannot fairly adjudicate upon the rights of the incumbrancer without hearing him. Under the English Statute, the giving of notice before declaration is discretionary with the Court. But under several other Indian Acts where notice is not explicitly provided for, it has been held by the High Courts that the court does not exercise a sound judicial discretion in passing orders which may prejudice a party without giving him a chance of being heard. (6) But the object of the rule cannot be defeated by the circumstance that the incumbrancer cannot be found. It has been held that in applying this section the court should not too strictly follow the words of the Statute.

1136. "The enactment being remedial," observed Kekewich, J., "I ought to give such elasticity to it as the words permit." (7) But the court will not, under the power given to it, compel a vendor of land to pay money into court for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship upon him, as, for instance, if the incumbrance is a

(1) 44 S., 25 Vict., C. 41, S. 2 (vii).

(2) Cf. S. 101, *post*.

(3) *Great Northern Railway Co. v. Sanderson*, 25 Ch. D., 785.

(4) See S. 78, *post*.

(5) *Per Kekewich J.*, in *In re Freme's Contract*, [1895], 2 Ch., 256 (261).

(6) Criminal Procedure Code (Act V of 1898), S. 437; *E. v. Haridas Sanyal*, I.L.R. 15 Cal., 608; *E. v. Jaijai Ram*, 2 C. W. N., 169, *E. v. Balasumnatambi*, I.L.R., 14 Mad., 334, F. B.

(7) *In re Freme's Contract*, [1895], 2 Ch., 256 (261) upheld O. A., *ib.*, 778.

perpetual rent-charge, and the sum necessary to procure its discharge, would far exceed the amount of the purchase-money payable to the vendor. In a case, a Railway Company contracted to sell some superfluous 'land,' free from incumbrance' for £868. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the Company might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title shewed that the land was subject to a perpetual rent-charge of £63 issuing out of it. The purchaser having required the Company to procure the release of the land from the rent-charge, and the Railway Company having refused, Pearson, J., in delivering judgment against the purchaser observed:— "The question is, whether under section 5 of the Conveyancing Act, I have power, or at any rate, whether I ought to compel the Company to take the necessary steps to release the land from the rent-charge. Section 5 is only permissive in its language. In the present case, the sum which would have to be paid into court would be about £2,300. The first question is, whether section 5 applies at all to a case of the kind, and I am rather disposed to think that it does not. I am not asked by the vendor to make use of the power conferred by this section, but I am asked by the purchaser to say that the vendors ought to apply to the court to make use of that power, when the vendors do not wish that the court should do so. I think that, when it is said that the court may 'direct or allow payment into court,' the word 'direct' applies to a sale by the court, and the word 'allow' to a sale out of court. This rent-charge, is secured on the land by an Act of Parliament, and I have great difficulty in saying that section 5 of the Conveyancing Act applies at all to such a case, so as to enable me to take away from the persons who are entitled to the rent-charge, that which the other Act has given them, without their consent, and indeed, without any notice to them. I should hesitate a long time before I could come to such a conclusion. But, supposing that, upon the application of the vendors, I could declare the land free from this rent-charge, what I have to consider is, whether, where the vendor made no such application, I ought to insist on their doing so, when they would have to pay into court a sum very considerably in excess of the purchase-money of the land, I am not aware that the court has ever said that the vendor is not entitled to rescind a contract, when the contract contains a provision such as that which is contained in the present contract, and when the result of his not rescinding would impose on him, terms which he never contemplated, and which, if he was not a rich man, would inflict on him the greatest possible hardship. In my opinion, my decision ought not to depend upon the length of the vendor's purse.⁽¹⁾ In the case of an ordinary vendor, I think I should have declined to order him to pay into court a sum very nearly three times the amount of his purchase-money, and the fact that the vendors are a wealthy company, ought not, in my opinion, to make any difference."⁽²⁾ Under this section property sold free from mortgage may be redeemed.⁽³⁾

1137. The interest payable under the section is that due up to the date of payment, and not only that due as on the date of the application.⁽⁴⁾ In England, usually an extra charge of 10 per cent. is ordered to be deposited to meet

(1) *Great Northern Railway Co. v. Sanderson*, 25 Ch. D. 788 (793, 794).

(2) *Milford Haven Railway and Estate Co. v. Mowatt*, 28 Ch. D. 420; see *Richardson v. Richardson* [1900], 2 Ch., 778; *In re Money Kyrie's Settlement* [1900], 2 Ch., 839

(843).

(3) *Patching v. Bull*, 30 W.R. (Eng.), 244; *Dickin v. Dickin* (1882), W. N. 119.

(4) Cf. *Stock v. Meakin* [1900], 1 Ch., 693.

the contingency of further costs, etc. (1) Investment made at the request of one party will not affect the other by any variation in the funds. It is therefore always advisable to state at whose request the investment is made. Upon an application to the court, under this section, the court will decide a question of construction involving the deterioration of interests *in future* if the decision of such question is necessary in order to ascertain what sum of money ought to be set aside to answer the incumbrances, and where the lower court had failed to decide the question, it was decided in appeal, notwithstanding that it affected the future rights of unborn children, the interests of those children being the same as those of the existing children who were before the court. (2) Where the claim of the incumbrancer to receive the money is not clear, the court will keep the money *in medio*, either where it is, or in court till he establishes his claim. And the same rule will apply where the mortgagor seeks to shew the mortgage to be void. The powers of the court in dealing with matters of this kind are absolutely unhampered, but its proceedings being open to an appeal, and since Appellate Courts are Courts of correction, it must not unnecessarily put parties to expense which it is the object of the section to avoid.

1138. As observed before, where a decree has been obtained on a mortgage, the latter merges into the decree, and cannot be paid off, following the provisions of the section. So where a person purchased certain property previously mortgaged to another who had obtained a decree on his mortgage, but who had during the progress of the negotiation for the purchase of the same property given a written undertaking, to accept from the purchaser a certain amount in full satisfaction of his decree, and that he consented to the proposed sale to him. The purchaser thereupon completed the purchase, retaining the proposed sum for payment to the mortgagee, who, however, refused to accept it, whereupon the purchaser applied under section, to deposit the agreed amount and for a declaration that the property was freed from the incumbrance. The mortgagee contended, *inter alia* that the mortgagee having merged into the decree, the section was inapplicable and that, in any case, the section would not apply where it involved the question of the adjustment of a decree out of court. These contentions were upheld by the court which, however, held the question to be covered by section 244 (c) of the Code under which the mortgage-decree was held to have been fully satisfied. (3)

(1) *Ambrose v. Ambrose*, 1 Cox., 194.

(3) *Mallikarjuna v. Narasimha*, I. L. R.,

(2) *In re Freme's Contract* [1895], 2 Ch., 24 Mad., 412.
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ADDENDA.

(VOL. I.)

[The cases noted here together with those cited in the text bring them down to the 1st January 1915.]

S. 1.—In construing the Act regard must be had to provisions founded on public policy, and those intended to protect merely private interests. The prohibition contained in section 6 (a) is an instance of the former (*Ramasami v. Ramasami*, I.L.R., 30 Mad. 255, (263)), while that enacted in sections 54, 59 and 123 may be regarded as of the latter (*Nand Kishore v. Kaniram*, I.L.R., 29 Cal. 355 (357); *Kaung Kan v. Myat*, 11 I.O. 850 (851)).

S. 5.—A petition of compromise filed in a Revenue Court withdrawing the petitioner's claim for mutation of names and consenting to the entry of the name of the opposite party does not effect any "transfer" of property and need not therefore be stamped and registered. *Jagrani v. Bisheshar*, 12 A.L.J. 1316; *Kokla v. Pearylal*, 11 A.L.J. 765.

S. 6.—Property dedicated to a family idol may be converted into secular property by the consensus of the family. In dealing with a question as to whether properties alleged to be *debutter* are really so or not, the manner in which they have been held and enjoyed is most important. *Gobinda v. Debendra*, 12 C.W.N. 98; *Tulsidas v. Siddhi*, 20 C.L.J. 318; *Kulada v. Kali Das*, 20 C.L.J. 312.

In determining whether any property is transferable regard must be had to the terms of the grant embodied in a *sanad* or other formal document. If it is unconditional, the property would be alienable though the grant may have been made for political considerations. *Kaniz Fatima v. Sakina*, 25 I.C. 120.

S. 8.—A sale-deed executed by several beneficial owners stated that the vendors sold and conveyed the property together with "all the estate, right, title, interest, claim and demand whatsoever of the vendors" therein. One of them was then the sole surviving executor of the testator, who alone was competent to sell the property, but he did not purport to convey it as executor. The High Court held that the sale passed no interest. But on appeal the Privy Council held that the words quoted above had the effect of conveying the right and title which one of the vendors possessed as executor. *Bijraj Nopani v. Pura Sundary*, 20 C.L.J. 368 P.C.; reversing *Pura Sundary v. Bijraj Nopani*, I.L.R., 37 Cal. 362.

S. 40.—A entered into a contract for sale of his house to B for Rs. 3,000 stipulating that the transaction shall be completed within three months. Meanwhile A agreed to give B the inspection of his title-deeds, which he failed to do and on expiry of the three months he sold the house to C who had notice of B's contract and who contested his suit for specific performance on the ground of delay, improvements costing Rs. 900, and efflux of the three months stipulated between A and B. But the Court decreed specific performance both as against B and C holding that the delay of a month after the last date available under the contract for specific performance could not disentitle the purchaser to specific relief, while any improvements made by C were made at his own peril, since he had no reason to suppose that time was so far of the essence of the contract as to annul it on its expiry. *Haradhan v. Bhagabati*, I.L.R., 41 Cal. 852. As to the first the Court seems to have conceded that delay apart from limitation might be a good ground for refusing specific performance (*ib.*, p. 862) but which cannot be supported in this country. As regards the three months and improvements, the Court rightly held that it was C's duty to require from B whether he had abandoned the contract, and his failure to do so affected him with notice of a subsisting contract if it was so found to be.

S. 41.—Priority counts from the date of execution and not from that of its registration, *Mathura v. Ambika*, 25 I.C. 725.

A manager holding property on behalf of the owner cannot be treated as its ostensible owner. *Jamna Das v. Usha Shankar*, 25 I.C. 158.

S. 43.—This section embodies an equity held to apply to the Berar even before the Act was extended to it.

Defendant I executed an unregistered mortgage of a field for Rs. 350 being the premium of a perpetual lease of that field in favour of the plaintiff who was then the Izardar of the village. Subsequently, on the 27th August 1904 to secure the same amount, he executed a registered lease.

The mortgagee Izardar's lease expired on the 31st March 1905, whereupon the village was made *khalsa*, and the Izardar appointed its Patel. Thereupon the mortgagor was recorded occupant of the land, and he mortgaged it on 30th March 1907 to the second defendant. It was held that the mortgagor's tenancy created by the plaintiff did not determine on expiry of the *Izara*, but that it continued on the village becoming *khalsa*, and that therefore, the plaintiff's mortgage had priority over that of the second defendant; that even if the first defendant had received a new lease on the village becoming *khalsa*, it would be a graft on the old lease and the plaintiff would then be still entitled to priority. *Jamnadas v. Paiku*, 10 N.L.R. 170.

S. 52.—An alienation made pending an appeal to the Privy Council is void for *lis pendens*. *Maharaj Bahadur v. Surendra*, 19 C. W. N. 152.

The principle of this section equally applies to moveable property. *Talari Kavali v. Viswanatham*, 25 I.C. 193.

Suits under O. 21, r. 68 are not original suits but a mere continuation of proceedings in the objection. Consequently, all alienations of the attached property made between the date of order passed on objection and the regular suit to set aside that order are subject to the doctrine of *lis pendens*. *Krishnappa v. Abdul Khader*, 25 I.C. 11; following *Phulkumari v. Ghanshyam*, I.L.R., 35 Cal. 202 P. C.; *Hari Shankar v. Naran*, I.L.R., 18 Bom. 260; *contra Kolasheri v. Kolasheri*, I.L.R., 4 Mad., 131 overruled by the Privy Council in *Phul Kumari v. Ghanshyam*, I. L. R., 35 Cal. 202 P. C.

Where the effect of a transfer made *pendente lite* is not to create a new right interfering with those of the parties in suit the doctrine would be inapplicable. Thus where during the pendency of A's suit on his mortgage B took another mortgage of the same property to pay off the mortgage of C executed before A's suit though later to his security in point of time, the Court held B's mortgage unaffected by the *lis pendens* and permitted him to redeem A in a suit of his own—*Tara Prosad v. Kristo Prosad*, 7 I. C. (Cal.) 473.

S. 53.—The fact that a deed is shown to have been supported by some consideration is not sufficient to take it out of the rule if it was not executed *bona fide*. *Chidambaram v. Srinivasa*, 20 C. L. J. 571, P. C.

A deed which, though in part for good consideration is, as regards the other part, only an arrangement to defeat creditors, is wholly void against the creditors and cannot be upheld to the extent to which it is supported by consideration. (*Id.*)

Fraudulent preference implies an act of free will so that there can be no preference where the act is the result of pressure. *Nripendra v. Ashutosh*, 20 C. W. N. 157 (160); following *Butcher v. Stead*, [1899] A. C. 419.

It is said that there is no distinction between a fraudulent alienation and fraudulent acquisition by a dishonest debtor, since the fraud in each case consists of a dishonest mode of dealing with property. *Ramasubba v. Arudai*, 25 I. C. 128. There is, however, this

distinction, that while persons protected by this section may set aside a fraudulent transfer, they have not the same remedy against a fraudulent acquisition. But it is obvious that a member of a joint Hindu family, who had fraudulently transferred the family estate and successfully defrauded his creditors, should not be permitted to set up his son to recover the entire estate including the father's share, though he can sue to recover his own share. *Id.*

The mere fact that preference has been given to one creditor over another does not in itself render the transaction in favour of the preferred creditor voidable under this section, provided the transferee is innocent of the fraud intended by his debtor. The motive with which a *benami* purchase is entered into, the position of parties to the transaction and their relation to one another, the possession of the property concerned and of the title-deeds relating thereto, the source and adequacy of the purchase-money and the previous and subsequent conduct of the parties to the transaction afford valuable data for determining the intention of the parties and the nature of the interest, if any, sought to be created. *Ahmad v. Raja Udai Narain*, 25 I. C. 164.

S. 54.—A stipulation for re-purchase cannot be enforced against a *bona fide* transferee for consideration without notice. *Maung Bya v. Maung San*, 10 I. C. 779.

A document throughout worded as a sale-deed and containing words of conveyance in *presenti* was nevertheless held to amount to a mere agreement for sale because it expressly stated that a sale-deed was to be executed, and in view of which the Court treated the rest of the deed as embodying merely the terms of the proposed conveyance. *Mangamma v. Ramamma*, I.L.R., 37 Mad. 480.

A certain property belonged to A, his separated brother B and the latter's minor son. A alone contracted to sell it stipulating that he should cause B and C to join with him in the conveyance. In a suit for specific performance of the contract for sale against A, the plaintiff applied for a conveyance of the entire property by A to enable him to make what he could out of the title so conveyed. But the Court dismissed his suit holding that it could not lend its sanction to a transaction devoid of legal effect, and which would, moreover, provoke litigation by casting a cloud on the title of B and C. *Govinda v. Apathsahaya*, I.L.R., 37 Mad., 403.

Surrender of his equity of redemption by the mortgagor in favour of the mortgagee is, of course, sale of immovable property within the meaning of this section, and, as such, subject to its provision as regards registration. *Ariyaputhira v. Muthu Kumarasami*, I.L.R., 37 Mad., 423 (427). So the term "price," of course, includes not only money but also money's worth (*ib.*, p. 428). In this case the consideration for the sale was the mortgage-money and which undoubtedly constituted its price. It could on no account be held (it is submitted) and as was wrongly conceded in the case that the transaction might amount to an "exchange" (*ib.*, p. 429). So where the brother settled some lands on the sister in compromise of her claim against him the transaction could not be viewed in any light but that comprised in the terms "sale" or "gift" (*ib.*, p. 430); *contra Thiruvengidachariar v. Ranganatha*, 13 M.L.J. 500, dissented from. Unless the settlement was merely an acknowledgment of existing rights in lands (*ib.*, p. 430); following *Krishna v. Aba Shetti*, I.L.R., 34 Bom., 139.

The fact the mortgagee set up an abortive sale by the mortgagor in his favour in satisfaction of his mortgage would not convert his possession which was admittedly permissive into adverse so as to prescribe a title under the Limitation Act (*ib.*, p. 431); following *Khairaj Mal v. Daim*, I.L.R., 32 Cal. 296, P.C.; *Bepari v. Pullanna*, I.L.R., 14 Mad. 39; *Bhagvant v. Kondi*, I.L.R., 14 Mad. 279; *Ramunni v. Kerala*, I.L.R., 15 Mad., 166.

Though the price may have been paid before the Registering Officer it is competent to the pre-emptor to prove that the true consideration was less, and which he may do by proving the market price of the same or similar properties. The vendee may equally support the stated

price by alleging special circumstances justifying it. *Ram Sarup v. Karamullah*, I.L.R., 36 All., 464; following *Abdul Majid v. Amolak*, I.L.R., 29 All., 618; *contra O'Connor v. Ghulam Haidar*, I.L.R., 28 All., 617, dissented from.

S. 55.—Where a vendor sells property on condition of re-conveyance to him on his paying the sale consideration back by a certain date, and naming a certain date when if the amount remained unpaid the sale was to become absolute, the vendor is at liberty to redeem any time before the final date. *Dasappalara v. Naubakke*, 1 I. O. 285 (286).

The limitation for a suit for breach of a covenant implied under this section is six years as provided in Art. 116 of the Limitation Act, and not merely three years either under Art. 62 or 97 of the Act since such covenants are enacted to be implied and read into every contract of sale, so that their breach is the breach of a contract in writing registered within the meaning of Art. 116. *Arunachala v. Ramasami*, 25 I. O. 618.

S. 55 (4) (b).—The vendor's charge is like any other charge assignable. *Shonandan Lal v. Moulvi Jainulabdin*, 19 C.W.N. xxviii.

S. 56.—In a case decided by a Bench of the Calcutta High Court the facts were as follows:—On the 29th June 1905 the owner mortgaged his thirteen properties to A who sued for and on the 22nd April 1909 obtained a decree for sale, after which the owner mortgaged one of the thirteen properties by conditional sale to B who foreclosed his mortgage on 8th June 1911 and was put in possession. As A was proceeding with the execution of his decree, B objected on the ground that the property foreclosed to him should be sold last. B's mortgage was held void as made *pendente lite* but judging from the published report of the case this objection to it was at no stage raised or considered, and B's contention was upheld under this section. *Tara Prasanna v. Nilmoni*, I.L.R., 41 Cal., 418.

